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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

**Proposals for issues to be discussed during the special session on mutual
legal assistance**

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FINLAND

Special session on MLA/Video conference, Strasbourg 28-30 May 2013

1. Working Group

With a view to upcoming special session I would like to share some Finnish experience. This time it is not practical experience but more related to law drafting.

Finland signed the Second Additional Protocol of the European Convention on Mutual Assistance in Criminal Matters in 2003. In December 2010 a Working Group was established with a view to ratify the Convention. The task of the Working Group was to draft necessary implementing legislation. The work was completed in December 2012 by publishing a report No 72/2012 (including 178 pages).

One of the achievements of the Working Group is a proposal for a new, special provision regulating hearing by video conference in cross border situations. Before this, hearing by video conference was based on direct application of international treaties and analogical use of domestic procedural legislation. The new provision (11a §) will be incorporated into the International Legal Assistance in Criminal Matters Act. The idea is to help practitioners and improve legal safety of interested parties.

The Governmental Proposal will be given to the Parliament soon and the law is expected to be approved by the end of the year 2013.

While preparing the new provision the Working Group discussed many different aspects of hearing by videoconference. Therefore, I would like to include the list of topics here. It may well be that many of them are already mentioned in Article 9 of the Second Additional Protocol or its explanatory report. Nevertheless, some of them may help PC-OC Mod to select topics for discussion for the special session.

- The Working Group (WG) noticed, that Article 9 of the Convention concern both pre-trial and trial stage.
- One of the benefits of the concept of hearing by video conference is that it diminishes travelling in cross border cases and reduces costs.
- The spirit of Finnish law on judicial assistance is openness. This means that the new provision about videoconference may be applied with any foreign state, regardless of whether cooperation is based on treaty or not. Between states parties treaty provisions are, of course, obliging.
- The new provision is meant especially for hearing witnesses, but it is possible to hear suspects too, if they consent to be heard by videolink. (In Finland a victim of crime is not formally a witness, but rather he/she has a special position as a complainant.)
- Traditionally, there is not so much regulation on requesting videoconference but rather on how to provide it. According to the WG report the judge or other authority must consider, if there are enough grounds to request for a videoconference. This may be the case if, for instance, the witness's travel costs would be enormous.
- Regarding para 2 of Article 9: When assessing what are "fundamental principles" one should not study ordinary procedural legislation but rather general principles of criminal proceedings. If the procedure somehow would be against Finnish Constitution or European Human Rights Convention, then the request should be rejected.

- Regarding para 3 of Article 9: The content of the request – a reference is here made to Article 14. In my opinion technical coordinates should be included in the request. A model request has been made in Finland. In practice it is important that there is a contact person to communicate directly with. Usually a test connection is useful before the actual hearing.
- Para 4: The person to be heard should be summoned according to national law. In Finland it means that the person can be summoned under a threat of a fine, or the witness can be brought to the court. The competent court is the court of first instance where the person lives, or where the evidence can be collected in an appropriate way. The prosecutor should be present, if the court so decides. One reason to be present is if his/her foreign colleague is present.

During preliminary investigation the police is usually a competent authority instead of a judge. When it comes to trial counsels, the witness/expert usually does not get a counsel. It is a duty of Finnish authorities to explain the situation for the witness. The victim of a crime may be granted a counsel or another person to support him/her. For the suspect the legal counsel is a fundamental right. Finnish authorities must supervise that this right is not infringed.

- Para 5: The judicial authority of the requested party is usually present. In Finland it is a chairman of the court (judge) or competent pre-trial authority (police) that must see that requirements in sub-para (a) are followed. Although the judge of the requesting state will pose questions, the Finnish judge shall supervise the situation and see that the fundamental principles of Finnish law are respected. This does not mean individual provisions, but rather principles of procedural legislation. The judge must also check the identity of the person that is being heard.

(b) Measures regarding protection of witnesses should be settled between the requesting state and requested state where necessary. Special arrangements can be made.

(c) As noted before, the hearing is usually conducted by the authority of the requesting state and according to its law, but then the Finnish judge must keep control over the situation.

(d) The Finnish judge shall take care of interpretation and make initiative to obtain one if necessary. There will be a reference in law to the provisions regarding the use of an interpreter. Also foreign language may be used, if this is not against the right of the persons involved.

(e) The person to be heard can refuse to testify in double: either according to Finnish or foreign law. In practice, the judge asks the witness if he/she feel disqualified. The witness must give an oath or affirmation according to Finnish law, or according to the requesting state's law.

- Para 6: Finally, the minutes of the hearing are to be made. However, the minutes do not include the actual content of the hearing. In Finland the hearing shall be (voice) recorded.
- Para 7 concern the situation that the witness refuses to testify although he/she is obliged to do so, or does not tell the truth. This goes according to the Finnish law. The offence is punishable in Criminal Code (perjury) and the Section does not need to be amended in this connection.
- Paras 8 and 9 regarding hearing accused persons and suspects were the most interesting for the WG. Finland will not give a declaration mentioned in para 9. Hearing the suspected/accused in Finland will be discretionary. In other words, Finnish authorities can in every individual case decide whether they agree to hearing by video. The hearing should be possible also according to national law. The general grounds for refusal are listed in International Legal Assistance Act and may also be applied. Most importantly, the suspected/accused person should always give his/her consent. The consent should be

recorded. This is something that the Second Additional Protocol does not require. It is expected that hearing suspects would happen mainly at pre-trial stage. National provisions on hearing suspects should be followed also when requesting assistance. Usually in Finnish procedure the suspect may be heard by videoconference when he is heard for intention to present evidence.

The right for attorney should be appreciated and the right for free legal aid. It is proposed that, for clarity' sake, that a special provision should be adopted regarding suspects/accused person's right to have a counsel in cross border video hearings, because situations can be more demanding than in domestic cases.

- The WG did not pay attention to technical matters or security issues in the use of video link.
- Amendments will be made to the following Acts of law: International Legal Assistance in Criminal Matters Act, Preliminary Investigation Act, Criminal Procedure Code, Code of Judicial Procedure and Coercive Measures Act.

Finally, I will enclose a draft Section 11a § and 11b § translated into English):

Section 11 a

Hearing by video conference

If a request for mutual legal assistance concerns hearing a witness, expert or victim by videoconference or by some other appropriate technical mode of communication where the participants are able to communicate verbally and visually with each other, the granting of the request requires that it may not be considered contrary to the fundamental principles of the Finnish law.

A hearing may be conducted by the competent authority of the Requesting State or it may be conducted under the direction of said authority.

A District Court judge or the preliminary investigation authority shall verify the identity of the person to be heard and supervise that the fundamental principles of the Finnish law are adhered to. If the competent authority finds that these principles are being infringed it shall immediately see to it that the hearing continues in conformity with said principles or terminate the hearing.

Minutes of the hearing shall be drawn up indicating the time and place of the hearing, identity of the person heard, identities and functions of all other persons participating in the hearing in Finland, oaths taken or affirmations given as well as the technical setting under which the hearing took place. The minutes shall be forwarded to the competent authority of the requesting State.

In addition to the above paragraphs 1-4, sections 20-22 shall also apply to the hearing.

A defendant or suspect may be heard in accordance with paragraphs 1-5 if the hearing would be allowed under Finnish law in similar circumstances provided that the person to be heard consents to the hearing. The consent shall be included in the recording.

A defendant or suspect who is being requested to be heard in conformity with this section shall have a right to attorney and on request a defence counsel shall be appointed to them for the hearing and the requisite consent. A court shall determine a reasonable fee to be paid to the defence counsel from state funds. To the appointment of the defence counsel shall apply mutatis mutandis what is being provided for in Chapter 2 of the Criminal Procedure Act (689/1997).

A defendant or suspect has to be informed, prior to acquiring their consent for the hearing, of their right to attorney and defence counsel.

Section 11 b

Hearing by telephone conference

The hearing referred to section 11 a above may also be conducted by telephone provided that the person to be heard consents to the hearing. The consent shall be included in the recording.

2. Russia

Regarding video conference and encryption, the Ministry of Justice of Finland has received a reply from the Prosecutor General's office of the Russian Federation. The GPO informs that in Russia encrypting means might be used for this aim only if they are certified according to requirements of the FSB and their class protection is corresponding to the classification level of the transmitted information. The GPO gave some examples of those certified means.

I can provide more detailed information during special session.

THE NETHERLANDS

Subject: Seizure and Confiscation of the Proceeds from Crime

Discussion point: Value confiscation versus property confiscation

In the early nineties the European Ministers of Justice discussed the need to create possibilities to hurt criminals where it hurts the most, their wallet. Result of these discussions were, in the end, the Convention on Laundering, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 1990) and the Council of Europe Convention on Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw, 2005)

Goal of these Treaties was to simplify international co-operation on search, seizure and confiscation of the proceeds from crime. The Strasbourg Convention was designed with the explicit possibility to take provisional measures and to confiscate proceeds even if the national procedure difference. The Explanatory Rapport is very clear about the possibilities to co-operate, when different systems are at stake. The Explanatory Rapport states under point 15 that different States have different systems of confiscation. All States have a system of so-called property confiscation, that is the confiscation of specific property, with respect to the instrumentalities used in the commission of offences. In some States there has to be a direct link between the property and the illegal activities.

Another system of confiscation is widely used in the member States of the Council of Europe: so-called value confiscation, which consists of the requirement to pay a sum of money based on an assessment of the value of the proceeds directly derived from offences, or their substitutes. As a result of a value confiscation, the state can exert a financial claim against the person against whom the order is made. If the claim is not paid, it may be realized in any property (no matter whether legally or illegally acquired) belonging to that person.

The committee agreed to put the two systems (value and property confiscation) of confiscation on an equal footing and to make the text unambiguous on this point. Section 7 of the Convention of Strasbourg 1990 says that :

'each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests:

for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

for investigative assistance and provisional measures with a view to either form of confiscation referred to under a above.'

In practice however, States still encounter difficulties on co-operation in this field. Some States are not able to co-operate when the systems differ. Other States require a direct link between the proceeds that must be seized or confiscated and the illegal activity. These problems can be encountered both in the procedure of provisional measures as well as in the procedure of the execution of the confiscation verdict.

Proposal to the PC-OC MOD:

In our opinion effective co-operation must recognize that the systems may not be alike but that they aim to achieve the same goals. Therefore, we would like to propose to look into this matter and explore the possibilities of member States to co-operate on the seizure and confiscation of proceeds from crime.

The Netherlands, Ms. Wietske Dijkstra, February 2013

SWEDEN

With reference to the e-mail below I would like to propose the following issues to be discussed at the special session on MLA.

- 1.) There is an obligation under Art. 16, if a declaration has been made, to provide a translation of the request submitted to the other state. In some cases, mostly from the same countries, the Swedish Ministry of Justice receives translations that are very poor. Often the requests are not understandable for the Swedish courts/prosecutors that are to fulfil the requests, which lead to the result that the requests cannot be fulfilled, or the courts/prosecutors decide to translate the documents through a Swedish translator and to take the cost for the translation themselves. This is not acceptable, and the PC-OC should therefore discuss what can be done to solve the problem with poor translations from some states.
- 2.) Among Swedish authorities there is a wish for a model request form with regard to MLAs. Whether a model request form should be provided by the PC-OC could be discussed at the meeting.
- 3.) Swedish authorities also would wish that it is discussed whether PC-OC could recommend time limits for responding to MLAs. As a proposal, recommendations could be made in the form of guidelines. Also there is a wish to receive a confirmation when a request has been received by the requested state, as well as contact information to the person responsible for the specific matter.
- 4.) Sweden has experienced an issue with regard to the service of documents. Art 7 provides the possibility to require a certain time when it comes to service of a summons on an accused person. Sweden has declared that we need the documents at the latest 30 days before to the date fixed for appearance. In some cases the requests for service are received by the Ministry of Justice later than 30 days before the date fixed for appearance, which creates problems. The accused person might not be served in time. The PC-OC could discuss what can be done to solve the problem with requests for the service of documents that are sent too late.

Carola Choi

UNITED STATES OF AMERICA

Thank you for advising us that at the next PC-OC plenary, there will be a special session on mutual legal assistance in criminal matters. Should the PC-OC MOD find it useful, we would suggest that the agenda include discussion of the following subjects:

- 1) Using alternative channels to formal judicial cooperation (this topic relates to our concern that as the result of the ever increasing number of requests for mutual legal assistance, this channel is becoming overloaded and assistance is delayed as a result);
- 2) The proposed EC directive and regulation on data protection, and the related revision of Convention 108, and their impact on cooperation in law enforcement matters with non- EU or COE Member States (this topic relates to our concern that new data protection rules being promulgated by the European Union and simultaneously in a proposed revision to Convention 108 could have a significant adverse effect on international cooperation in penal matters with non-Member States); and
- 3) How other countries can understand U.S. legal requirements for obtaining mutual legal assistance, including obtaining electronic evidence from Internet service providers located in the U.S., and craft their requests in a matter that meets them (this topic stems from our understanding that many practitioners do not understand well U.S. legal requirements and may not always receive the information or evidence they seek as a result).

We would of course be pleased to assist in the preparation of the discussion of these topics. Should you wish to obtain further detail regarding our thinking on these issues, do not hesitate to contact me.

Ken Harris

SECRETARIAT

Exchange of views with the Cybercrime Convention Committee (T-CY)

The 2013 round of T-CY assessments focuses on the efficiency of the international cooperation provisions (in particular Article 31) of the Budapest Convention on Cybercrime, including expedited channels and means of communication and obtaining of electronic evidence from Internet service providers. This session should allow for an exchange of view between the T-CY and the PC-OC on this matter of common interest.

Alexander SEGER
Head of Division on Data protection and Cybercrime