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WAYS TO IMPROVE INTERNATIONAL CO-OPERATION IN THE CRIMINAL JUSTICE FIELD

Report prepared by
Ms Joana GOMES-FERREIRA
Public Prosecutor, General Public Prosecutor's Office (Portugal)
expert consultant of the Consultative Council of European Prosecutors (CCPE)
in the light of replies to the questionnaire on the subject

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1. Introduction: this task was a most interesting and enriching challenge. I must emphasise the frankness of the replies given, which showed that those contributing were prosecutors truly concerned with matters of international cooperation and wished to share their own experiences, pooling their efforts for the common good. As a prosecutor of the Republic of Portugal and coordinator of the services responsible for international cooperation in criminal law matters of the prosecutor general's office – which, in Portugal, acts as the central authority for cooperation in criminal law matters¹ –, competent to transmit all requests for extradition (except the European arrest warrant which is a totally judicial cooperation procedure), transfers, transfer of proceedings and execution of foreign criminal law decisions, surveillance of persons conditionally released and requests for judicial assistance, I fully recognised and empathised with the problems raised by our colleagues. I welcome their successes and thank them for the adroit suggestions which they all made.

So it is now for me to report on the results, not forgetting the openness of one prosecutor's office² which, while excluded from international cooperation procedures under the Code of criminal procedure in force until 2008, nonetheless wished to make a small contribution, reflecting a fairly widespread suggestion that direct contact be forged via a coordination body, in this case, EUROJUST. I would also like to acknowledge the input of one State which chose to provide fairly comprehensive information on its system of international judicial assistance³.

2. Main obstacles: the contributions were fairly consistent in naming the problems that disrupt, slow down and sometimes even compromise healthy international cooperation. Bearing in mind that the framework for cooperation, where the instruments are concerned, does not appear very straightforward for judicial authorities⁴, I think that the problems may be grouped as follows:

2.1. Requests and their shortcomings: several contributions mentioned problems arising from the preparation of the requests themselves. Some were poorly drafted, giving either inadequate information or excessive detail⁵, not signed or poorly researched⁶, containing inaccurate information⁷, incorrectly translated, unintelligible⁸ or difficult to fathom, too brief or not following the most appropriate procedure⁹, substantially undermining what should be a healthy cooperation procedure.

These problems, which might be termed original, not because they are unusual or unexpected, but because they lie at the origin of a procedure that will progress with difficulty, may be due to a

¹ Under article 21 of Law no. 144 of 31 August 1999 which stipulates that "The Office of the Prosecutor general of the Republic (*Procuradoria-Geral da República*) is designated as the central authority for receiving and transmitting cooperation requests covered by the present text and for any notifications concerning such requests."

² Austria whose new Code of criminal procedure, to enter into force in 2008, stipulates that competence for international cooperation shall be assigned to the Prosecutor's office.

³ Turkey.

⁴ Belgium.

⁵ Northern Ireland, Finland and also Hungary, which mentioned the lack of a list of questions which might increase the chances of execution being fully implemented by the requested authority.

⁶ Monaco.

⁷ Armenia.

⁸ Hungary, Spain, France, Ukraine, Switzerland, Luxembourg or Liechtenstein.

⁹ Slovenia.

combination of fairly varied factors. Prosecutors suffer from a persistent lack of training¹⁰, as well as the unwieldiness of procedures, both internal and external¹¹, a lack of funding restricting or slowing down the possibilities of translation or, quite simply, what has been termed the human factor¹², a blend of not quite enough preparation and a little too much work, which will result in any requests not perfectly fitting the profile of what has been seen or known before slipping into a black hole, as one contribution colourfully expressed it¹³.

2.2. Transmission: the manner of sending requests laid down in international instruments is, in itself, indicative of closer links between the States. The old, unwieldy diplomatic channel was done away with following the Convention on mutual judicial assistance in criminal matters (Strasbourg, 1959)¹⁴ and, pursuant to the 2nd additional protocol to that convention, direct transmission between competent judicial authorities to submit and execute requests is already possible¹⁵. However, the lack of contact details for the competent local-level authorities results in requests being sent to central authorities¹⁶. Requests very frequently fail to include the contact details of the requesting authorities, preventing the forging of direct contact often wished for by the requested authority, and leave a very short deadline for execution by the time they arrive, demanding unreasonable efforts on the part of the requested authority, especially where such urgency was not justified by the seriousness of the allegations or the crucial nature of the procedure¹⁷. In addition, the simultaneous use of different channels of communication was seen as a disruptive factor where it resulted in the same request being processed by different authorities in parallel before reaching the authority that would be tasked with executing it¹⁸. Finally, the increase in the number of mutual assistance requests is regarded as a factor heavily contributing to the paralysis of requested authorities, repeatedly bogged down by the execution of requests relating to minor cases.¹⁹

2.3. Execution: it is at the level of execution that the trickiest problems are to be found. Above all, the culture of cooperation, or rather the lack of it, creates real problems. The lack of European judicial culture²⁰, manifested by a degree of resistance in practical terms that may result in cooperation procedures being systematically relegated by internal procedure²¹ is highly damaging to international cooperation.

Even so, the problems perceived as most acute at this level are those arising from differences between legal systems²². The means by which evidence is obtained, or not, differs, with

¹⁰ In particular, the contribution of the Czech Republic (page 6) mentions the need for permanent specialised assistance on how to draft a request, who to send it to and other practical problems.

¹¹ Noted by France.

¹² Norway mentioned this.

¹³ Finland (page 35), referring to requests already sent but the colourful expression used can equally apply here.

¹⁴ **Article 15**

1 Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.

¹⁵ **Article 4 – Channels of communication**

Article 15 of the Convention shall be replaced by the following provisions:

"1 Requests for mutual assistance, as well as spontaneous information, shall be addressed in writing by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels. However, they may be forwarded directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party and returned through the same channels".

¹⁶ Deplored by Hungary and the United Kingdom.

¹⁷ Difficulties emphasised by Spain, which advocated the forging of prior bilateral contacts, or Latvia, which stressed the harmful consequences.

¹⁸ Spain again and also Monaco, which mentioned counterproductive internal chains of transmission in certain States, and Finland which deplored one authority's inability to re-send a request mistakenly sent to an authority that was not competent.

¹⁹ Mentioned by France.

²⁰ France too.

²¹ Mentioned by Belgium.

²² The Czech Republic, Ukraine, Slovakia, Switzerland.

substantial adverse effects²³; the problem of dual criminal liability or *ne bis in idem* may arise²⁴; it would appear that even the competence of the requesting authority is sometimes called into question²⁵; the system of judgments *in absentia* would benefit from being harmonised at international level²⁶.

Sometimes, it is not even an issue of incompatibility of systems but merely of mutual ignorance that causes a request to be poorly drafted or executed²⁷.

While these problems have a very real impact on requests for judicial assistance, it is at the level of extradition that their disruptive effects take on a new dimension, creating areas of friction between the States themselves. Some of the contributions mentioned aborted extradition proceedings after political grounds were raised or interpretation of the same legal concept differed²⁸. Similarly, the obstacles generated by the impossibility of extraditing nationals are reiterated²⁹, with calls for the possible opening of authorities to a system of extradition combined with the recovery of the national for execution of the sentence³⁰.

All these arguments lead us to the point that comes across most strongly in the contributions where the problems of cooperation are concerned. The word **DELAY** is explicitly mentioned in 14 of the 28 replies, while in many others it is apparent between the lines as a logical conclusion of other complaints. The causes are none other than the ones I have just mentioned: requests running into difficulties owing to various factors or received late, mutual incomprehension between the judicial players, the impossibility of direct contact, are all sources of delay.

This all suggests some very negative conclusions, and yet that is not the case!

3. Success stories: the overall feeling is that the system of international cooperation works fairly well and that, since the beginning of the 1990s, it is becoming more and more effective³¹. So, while problems abound, it is undeniable that the authorities have had to hit on more or less practical solutions to overcome them.

3.1. The practice most frequently cited as the solution to the problems of cooperation is **direct contact**³² between the authorities concerned, held up as exemplary where it exists and sorely missed when it was not possible or contact details were lacking as a result of decentralised and less formal cooperation³³.

It is clear from the contributions that European prosecutors strongly wish conditions to be quickly created so that they can work together, directly, to find the best solutions for their procedures in cases where international assistance becomes inevitable.

Direct approaches of this kind firstly require convention-based provision which, although it already exists, must be made effective by the speeding up of ratifications of the instruments already concluded³⁴; otherwise, renovations of conventions in the field of extradition and mutual

²³ Poland even mentioned ignorance and failure to understand the specialities of other systems, echoed by Northern Ireland and by Scotland.

²⁴ Portugal, France and Greece.

²⁵ Finland.

²⁶ Italy which also raised the problems arising from *ne bis in idem* and the validity of evidence obtained via a request for assistance.

²⁷ Luxembourg and Belgium.

²⁸ The Russian Federation and Turkey.

²⁹ France.

³⁰ *Idem*.

³¹ Hungary, Slovenia, Monaco, Finland, Ireland, Luxembourg, Norway and Liechtenstein, if only to mention the replies starting off with this kind of conclusion.

³² The Czech Republic, Northern Ireland, Croatia, Portugal, Slovenia, Scotland, Monaco, Greece, Finland, France, Slovakia, Italy, the United Kingdom, Ireland, Switzerland, Belgium.

³³ Poland

³⁴ Switzerland (page 60) and Luxembourg (page 62).

assistance will have to be considered³⁵, with heavy emphasis on building trust between judicial authorities.

With the legal conditions in place, the overall feeling is that judicial authorities should be encouraged to contact one another directly or, if they are hampered by a lack of expertise, through specialised bodies whose role is to serve as an active intermediary between judicial authorities. The prime example is EUROJUST³⁶, with its coordination role, but there is also the European Judicial Network³⁷, which meets the need for a decentralised, informal and flexible cooperation culture, as well as liaison judges, more oriented towards questions of bilateral cooperation³⁸.

3.2. In a supporting role to this growing tendency to directly sort out requests and remove obstacles, **specialised training and assistance³⁹ or even specialisation at national level** were reported as factors in success. The better the authorities are informed of/trained in cooperation and the more capable they are of handling a foreign language, the easier it is for them to establish contact and find the right solution which would otherwise escape them. This combination of factors, also stemming from an ever greater awareness that "national" cases will cease to exist, is due, and I cite the words of our Luxembourg colleagues which strike me as quite right and faithfully reflecting the overall feeling of growing competence, to "something of a more relaxed view of anything to do with requests for judicial assistance".

Given the delicate balance between failure and success, the replies have yielded some interesting suggestions as to how to improve cooperation.

Suggestions: stemming from both awareness of the shortcomings that caused problems and satisfaction with successfully attempted procedures, the suggestions submitted are closely linked to the respondents' experiences and geared to neutralising problems or increasing the chances of success.

Across the board, **specialised training** for prosecutors is suggested, encouraged and even exemplified⁴⁰.

This training, generally mentioned in connection with conferences, seminars, working groups, twinning arrangements and meetings may also, according to some replies, take the form of compiling and organising information, which is then made available to local judges, possibly through the preparation of a manual or handbook on mutual judicial assistance⁴¹, circulars at the level of the Prosecutor's office⁴² on questions of international cooperation, information disseminated on the criminal investigation systems of each country, along the lines of the "*Fiches belges*" information records⁴³, and even human rights training⁴⁴ for judges in particular but also for lawyers.

While these suggestions are aimed at creating conditions for optimum information on the framework of work to be carried out together, there is very keen awareness that the authorities are not yet prepared to launch into direct cooperation. Accordingly, the existence of specialised

³⁵ The Russian Federation and Ukraine, and also Slovakia regarding the elimination of legal problems resulting, for example, from the speciality rule.

³⁶ Slovenia, Scotland, Finland, Italy, Turkey, Ireland, Switzerland, Luxembourg, Norway and Liechtenstein.

³⁷ Portugal, Finland, Luxembourg and Liechtenstein.

³⁸ Poland, the United Kingdom and Turkey.

³⁹ The Czech Republic, Finland, France, Norway.

⁴⁰ The Czech Republic, Poland, Portugal, Finland, France, the United Kingdom or Liechtenstein.

⁴¹ Poland, Italy and Norway.

⁴² Portugal and Greece.

⁴³ Scotland.

⁴⁴ France.

intermediaries is not forgotten and there are suggestions of setting up networks of points of contact, inspired by the European Judicial Network, while the coordination work of EUROJUST⁴⁵ is highly spoken of.

Other suggestions, at a completely different level, related to the optimum application of the **conventions** that already exist, by encouraging ratifications⁴⁶ or through new instruments⁴⁷ aimed at more flexible and simplified procedures based on mutual trust, and touching on sensitive issues such as political motives, dispute resolution machinery, the system of reservations in force within this framework, simplified extradition proceedings, the possibility of doing away with the speciality rule.

Finally, and as something to underpin this new spirit of cooperation geared to very direct and more flexible relations, one specific proposal was aimed at setting up, in each State, a kind of "complaints" department to deal with complaints from other States regarding the incorrect execution of requests, irregular intervention⁴⁸ etc, and there was also emphasis on the potential offered by an atmosphere of cooperation where all those involved could make contact and work together, using a single working language⁴⁹.

CONCLUSIONS

The conclusions I submit here are obviously drawn from my report on the tremendous wealth of information yielded by the input of 28 representatives of prosecutors general as well as my knowledge of the activities of the PC-OC committee, of which I have the honour of being Vice-chair, and primarily, the experience I have accumulated in working for nearly eight years now within a central authority in the field of international cooperation in criminal law matters.

Above all, I share the views of those who call for the entry into force of the existing instruments so that we can assess their strengths or weaknesses. Drawing up instruments that ultimately do not fully enter into force as a result of too few ratifications is an expensive and time- and energy-consuming exercise. The explanation that efforts are being focused elsewhere, as is clearly the case for the 2nd additional protocol to the European Convention on mutual judicial assistance, in relation to the Convention on mutual assistance between the Member States of the European Union, holds true but it is no justification for so few ratifications. Of the Council of Europe's 46 members, only twelve have set about implementing this instrument, including Portugal, luckily for me, on 1 May 2007. And the application of this Protocol would immediately open up the possibility, establishing it as a rule, of directly sending requests for assistance to the competent authorities for execution, which is not allowed under the 1959 Convention.

The CCPE could envisage emphasising to the representations of each country **the expression of interest observed, among the practitioners, in the full entry into force⁵⁰ of the instruments recently negotiated** as a factor in improving cooperation procedures once, and just by way of example, there is provision for and emphasis on direct contact between judicial authorities.

⁴⁵ Poland, Slovenia, Scotland, Switzerland and Belgium.

⁴⁶ Switzerland, Luxembourg and Belgium.

⁴⁷ The Russian Federation, Ukraine, Slovakia and Italy.

⁴⁸ Belgium.

⁴⁹ Norway.

⁵⁰ In this respect, Switzerland.

Similarly, those working on a daily basis with cooperation procedures in the area of extradition have the sole wish of modernising the existing instruments, which are already nearly 30 years old⁵¹, hinging on building trust which would make it possible, for example, to speed up a procedure for handing persons over, by simplifying it, on the basis of the consent of the individual whose extradition is requested and whose fundamental rights would obviously remain guaranteed without restriction.

On this particular point, I must draw the attention of our illustrious assembly to the activities of the PC-OC committee, which has set up, internally, a working group which is currently developing its thoughts on the need to modernise several Council of Europe conventions, first and foremost those covering extradition and transfer. Once it has specifically focused on some of the reasons given in the contributions for failures in international cooperation (including political causes, the problem of reservations, compensation in the event of acquittal, to give just three examples), it seems logical to me for **this group of prosecutors**, who are aware either of the wishes of some of the representations or the activities currently undertaken by the PC-OC committee, **to be able to envisage endorsing those activities**⁵².

Similarly, the wishes expressed in several contributions regarding the need for and proven added value of **the setting up of a network of practitioners**, capable of supporting, assisting and facilitating the work of the judicial authorities at the level of direct cooperation, tie in with the thinking of the working group organised within the PC-OC committee, **which is another reason for the CCPE to back its activities**.

That same working group is working on the setting up of an up-to-date, practically-oriented database, pooling global information on the applicable instruments, giving prosecutors grounds for hope that they will be able to very quickly obtain comprehensive information.

So while we conclude that direct contact between local-level authorities may already be made, through the application of the 2nd additional protocol to the European Convention on mutual judicial assistance, and that the CoE, through the PC-OC committee where the problems facing cooperation are discussed, has already turned its thoughts to how best to modernise the instruments found the most wanting by recent developments and new forms of crime, there is still an enormous amount of work to be done where local prosecutors are concerned.

I can therefore only strongly endorse suggestions regarding training for the authorities concerned by cooperation procedures. The CCPE could recommend, therefore, that:

1. **Circulars**, summarising the applicable mechanisms and promoting their use, be sent around to prosecutors, providing them with help and guidance with tools that are currently regarded as too disparate and complex.
2. **Manuals** on specific matters (one example being the Manual on procedures for issuing the European arrest warrant, distributed by the Prosecutor general of the Republic of Portugal to all members of the prosecution authorities, and available *on-line* on the website of the office of the Prosecutor general) be drafted and sent around to the authorities concerned, or **multilingual forms** which could standardise and facilitate use of the most common assistance measures.
3. **A statement on good practices**, along the lines of the one promulgated within the European Union, be drafted, since it could provide added value to training in drawing the attention of local-level authorities to a few procedures that are simple enough but, once adopted, do much to facilitate direct contact (such as notification of receipt, the need to comply with the urgent deadlines indicated or to give a cooperation procedure priority over an internal procedure where this is justified by its sensitive nature).

⁵¹ The 2nd additional protocol to the European Convention on extradition dates from 17 March 1978.

⁵² As is the wish, for example, of the Russian Federation.

4. **Training initiatives**, either following a theme (cooperation arrangements; facilitating instruments) aimed at a wide audience, or in the form of a working meeting intended to provide solutions and ideas for regional or local situations, be envisaged, if possible in partnership with training colleges, where these exist.
5. **Regional meetings** between representatives of two or three States, affected by the same problem or by a surfeit of proceedings needing to be addressed (this would be the case for working meetings between prosecutors from two neighbouring States sharing the same region, such as the French and Spanish Pyrenees) be run on an annual basis, which would allow them not only to discuss the specific cases but also to inform one another of the specific characteristics of their systems. These forums could also be conceived within a framework of cooperation with bodies such as **the European Network of training colleges**.
6. **Units of prosecutors specialising in cooperation be set up internally**, tailored in each case to the specific features of each system, which would be tasked with centralised execution of requests for assistance and assisting their local-level colleagues in the drafting and sending of requests.