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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)

Action plan on TOC, Action A4, Key area 1:
Establish a mechanism to address judicial cooperation problems

Preliminary question to a discussion on action A4 of the CoE Action plan on transnational organised crime (TOC)

Plan d'Action sur le Crime Organisé Transnational (COT), l'Action A4, Domaine Clé 1 :
Etablir un mécanisme pour traiter les problèmes de la coopération judiciaire

Question préliminaire à la discussion sur l'Action A4 du Plan d'action contre le crime organisé transnational (COT)

REPLIES / REPONSES

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INTRODUCTION

The Action Plan on Combating Transnational Organised Crime [CDPC (2015) 17 Fin] reads, Key area 1, Action 4:

“Action 4: Establish a mechanism to address judicial co-operation problems

In the process of requesting international co-operation from other States, the existence of conventional rules and obligations are often not enough to obtain the co-operation requested. Practitioners claim that sometimes there is not even a response to their requests, or that such responses may be delayed for years. The PC-OC undertakes an important role in the monitoring of the relevant conventions and also the practical problems encountered in their implementation. The practitioners consider that when they face a non-co-operative State, the single judge or prosecutor is not able to trigger any mechanism to remind the requested authority of their obligations in complying with their international commitments. Member States are not always in the position to follow the diplomatic channel to help the problems detected in the international co-operation be overcome, and if they do, the response may also take much time.

A first step to take is to establish rules, within the legal framework of judicial co-operation, to send the confirmation of receipt of the request received within a short time. Secondly, the duty to consult between the authorities involved in the international judicial co-operation process should be established when there are problems or delays in the execution. Modifying the relevant conventions accordingly should be considered. This action is linked to action 1 under paragraph b) of this key area (Review provisions on international co-operation in Council of Europe conventions and relevant reservations/declarations to them/these conventions).”

When discussing the priority actions to be undertaken by the PC-OC for the implementation of this Action Plan (as contained in Doc PC-OC (2016)05), the PC-OC Mod agreed at its 23rd meeting (28 February-2 March 2017) that further information would be required to propose an adequate reply to the issues raised under this action and decided to address the following questions to the PC-OC.

Le Plan d’Action sur la lutte contre le crime organisé transnational [CDPC (2015) 17 Fin] , Domaine clé 1, Action 4, énonce :

« Action 4 : Etablir un mécanisme pour traiter les problèmes de la coopération judiciaire

Dans le cadre du processus de demande de coopération internationale de la part d’autres Etats, les règles et obligations conventionnelles existantes ne sont souvent pas suffisantes pour obtenir la coopération demandée. Les praticiens affirment que les demandes restent parfois sans réponse, ou que de telles réponses peuvent être différées pendant des années. Le PC-OC joue un rôle important dans le suivi des conventions pertinentes et des problèmes pratiques rencontrés durant leur mise en

œuvre. Les praticiens considèrent que, face à un Etat non coopératif, le seul juge ou procureur n'est pas en mesure de déclencher un quelconque mécanisme pour rappeler aux autorités requises qu'elles sont tenues de respecter leurs engagements internationaux. Les Etats membres ne sont pas toujours en mesure de suivre la voie diplomatique pour aider à dépasser les problèmes détectés en matière de coopération internationale, et s'ils le font, la réponse peut également prendre beaucoup de temps.

Une première mesure à prendre consiste à établir des règles, dans le cadre juridique de la coopération judiciaire, qui imposent l'envoi d'un accusé de réception de la demande reçue dans un bref délai. Deuxièmement, fixer l'obligation, pour les autorités impliquées dans un processus de coopération judiciaire internationale, de se consulter en cas de problèmes ou de retards dans l'exécution. Il conviendrait d'envisager de modifier en conséquence les conventions pertinentes. Cette action est liée à l'action 1 paragraphe b) de ce domaine clé (Réviser les dispositions relatives à la coopération internationale dans les conventions du Conseil de l'Europe et les réserves/déclarations visant ces conventions). »

Le PC-OC Mod, en discutant durant leur 23^{me} réunion (28 février-2 mars 2017) les actions prioritaires à mener par le PC-OC pour la mise en œuvre du Plan d'action (telles que contenues dans le Doc PC-OC (2016)05) était d'avis que des informations supplémentaires étaient nécessaires pour répondre comme il convient aux questions soulevées dans le cadre de cette action et avait décidé de poser au PC-OC les questions suivantes.

QUESTIONS

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*
- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

2. Could you think of any solution to address the problems mentioned under Action A4?

1. En faisant une demande d'entraide liée au COT, est-ce que votre pays

- a. *rencontre des problèmes liés à l'absence d'accusé de réception de votre demande? Est-ce que ceci arrive rarement ou fréquemment?*
- b. *rencontre une absence de coopération de la part des autorités requises pour consulter lorsque votre demande n'est pas exécutée? Est-ce que ceci arrive rarement ou fréquemment?*

2. Auriez-vous des solutions à proposer pour résoudre les problèmes mentionnés sous l'Action A4?

SUMMARY OF REPLIES

1. When making a request for mutual assistance relating to TOC, does your country

- a. experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*
- b. meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

2. Could you think of any solution to address the problems mentioned under Action A4?

- **Replies to the questions 1a and 1b:**

Countries	Reply to question 1a	Reply to question 1b
Andorra	No problems have been encountered.	No problems have been encountered.
Austria	No problems have been encountered. The confirmation of receipt is sent regularly. In any case, it does not guarantee a faster execution of the request.	No problems have been encountered.
Croatia	Problems are rare.	Problems concerning the consultation with requested authorities in case of non-execution tend to be the exception.
Estonia	It is rare to receive a confirmation of receipt, although it would be very useful if it was accompanied with details of the responsible authority.	Estonia is not in favour of establishing a duty to consult, but there is the possibility to ask for additional information or clarifications.
France	It is rare to receive a confirmation, but it is not considered necessary.	This lack of willingness is rare.
Finland	No problems have been encountered so far.	No problems have been encountered.
Germany	Problems are rare. They depend on the frequency of the cooperation between states.	Problems are rare. They depend on the frequency of the cooperation between states.
Netherlands	No problems have been encountered, but the confirmation is rarely sent.	No lack of willingness has been experienced. Questions are answered timely and frequently.
Portugal	It is extremely rare to receive a confirmation of receipt and, thus, difficult to establish a link between the absence of confirmation and problems in execution.	Problems are rare. Usually clarifications are sent.
Romania	Confirmation is rarely sent, but it depends on which channels and means of communication are used and on which authority the request is sent to (i.e. when request is sent by email, the confirmation of receipt is automatic, while by post, there is often no confirmation).	It is rare to have requests not executed at all, but the partial execution is very frequent as well as the delay of the execution.
Slovak Republic	No particular negative experience has been encountered.	No particular negative experience has been encountered.
Switzerland	No problems have been experienced. If a confirmation of receipt is specifically	No lack of willingness has been experienced. However, sometimes requests remain

	requested, it is usually sent.	unexecuted, although further information has been provided, due to political unwillingness.
Turkey	It is rare to receive a confirmation, but no major problems have been encountered.	No problems have been encountered.

- **Replies to the question 2:**

Countries	Solutions to address the problems mentioned
Austria	A solution would be to contact the requesting State after a certain period of time. The reason for the delay of the execution should be communicated.
Croatia	The solution is the direct communication, through Eurojust or existing networks.
Estonia	Practitioners should ask the help of the central authorities which, then, can make use of diplomatic channels and networks.
France	A solution would be to contact the foreign authorities by post or mail or to contact the magistrate of liaison there.
Germany	Networks like EJM and Eurojust are useful as well as contact persons of every country.
Portugal	It is important to create a spirit of cooperation at the international level as at the national. This requires to justify the reasons of delay and the obstacles on the execution of the request. The identification of specialised and active contact points, also at the central authority, are very useful.
Romania	An effective communication between authorities is needed and, in particular, a tool/mechanism which would enable national authorities to act as active connections during the whole process of cooperation, by making use of the legal provisions of the CoE treaties and enhancing the use of the single points of contact as well as the use of the PC-OC model forms.
Slovak Republic	A solution would be to use the EJM contact points or the diplomatic channels and to create a list of contact points in the field of TOC.
Switzerland	The establishment of the duty to consult would be useful. However, the confirmation of receipt is not considered useful for the cooperation and the execution of the request. The best way to improve cooperation is the direct communication between authorities.
Turkey	Networks like EJM and Eurojust are very useful, the best solution is to have contact persons for every country.

ANDORRA

1. En faisant une demande d'entraide liée au COT, est-ce que votre pays

- a. *rencontre des problèmes liés à l'absence d'accusé de réception de votre demande? Est-ce que ceci arrive rarement ou fréquemment?*
- b. *rencontre une absence de coopération de la part des autorités requises pour consulter lorsque votre demande n'est pas exécutée? Est-ce que ceci arrive rarement ou fréquemment?*

Non

2. Auriez-vous des solutions à proposer pour résoudre les problèmes mentionnés sous l'Action A4?

Non

AUSTRIA

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*
- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

So far, problems regarding the execution of letters of request for mutual legal assistance relating to transnational organised crime due to the lack of a confirmation of receipt of a request have not been encountered. According to the experience of the Federal Ministry of Justice as a Central Authority for mutual legal assistance in criminal matters, a confirmation of receipt (which is sent by some States on a regular basis) does not necessarily lead to a (faster) execution of a letter of request.

2. Could you think of any solution to address the problems mentioned under Action A4?

To our view it seems to be more appropriate to contact/inform the requesting State after a certain period of time (e.g. 4 months) after the receipt of the request if the request for mutual legal assistance is still pending and cannot be fulfilled within due time. At the same time the reason for the delay and the expected timeframe for execution should be communicated.

CROATIA

Regarding questions listed below please be informed that generally there is rarely a problem regarding the confirmation of the MLA requests or consultations with requested authorities when the request remains unexecuted. With most of the country's such problems are exceptions and are in most cases solved by direct communication, through Eurojust or through existing networks.

ESTONIA

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*

It is rare to receive confirmation for receipt of the request. It would be useful to receive the confirmation of receipt together with details of the authority who is responsible for executing it.

- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

In the process of deciding the possibility to execute incoming MLA request or already in the process of execution it, always is possible for the executing authority to ask additional information or clarifications from the requesting State. This could be also named as a consultations. Estonia is not in favour of establishing the duty to consult.

2. Could you think of any solution to address the problems mentioned under Action A4?

Suggestion to encourage practitioners (prosecutors, judges) to ask help of their Central Authorities who has possibility to use diplomatic channels, networks, personal contacts etc.

FRANCE

1. En faisant une demande d'entraide liée au COT, est-ce que votre pays

- a. *rencontre des problèmes liés à l'absence d'accusé de réception de votre demande? Est-ce que ceci arrive rarement ou fréquemment?*

L'autorité centrale et les autorités judiciaires françaises ne sont que très rarement destinataires d'accusé de réception des demandes transmises aux autorités étrangères.

En pratique, la transmission d'un tel accusé de réception ne nous semble pas indispensable et nous n'en demandons ni n'en adressons.

- b. *rencontre une absence de coopération de la part des autorités requises pour consulter lorsque votre demande n'est pas exécutée? Est-ce que ceci arrive rarement ou fréquemment?*

Une telle absence de réponse est rare.

2. Auriez-vous des solutions à proposer pour résoudre les problèmes mentionnés sous l'Action A4?

Lorsque l'autorité centrale française souhaite s'enquérir des suites réservées à une demande d'entraide, plusieurs moyens sont à sa disposition afin de contacter les autorités étrangères : transmettre une relance par courrier ou par e-mail à l'autorité étrangère compétente, ou s'adresser au magistrat de liaison français ou à l'attaché de sécurité intérieure présent dans l'Etat d'exécution afin qu'il favorise l'exécution de la demande d'entraide française concernée.

FINLAND

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*
- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

2. Could you think of any solution to address the problems mentioned under Action A4?

Our answer to both questions a and b is no.

GERMANY

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*
- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

Most of the German Länder do not have any problems. In other Länder problems occur only rarely, they are not quantifiable and depend on the frequency of the cooperation between the states. In general we can say, that the more serious a crime is, the more frictionless is the cooperation.

2. Could you think of any solution to address the problems mentioned under Action A4?

Useful are networks like EJM and Eurojust to address problems. Furthermore it would be conducive if every country has a contact person for demands. We consider that a personal contact is the best way to find solutions for problems.

NETHERLANDS

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*

No we do not experience problems due to a lack of confirmations of receipt. We do not often receive a confirmation of receipt, which we do not view as a problem. However, the Dutch Central Authority does appreciate receiving confirmations of receipt, and sees it as a good service towards partners. In light of this we will start exploring possibilities of sending confirmations of receipt, possibly by e-mail.

- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

No we do not experience a lack of willingness on the part of requested authorities to consult when requests remain unexecuted. Questions to colleagues from other countries are answered frequently and timely. In more complex matters there is also the possibility for the Police Liaison to advise on the execution of the request.

2. Could you think of any solution to address the problems mentioned under Action A4?

We have not formulated an answer to question 2.

PORTUGAL

1. En faisant une demande d'entraide liée au COT, est-ce que votre pays

a. rencontre des problèmes liés à l'absence d'accusé de réception de votre demande? Est-ce que ceci arrive rarement ou fréquemment?

L'accusé de réception, qui a été développé dans le cadre de l'Action Commune sur les Bonnes Pratiques par le Réseau Judiciaire Européen est très rarement utilisé. Les autorités judiciaires portugaises qui l'ont utilisé se plaignent de ne jamais avoir reçu de réponse. Donc, due son utilisation extrêmement rare il n'est pas possible d'établir un lien entre cette absence et des problèmes liés aux situations de retard, voir absence de réponse. En tout cas, si on pourrait encourager les autorités d'exécution à remplir et renvoyer l'accusé de réception il serait sans doute utile pour, d'une façon simple, obtenir des contacts directs en vue à la facilitation de l'exécution de la demande.

b. rencontre une absence de coopération de la part des autorités requises pour consulter lorsque votre demande n'est pas exécutée? Est-ce que ceci arrive rarement ou fréquemment?

Normalement dès qu'on a obtenu des coordonnées de l'autorité requise et qu'on cherche à obtenir des informations, voir des consultations, sur l'état d'exécution d'une demande, il est possible d'avoir des réponses plus ou moins complètes. Aussi l'utilisation des points de contact du RJE, quelques fois, peut compléter des réponses incomplètes ou pas claires. Donc, c'est rare de ne pas réussir à obtenir de l'information sur l'état de l'exécution, tandis que celle-ci n'est pas conclue, d'une demande ce qui n'équivaut pas à obtenir son exécution, à la fin.

2. Auriez-vous des solutions à proposer pour résoudre les problèmes mentionnés sous l'Action A4?

La solution définitive est de réussir à créer une mentalité de coopération internationale qui permettra à chaque autorité de se sentir responsable pour l'exécution internationale comme pour une procédure nationale. Une exécution efficace et rapide aussi comme une justification sur les délais ou les obstacles serait toujours convenable. En tout cas l'identification de points de contact spécialisés et actifs, inclusive à l'autorité centrale nous parait un ajout important.

ROMANIA

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*
- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

2. Could you think of any solution to address the problems mentioned under Action A4?

Disclaimer - Reply to Q1 was considered only from the perspective of the experiences encountered when cooperating with states members of the Council of Europe irrespectively of their membership to the EU, and based on the Council of Europe legal instruments only.

Reply to Q1a

Lack of confirmation of receipt of request for mutual legal assistance is a recurrent issue encountered not only in the field of TOC cases but in other cases as well.

Whether it happens rarely or frequently depends on to which foreign authority the request is transmitted to and consequently which channels and means of communication (address) have been used. Theoretically, when request is submitted by e-mail, confirmation of (delivery or read) receipt is automatically received. However, even in those cases, it frequently happens that no further information is received (e.g. confirm that the authority **receiving the request** is indeed competent to act as a receiving and/or executing authority, contact details of persons in charge with the execution request or the person who can be consulted on the execution of the request, actions taken for its execution, and so one). When request is submitted *by poste*, it happens frequently to experience lack of confirmation.

Reply to Q1b

We have frequently experienced partial execution of the request not preceded by consultation as well as *delays* in obtaining the evidence required. Request not executed at all is a rarely experience. We did not experience lack of willingness to consult when requested.

Reply to Q2

Key Area - Enhancing international cooperation trough networks – Direct action for implementation - Action 4

While highlighting that the normative framework *only* it is not enough to obtain cooperation, Action 4 addresses two issues (problems) - *no reply at all or delay in replying to a request for mutual legal assistance*, and identifies two corresponding solutions (obligations) - establish rules to send the confirmation of receipt within a short time (*obligation to inform*), and *obligation to consult* when there are problems or delays in the execution.

No reply at all or delay in replying to a request for mutual legal assistance can be influenced by several factors allocated not only to the requested authority but the requesting one.

Identifying the possible causal factors including the root cause of these issues would require an in-depth “investigation” which would definitely go beyond the limits and deadlines of the current Action Plan.

However, we do consider that both identified issues/problems as well as both solutions are related to the *communication process* crossed by any request for mutual legal assistance and therefore to our view the development of any future mechanism/tool should be focused on effective communication between the requesting and requested authorities while striving for the timeliness.

Such mechanism/tool should cover all components of the communication process and concentrate on all stages: before (drafting of a request), after (formal dispatch of a request) and during the execution of a request for mutual legal assistance. The idea behind is simple: to have national authorities acting as *active connections* and performing their roles as central authorities and/or executing authorities as best as possible, during the whole process of cooperation.

To this end, such mechanism/tool should *inter alia*

- Evidentiate the potential of specific legal provisions of the CoE treaties in the field of mutual legal assistance (such as art. 1, art. 4, art. 15 of ETS 030, art. 8 of ETS 182, art. 16, 20 of ETS 141, art. 30, 34 (6), 35, 40 of ETS 198)
- Enhance the use of the list of the single points of contacts of PC-OC not only to solve recurrent issues when no reply is received or delay is experienced, but for preliminary (informal) consultations.
- Enhance the use of *model forms* elaborated so far by PC-OC while developing new ones (e.g. confirmation of receipt of a request for mutual legal assistance)

Such an approach will ensure complementarity with other proposed actions under *the same Key Area* such as Action 3 – Development/Elaboration and support of model forms.

SLOVAK REPUBLIC

Regarding the preliminary questions on TOC, the Slovak Republic does not have any particular negative experience, although the vast majority of the requests are addressed to the EU countries. If the problem occurs, we use the European judicial network contact points (in the case of EU country) or diplomatic channel (in the case of third countries).

As to our suggestion, creating, or if it already exists, distributing a list of contact points working in the field of TOC will be useful.

SWITZERLAND

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*

The Federal Office of Justice (FOJ) of Switzerland does not experience problems due to the lack of a confirmation of receipt of a request although it is appreciated if the FOJ voluntarily receives a confirmation of receipt. If the FOJ needs a confirmation of receipt for its proceedings and if it is specifically requested, the FOJ usually receives it.

- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

If a request remains unexecuted, the FOJ usually asks the requested authorities to inform it about the reasons. Usually, if the FOJ asks to be informed about the reasons, the FOJ does not experience a lack of willingness on the part of the requested authorities to consult. However, the FOJ has experienced that some requests remain unexecuted despite supplying the requested authorities with additional information. This might be due to a political unwillingness to execute requests that contain an asset freeze e.g.

2. Could you think of any solution to address the problems mentioned under Action A4?

It might be useful to establish the duty to consult between authorities involved in the international judicial cooperation process. However, if there is no political will to execute a request, even a duty to consult might not lead to any result.

The FOJ believes that the implementation of a rule whereby judicial authorities send a confirmation of receipt of requests, is not useful to increase judicial co-operation and reduce issues which arise with non-co-operative states. Firstly, the sending of a compulsory confirmation of receipt would result in unnecessary administrative efforts, secondly, the receiving of a sole confirmation of receipt does not mean that a request will be executed.

The FOJ believes that the direct communication between the requested and requesting state is the best way to improve judicial co-operation and reduce issues which arise with non-co-operative states.

TURKEY

1. When making a request for mutual assistance relating to TOC, does your country

- a. *experience problems due to the lack of a confirmation of receipt of your request? Does this happen rarely or frequently?*

Although, confirmation is rarely sent, it is not a big problem.

- b. *meet a lack of willingness on the part of the requested authorities to consult when your request remains unexecuted? Does this happen rarely or frequently?*

No problems have been encountered.

2. Could you think of any solution to address the problems mentioned under Action A4?

Useful are networks like EJM and Eurojust to address problems. Furthermore it would be conducive if every country has a contact person for demands. We consider that a personal contact is the best way to find solutions for problems.

I think the best solution is contact points. It would be useful and practical, if every country has a contact person.