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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

***Guidelines on practical measures
to improve co-operation in respect of transfer of proceedings,
including a model request form***

Adopted by the PC-OC during its 63rd plenary meeting (13-15 November 2012°

Background

The PC-OC decided at its plenary meeting from 14 to 17 June 2011 (60th meeting) to send out a questionnaire to all delegations related to the transfer of proceedings and jurisdiction so as to gather information about the application of the relevant Council of Europe instruments and to assess the need for initiatives to improve their effectiveness or for the development of a new instrument in this field.

The following instruments and/or specific provisions were covered by the questionnaire:

- The European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73);
- Laying of information under Article 21 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30);
- Transfer of proceedings as an alternative to extradition: the application of the '*aut dedere, aut judicare*' principle under Article 6, paragraph 2, of the European Convention on Extradition (ETS No. 24).

The questionnaire, its introductory note and the compendium of replies are contained in Document PC-OC (2011)14. A summary of the replies is contained in Document PC-OC (2011) 16 rev.

The PC-OC considered, at its plenary meeting from 6 to 9 December 2011 (61st meeting), the replies to the questionnaire as well as the follow-up to be given and decided:

- to develop practical guidelines, if appropriate contained in a legal instrument, in respect of transfer of proceedings *inter alia* in application of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and Article 6, paragraph 2 of the European Convention on Extradition. The guidelines would *inter alia* address the following issues:
 - bilateral consultation between the requesting and the requested states before, during and after (feedback) the submission of requests for co-operation;
 - proportionality of the case with regard to the procedure initiated and the appropriateness of submitting the request;
 - ways to accelerate and facilitate procedures so as to avoid impunity while lowering costs and efforts involved (eg. by suggested time limits to react to a request; development of a model form for submitting requests, including a coversheet and/or a summary; reconsider translation requirements and burden of costs);
 - ways to deal with differences in national legislation as regards extraterritorial jurisdiction;
 - admissibility of evidence, and mandatory and discretionary prosecution;
- to instruct its working group, the PC-OC Mod, to elaborate draft guidelines for consideration at its next plenary meeting;
- to keep the CDPC informed on future developments.

The PC-OC Mod discussed, during its meeting on 22-23 March 2012 (13th meeting), the outline for draft guidelines prepared by the Secretariat and decided to ask the Secretariat to amend the draft outline on the basis of the discussions held and to present it to the PC-OC plenary for consideration and further guidance.

The PC-OC Mod also discussed the possible status of the guidelines. It considered the possibility of appending them to a recommendation or declaration of the Committee of Ministers to member states but decided to postpone further discussion on this point until the content and nature of the guidelines are defined.

During its 62nd meeting on 9-11 May 2012, the PC-OC considered and endorsed the approach proposed for the draft outline for practical guidelines proposed by the PC-OC Mod (PC-OC Mod (2012) 01 Rev) as well as for the model request form on laying of information (contained in document PC-OC (2012)06), made suggestions for their further development and instructed the PC-OC Mod to:

- finalise the draft guidelines and the model request form, taking into account the comments made by the plenary and to present it for consideration at its next plenary meeting.

The PC-OC Mod finalised the draft guidelines and the appended model request form during its 14th meeting on 26-28 September 2012 for consideration by the PC-OC plenary. It proposed that the plenary adopt these guidelines as a practical PC-OC tool, taking into account their technical nature and the need for their regular update.

During its 63rd plenary meeting (13-15 November 2012), the PC-OC considered the draft guidelines and the appended model request form proposed by the PC-OC Mod (PC-OC Mod (2012) 01 Rev 3) and decided to :

- adopt the guidelines and the model request form with some amendments;
- present the guidelines and model request form to the CDPC with the proposal to publish them as a practical PC-OC tool for practitioners, taking into account that the guidelines are of a technical nature and might need to be regularly updated;
- subject to the approval of the CDPC, instruct the Secretariat to publish the guidelines and model request form on the PC-OC website.

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General introduction (rationale of the guidelines)

In reply to the questionnaire on transfer of proceedings and jurisdiction sent out in 2011 to members of the PC-OC, many delegations reported practical difficulties in applying transfer of proceedings on the basis of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and of Article 6, paragraph 2 of the European Convention on Extradition.

Any decision to transfer proceedings is made in the interest of justice and serves to determine which jurisdiction is in the best position to prosecute. However, each legal instrument mentioned above has its own legal procedure and conditions to be observed. In addition, each case is unique and any decision for transfer should therefore be taken on its individual facts and merits.

In taking these individual decisions, national authorities will observe the interest and good administration of justice which include not only legal considerations - the respect of the law, the relevant international legal instrument and the fundamental principles of law (such as the *ne bis in idem* principle) - but also practical considerations (such as avoiding unnecessary costs).

Guidance on the legal considerations can be found in the explanatory reports to the provisions of the relevant legal instruments, as well as in the various recommendations of the Committee of Ministers related to them. Particular reference is hereby made to Recommendation R(79) 12 concerning the application of the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73). The texts of all relevant standards and reports are to be found on the website of the PC-OC (www.coe.int/tcj).

Guidance on the practical considerations, establishing a good practice for authorities so as to accelerate and facilitate procedures, to avoid unnecessary efforts or costs, is still lacking. The present guidelines and the model request form aim therefore at facilitating the practical aspects of the application of the legal instruments and its specific provisions mentioned above by proposing a step by step check-list of procedure for the requesting and the requested state.

These guidelines and the model request form address all practitioners involved in the application of the relevant conventions, including, but not only, the central authorities of States Parties.

These guidelines and the model request form are intended mainly for the transfer of proceedings, including requests for transfer under the European Convention on the Transfer of Proceedings in Criminal Matters, Article 21 of the European Convention on Mutual Assistance in Criminal Matters, Article 6(2) of the European Convention on Extradition and other similar instruments.

Central authorities responsible for the application of these conventions and other relevant instruments are encouraged to translate the present guidelines and model request form in their official languages and make them available to practitioners, for example by posting them on their national website.

Guidelines

A. Guidelines to the Requesting State

When considering making a request concerning transfer of proceedings, requesting states should:

1. Consider the legal basis allowing for transfer of proceedings, including the treaties ratified by the requested state, the declarations attached and the national legislation with regard to the jurisdiction of the requested state and other issues of relevance. Attention should also be paid to the different alternatives to transfer of proceedings such as:

- the possibility to request extradition or, for EU member states, to issue a European Arrest Warrant;
- the possibility to make use of requests for mutual legal assistance in criminal matters (hearings of the persons concerned, including by videoconference, the summoning of persons or the temporary transfer of witnesses to the requesting state, etc.).

2. Consider the proportionality of the case with regard to the procedure initiated as well as its appropriateness taking into account the need to avoid impunity, the efficiency of proceedings and the specific requirements of the convention to be applied.

Transfer of proceedings to another state might notably be considered appropriate if that state has jurisdiction and can achieve the purpose of criminal proceedings more effectively. In this context account may be taken *inter alia* of the following considerations:

- a. the nationality and place of residence of the suspected person;
- b. the possibility that the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested state;
- c. the place where the offence occurred and/or where the most important items of evidence can be found;
- d. the possibility that proceedings are being taken against the suspected person for the same or different offences in the requested state;
- e. the practicability to deal with all the prosecutions in the jurisdiction of the requested state in cases where the offence(s) occurred in several jurisdictions;
- f. the possibility of the presence of the suspected person in the proceedings in the requesting or the requested state;
- g. the willingness and ability of witnesses to travel and give evidence in the jurisdiction of the requested state;
- h. the interests of victims and whether they would be prejudiced, for example in their possibilities to claim compensation, if any prosecution were to take place in one jurisdiction rather than another;
- i. the likelihood that the enforcement in the requested state of a sentence, if one were passed, will improve the prospects for the social rehabilitation of the person sentenced;
- j. the likelihood that the requesting state could not itself enforce a sentence, if one were passed, even by having recourse to extradition, and that the requested state could do so.

3. Proceed before submitting the request, if considered necessary, with an informal preliminary consultation (for example by phone, e-mail, videoconference or meetings) with the state or the states to which a request might be addressed so as to discuss:

- the appropriateness and potential success of the request envisaged;
- ways to deal with differences in national legislation (e.g. extraterritorial jurisdiction; admissibility of evidence, mandatory or discretionary prosecution);
- the timeframe and practicalities of the co-operation (contact persons, elements to be included in the request, translation requirements and costs etc.).

4. Decide as soon as possible whether or not to send a request. The request should include as far as possible all the evidence that can be collected in the requesting state.

5. Use, as appropriate, the model request form presented in the appendix to these guidelines.

6. When asked by the requested state, provide any supplementary information related to the request.

B. Guidelines to the Requested State

In order to facilitate co-operation the requested state should:

1. If the requesting state asked for an informal preliminary consultation as mentioned under Chapter A, guideline 3, provide clear indications on the legal and practical issues of importance to a successful and rapid follow-up to the request.
2. Once the request has been received and upon request from the requesting state, confirm receipt without delay and indicate the contact details of the person in charge of the request.;
3. If a request received is unclear or incomplete, consult the requesting state without delay. Facilitate consultation with the requesting state, for example by promoting direct contact between the authorities involved in a particular case.
4. Take all possible measures to ensure that a decision on the request for the transfer of proceedings is taken without undue delay. If unforeseen delays occur, inform the requesting state. Inform the requesting state of any decision to accept or refuse the request.
5. If the decision has been taken to accept the request, keep the requesting state informed on the follow-up of the case by the competent authorities and send it a copy of the final decision.

**Appendix to the Guidelines
on practical measures to improve co-operation
in respect of transfer of proceedings**

MODEL REQUEST FORM

<p>Request for:</p> <p>Made on the basis of:</p> <p><input type="checkbox"/> The European Convention on the Transfer of Proceedings</p> <p><input type="checkbox"/> Article 21 of the European Convention on Mutual Assistance in Criminal Matters</p> <p><input type="checkbox"/> Article 6, paragraph 2 of the European Convention on Extradition</p> <p><input type="checkbox"/> Other: _____</p>
<p>1. Requesting authority:</p> <p>- Name of the requesting authority:</p> <p>- Name and function of contact person:</p> <p>- Address:</p> <p>- Tel.:</p> <p>- Fax:</p> <p>- E-mail:</p> <p>- Working language(s):</p>
<p>2. Requested authority</p>
<p>3. Person(s) who is/are the subject(s) of the request</p> <p>- All information available on the person(s) concerned (identity, nationality, location, etc.)</p>
<p>4. Summary of facts (including date, place and conduct)</p>
<p>5. Legal qualification and provisions</p> <p>- Legal qualification</p> <p>- Legal provisions concerning the offence(s) and the maximum penalty applicable (in attachment)</p> <p>- Legal provisions concerning lapse of time where appropriate (in attachment)</p> <p>- Other legal provisions where appropriate (in attachment)</p>
<p>6. Information on the procedure in the requesting state (including action taken and evidence gathered)</p>

7. Reason(s) for the request

- the suspected person is ordinarily resident in the requested state
- the suspected person is a national of the requested state or that state is his or her state of origin
- the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested state
- proceedings for the same or other offences are being taken against the suspected person in the requested state
- the transfer of the proceedings is warranted in the interests of arriving at the truth/ the most important items of evidence are located in the requested state
- the enforcement in the requested state of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced
- the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting state and his or her presence in person at the hearing of proceedings in the requested state can be ensured
- the requesting state cannot itself enforce a sentence if one were passed, even by having recourse to extradition, and the requested state could do so
- other:.....

8. Additional information and requests

- Request for confirmation of receipt of the request for transfer of proceedings (possible special requirements with regard to the confirmation)
- Indication of available information or items not attached to the request
- Readiness to furnish translations
- Any other additional information or requests such as requests for provisional measures

9. Indication of attachments (copies of documents, files, items, etc.)

10. Signature and seal