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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)

**Overview of reservations made to Council of Europe treaties
within the remit of the PC-OC and of relevance to the fight against transnational
organised crime**

1. Extradition

European Convention on Extradition

The European Convention on Extradition provides for the extradition between Parties of persons wanted for criminal proceedings or for the carrying out of a sentence. The Convention does not apply to political or military offences and any Party may refuse to extradite its own citizens to a foreign country. In that case however, a Party should, at the request of the requesting Party, submit the case to its competent authorities in order that proceedings may be taken ("*aut dedere aut judicare*") With regard to fiscal offences (taxes, duties, customs) extradition may only be granted if the Parties have decided so in respect of any such offence or category of offences. Extradition may also be refused if the person claimed risks the death penalty under the law of the requesting State.

The Convention counts 50 State Parties.

Article 26 foresees in its paragraph 1 that reservations can be made in respect of any provision or provisions of the Convention.

Reservations made by 28 State Parties to the European Convention on Extradition seek to ensure that they can waive the obligation to extradite contained in *Article 1* in cases where a person requested for extradition would have been convicted in circumstances that violate fundamental procedural guarantees (protection of the right of defence) or that entail consequences of exceptional gravity to the person (taking into consideration age, state of health, etc.).

Article 2, which defines extraditable offences, is subject to 10 reservations by Parties, mainly in respect of the double criminality principle or the minimum length of sentence required.

Fifteen Parties reserved themselves the power to determine whether an offence is deemed to be a political offence according to *Article 3*, while 8 Parties made reservations to *Article 4* so as to ensure that extradited persons will not be tried by a military court or under military law.

Six States have made reservations in respect of *Article 7* in order not to grant extradition for an offence committed in whole or in part in a territory under their jurisdiction.

One Party made a reservation to *Article 8* on "*pending proceedings for the same offence*" by extending the right not to extradite a person when proceedings are pending whether or not the proceedings concern the offence for which extradition is requested.

Reservations made by nine State Parties to the provisions of *Article 9* the rule *non bis in idem* cover the right to refuse extradition if final judgement has been passed in a third State on the person claimed.

As for *Article 11* on capital punishment, seven Parties made reservations mainly indicating the refusal to extradite a requested person if the requesting state does not provide adequate assurances that the death penalty will not be executed. Only one State Party continues to authorise the extradition of a foreign national in cases where an offence punishable by death by the requesting party is also punishable by the same penalty by the criminal law of the requested party.

Nine State Parties made reservations to *Article 12* (request and supporting documents) so as to reserve themselves the right to refuse extradition if the requesting state does not provide evidence establishing a sufficient presumption of guilt of the person concerned or if the warrant or sentence seems to be manifestly ill-founded.

Three Parties made reservations to *Article 14* so as to reinforce the application of the rule of speciality.

The provisions of *Article 16*, on provisional arrest, have led six Parties to indicate additional requirements for requests in this matter.

Six Parties made reservations in respect of *Article 18*, so as to add further conditions or restrictions to the surrender of the person to be extradited. *Article 21*, concerning transit, is subject to three reservations.

One Party made a reservation with regard to *Article 25*, regarding the detention order.

Seven Parties invoked the existence of special arrangements or uniform legislation between them in respect of *Article 28*, concerning relations between the Convention and bilateral agreements.

Overall, reservations made by the State Parties do not seem to challenge the spirit and text of the European Convention of extradition but aim to reinforce the conditions of extradition and guarantee the protection of the extradited person once under the national jurisdiction of the requesting State.

Additional Protocol to the European Convention on Extradition

The European Convention on Extradition bars extradition in respect of all political offences. While it does not define the notion of political offence, it excludes from the scope of such offences the taking of the life of a Head of State. **The Additional Protocol** further limits the scope of political offences in its Chapter I by excluding also war crimes and crimes against humanity so as to ensure that these crimes are subject to extradition. Chapter II of the Protocol supplements the provisions of the Convention that deal with the principle “*ne bis in idem*”, namely its Article 9, by enlarging the number of instances in which the extradition of a person is barred where that person has already been tried for the offence in respect of which the extradition claim was made.

The effect of *Chapter I* is however weakened by the fact that 10 out of the 40 State Parties made use of the possibility foreseen in *Article 6* of the Additional Protocol not to accept this Chapter, or to apply it on a case by case basis.

One Party declared that it does not accept *Chapter II* which supplements Article 9 of the Convention with regard to the *ne bis in idem* principle.

Second Additional Protocol to the European Convention on Extradition

The **Second Additional Protocol** is designed to facilitate the application of the Convention on several points and aims, in particular, to include fiscal offences among the category of offences for which a person may be extradited under the Convention. This Protocol also contains additional provisions on judgments *in absentia* and amnesty.

The Second Additional Protocol also foresees the possibility for State Parties not to accept certain Chapters (Article 9 paragraph 2). Out of 42 Parties, five declared not to accept Chapter I (concerning the possibility to grant extradition of a person wanted for several separate offences including offences subject to pecuniary sanctions), one declared not to accept Chapter II (which adds fiscal offences to the category of extraditable offences), two Parties exclude the application of Chapter III (which concerns extradition of persons judged *in absentia*), one Party does not accept Chapter IV (concerning the refusal of extradition for an offence for which the requested state has declared amnesty) and seven Parties made a declaration in order not to apply Chapter V (concerning the possibility to communicate requests for extradition otherwise than by diplomatic channels).

Third Additional Protocol to the European Convention on Extradition

The **Third Additional Protocol**, which supplements the Convention in order to simplify and accelerate the extradition procedure when the person sought consents to extradition, has up to now been ratified by 16 States. The Protocol foresees in its Article 17, paragraph 2, the possibility for reservations only with regard to Article 2, paragraph 1 (initiation of the procedure). One State Party made use of this possibility and issued a reservation concerning the underlying documents to be provided.

Fourth Additional Protocol to the European Convention on Extradition

The **Fourth Additional Protocol** supplements the Convention with provisions concerning, in particular, the issues of lapse of time, requests and supporting documents, rule of speciality, transit, re-extradition to a third State and channels and means of communication. The Protocol has been ratified by eight States.

In accordance with the possibilities provided by Article 13 of the Protocol, two Parties made a reservation in respect of Article 1, paragraph 2 (concerning the obligation to extradite even when the prosecution or punishment of the person claimed would be statute-barred according to the law of the requested Party) and two further Parties reserved the right to require the original or authenticated copy of the request and supporting documents in respect of Article 6 (Channels and means of communication).

2. Mutual Legal Assistance

European Convention on Mutual Assistance in Criminal Matters

Under this Convention, Parties agree to afford each other the widest measure of mutual legal assistance. The Convention sets out rules and conditions for the enforcement of letters rogatory by the authorities of a Party which aim to procure evidence (audition of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings undertaken by the judicial authorities of another Party. The Convention also specifies the requirements that requests for mutual assistance and letters rogatory have to meet (transmitting authorities, languages, refusal of mutual assistance).

The Convention has been ratified by 50 States,

Article 23, paragraph 1 foresees that reservations can be made to all of its provisions.

Three Parties made a reservation in respect of *Article 1*, and concern the condition of double incrimination while 25 parties made a reservation as to *Article 2*, mainly concerning double criminality, the respect of the principle *non bis in idem*, and the requirement that the offence is not a subject of investigation in the requested State or in a third State.

Chapter II of the Convention- Letter Rogatory – covers Articles 3 to 6.

Six State Parties made reservations related to *Article 3* and concern the right not to take evidence of witnesses where its law recognises exemptions from giving evidence.

One State Party issued a reservation with regard to *Article 4* which foresees that requesting Parties may ask the date and place of execution of the letters rogatory as well as the presence of officials and interested persons .

A large number of States (40) have formed reservations in respect of *Article 5* concerning the execution of rogatory letters for the search or seizure of property and have chosen to make this dependent on the requirement of double incrimination as well as the compatibility with national law. Two State Parties have made the execution of such rogatory letters dependent on the offence being an extraditable offence within the meaning of the European Convention on Extradition.

Chapter III – Service of Writs and records of judicial verdicts - Appearance of witnesses, experts and prosecuted persons - covers Articles 7 to 12

While one Party reserved the right the refuse a request for service of writs etc. on the basis of *Article 7*, 11 Parties made reservations in respect of *Article 11* concerning the possibility to request temporary transfer of persons in custody in order to be heard as witnesses or for purposes of confrontation, or to grant transit through their territory. Two Parties included a reservation in granting immunity to witnesses, experts and prosecuted persons under the conditions stipulated by *Article 12*.

Chapter IV - Judicial records – is covered by *Article 13*. Eight Parties made a reservation to requests for information on, or extracts from, judicial records by imposing further conditions or limitations.

Chapter VI - Laying of Information – is covered by *Article 21*. Three Parties reserved themselves the right not to apply this article.

Chapter VII - Exchange of information from judicial records - is foreseen by *Article 22*. Eleven Parties issued reservations regarding the automatic or systematic application of this provision.

Article 26, concerning the application of the convention with regards to other conventions or bilateral agreements, counts five reservations made by Parties who reserve the right to derogate from the Convention by reason of special arrangements between certain States (e.g. between the Benelux countries).

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

The Protocol withdraws the possibility offered by the Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence (Chapter I). It extends, in its Chapter II, international co-operation to the service of documents concerning the enforcement of a sentence and similar measures (suspension of pronouncement of a sentence, conditional release, deferment of commencement of enforcement of a sentence or interruption of such enforcement). Finally, Chapter III adds provisions relating to the exchange of information on judicial records. The Protocol counts 43 Parties.

Article 8 reaffirms in its paragraph 1 the application of reservations made to the Convention, while paragraph 2 stipulates that any State may reserve the right not to accept Chapter I (Articles 1 and 2), or only partly as stipulated in subparagraph a, and/or not to accept Chapter II (Article 3) and/or Chapter III (Article 4).

Nine Parties made reservations to *Chapter I*, concerning mutual assistance with regard to fiscal offences. These reservations mainly limit co-operation in respect of letters rogatory for search or seizure of property, excluding this possibility for all or certain fiscal offences or requiring that the offences motivating the request fulfil the double criminality principle, or the speciality principle.

Five Parties reserved themselves the right not to accept *Chapter II* of the Protocol which foresees mutual assistance with regard to the service of documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings as well as assistance regarding measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement.

Three Parties declared not to accept *Chapter III* of the Protocol which supplements Article 22 of the European Convention on Mutual Assistance in Criminal Matters on exchange of information on judicial records, with the possibility to request a Party to communicate a copy of the convictions and measures related to individual cases.

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

This Protocol intends to improve States' ability to react to cross-border crime by broadening the range of situations in which mutual assistance may be requested and making the provision of assistance easier, quicker and more flexible. It introduces in particular the possibility to request judicial co-operation by the use of special investigation techniques, as regulated by Articles 17, 18, 19 and 20. The Protocol has been ratified by 36 States.

Article 33 stipulates in its paragraph 1 that reservations made to the Convention or to the Additional Protocol will also apply to the Second Additional Protocol while paragraph 2 foresees the possibility for

Parties not to accept, wholly or in part, Articles 16 (Service by Post), 17 (Cross-border observations), 18 (Controlled delivery), 19 (Covert investigations) and 20 (Joint investigation teams).

In addition, *Article 11*, concerning spontaneous information, foresees in its paragraph 2 that the providing party may impose conditions on the use of such information by the receiving Party. Paragraph 4 of this article enables Parties to reserve the right not to be bound by the conditions imposed by the providing State unless it receives prior notice of the nature of the information to be provided and agrees to its transmission. Eleven States have issued a declaration to that effect.

Fourteen Parties excluded the application of *Article 16* (allowing judicial authorities of Parties to address procedural documents and judicial decisions to persons concerned living in the territory of another Party directly by post).

Sixteen Parties do not accept cross-border observations (*Article 17*) and two further Parties accept this only under conditions.

Two Parties reserved themselves the right not to accept co-operation in relation to Controlled deliveries (*Article 18*), two further parties will allow for such assistance only under certain conditions.

Article 19 on Covert Investigations is not accepted by five State Parties, and only conditionally by two other Parties.

The application of *Article 20* on Joint Investigation Teams has been excluded by two Parties.

3. Transfer of proceedings

European Convention on the Transfer of Proceedings in Criminal Matters

This Convention foresees the conditions and procedures under which a Party may request another Party to take proceedings against a suspected person in its stead. The Convention counts 25 Parties.

Reservations made to the European Convention on the Transfer of Proceedings in Criminal Matters are based on Article 41 which entitles Parties to avail themselves of one or more of the reservations provided for in Appendix I. These include the right:

- a) to refuse a request for proceedings, if it is considered that the offence is purely a religious offence;
- b) to refuse a request for proceedings in respect of an act for which only an administrative authority can impose sanctions;
- c) not to accept Article 22;
- d) not to accept Article 23;
- e) not to accept the provisions contained in the second sentence of Article 25 for constitutional reasons;
- f) not to accept the provisions of Article 26 paragraph 2 where the State is competent by virtue of its own law;
- g) not to apply Article 30 and 31 regarding acts for which only an administrative authority can impose sanctions; and
- h) not to accept Part V.

Among the reservations made, eight concern refusal of requests for proceedings, if it is considered that the offence is purely a religious offence (a); nine concern refusal of requests for proceedings in respect of an act for which only an administrative authority can impose sanctions (b); eight are made by Parties who do not accept Article 22, which concerns the prolongation of the time-limit for proceedings by six months in the requesting state (c) and ten by Parties who do not accept Article 23, automatic prolongation of the time limit for proceedings in the requested state in cases of subsidiary competence (d). Three Parties declare not to accept the provisions contained in the second sentence of Article 25 for constitutional reasons (e). Two Parties do not accept the provisions of Article 26, paragraph 2, where the State is competent by virtue of its own law (f) and seven Parties declared not to apply Article 30 and 31 regarding acts for which only an administrative authority can impose sanctions (g). One Party declared not to approve the provisions contained in Part V of the Convention, concerning the “*ne bis in idem*” principle.

4. Seizure and Confiscation

European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

The Convention aims to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. It has been ratified by 49 States.

In accordance with Article 40, State Parties may avail themselves of the reservations provided by this article. These include the right for a State Party to apply the provisions regarding confiscation measures (Article 2) and laundering offences (Article 6) only to offences or categories of offences specified; to apply the provision related to the execution of confiscation based on the recognition of the factual content of the requesting state's judicial decisions (Article 14, paragraph 2) only subject to the State's constitutional principles and the basic of its legal system; to make reservations to the provisions with regards to the service of judicial documents to persons affected by provisional measures and confiscation (Article 21) or to the provisions regarding the form of request and languages (Article 25) and, finally, to restrict the use of information and evidence used by the requesting State to only investigations and proceedings specified in the request (Article 32).

Eleven States made a reservation to *Article 2* and fifteen to *Article 6* so as to limit the application of these provisions to the offences specified. Twenty-three Parties made use of the right to execute confiscation and recognise the factual content of the requesting state's judicial decisions leading to confiscation only subject to the State's constitutional principles and legislation (*Article 14*). Twenty-eight States issued special requirements or conditions as regards the service of judicial documents to persons affected by provisional measures and confiscation (*Article 21*) while thirty-five State Parties made reservations to the provisions of *Article 25* regarding the form of the request and languages to be used. Twenty-eight Parties made use of the possibility provided by *Article 32* by declaring that, without prior consent, information or evidence provided under this Convention may not be used or transmitted by authorities of requesting Parties for other investigations and proceedings than those mentioned in the request.