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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)

**Guidance on good practices regarding the
post-surrender phase in extradition proceedings
(final)**

The PC-OC identified the post-surrender phase as a lengthy and sometimes troublesome stage in extradition proceedings. Although it is an inevitable aspect of the application of the European Convention on Extradition (CETS No. 24, hereinafter: “the Convention”), this phase is seldom discussed in the PC-OC meetings and suffers from lack of guidance. The PC-OC considered that such guidance should also comprise all aspects of potential relevance to the post-surrender phase.

This document is based on a draft prepared by a special working group set up by the PC-OC, and has been amended and reworked by the PC-OC Mod and PC-OC over several meetings in 2022 and 2023. It was finalised by the PC-OC at its 84th plenary meeting on ... November 2023.

The following paper consists, lengthwise and crosswise, of two layers:

- a. Listing legal occurrences and needs which take place during the post-surrender phase and require the PC-OC’s further attention. The working group identified such occurrences in connection with articles 14, 15, 18 and 19.2 of the Convention as well as in practices which were developed during the years, which are not explicitly covered in the Convention;
- b. Recommendations on non-binding and sometimes informal courses and methods of action, which would be considered as “good practice”, vis-a-vis various legal situations. At the same time, the PC-OC calls on the parties to make sure that their central authorities fulfil the obligations stemming from the Convention also during this segment of the post-surrender phase.

For the purposes of this guidance, informal communications should be considered as confidential in principle.

Legal occurrences and methods of action

Article 18: Decision regarding extradition – flow of information

The article requires transmission of information from the requested State to the requesting State, of its decision with regard to the extradition, as well as introduction of the reasons for any complete or partial rejection (subsections 1 and 2).

This article deals with a matter which has a great significance to the post-surrender phase, in particular when extradition of the requested person is sought for prosecution. Clearly, the article regulates the formal obligation to transmit the most relevant information, such as the final decision on extradition (or, by analogy, the requested person’s renunciation of entitlement to the rule of speciality – see article 4 of the 3rd Additional Protocol). However, on the informal level, a requested central authority should be open to the idea of transmitting the information as soon as possible after the decision(s) are taken, well-before surrender. In this regard, there was agreement in the PC-OC that the requested central authority should inform the requesting Party of the main decisions taken regarding its request for extradition, even before the decisions become final, for two main reasons:

- a. Early notice allows the authorities of the requesting State to analyse the legal significance of the decision and to make the necessary adjustments to their proceedings. Such information might be highly significant in cases where proceedings against co-perpetrators or seizure proceedings are already conducted at the requesting Party’s courts.

- b. When the denial of extradition is based upon reasons stemming from the proceedings in the requesting State, its law or the conditions in it, information provided by its authorities might serve as a basis for the consideration of the authorities of the requested State whether to file an appeal or not against the denial before their courts, when such a possibility exists.

Whenever possible, the requested State should communicate, at an informal level, information concerning the content and terms of extradition decisions even before they become final.

A flexible interpretation for Article 18's term "reasons" is desirable. While a clear although partial decision should not require elaboration, a complicated one could affect the extent to which the requesting Party would be able to conduct the proceedings, within the new prosecutorial frame drawn and dictated by the decision of the requested Party.

The central authority(ies) of the requested State should remain available to respond to inquiries from the requesting State to clarify terms of the extradition decision following surrender, when they are in a position to do so.

In addition, it should be reminded that usually, the decision on extradition does not provide the overall information regarding the period and the forms of custody and restrictive measures taken against the requested person in the requested Party, or medical and social information; all of which might be significant factors in the scope of the legal proceedings against and deprivation of liberty of the extradited person following the surrender (frequently in their favour). This information could include, for example:

- addictions and rehabilitation;
- vulnerabilities which might put at risk their rehabilitation efforts or prevention of deterioration;
- sources of moral support;
- any other information which might contribute to the continuity of the treatment, if given, and the welfare of the extradited person, in particular if expected to be held in custody after surrender.

The PC-OC encourages the transmission of a wide range of such information, when available, provided that specific legal constraints, such as the applicable data protection framework, do not prevent it.

As for the timetable for the transmission of the information, information regarding the length of deprivation of liberty should be transmitted according to Article 18, paragraph 3 of the Convention with the surrender, and the right occasion to do that seems to be the surrender. Obtaining the information regarding medical and social conditions of the extradited person from other agencies (the prison services) should not delay the surrender and may be transmitted afterwards. The PC-OC considered that while this information is typically not transmitted outside specific situations (for example for dangerous persons, or where medical attention is required during transport), it would be useful for the authorities of the requesting State to receive them on a more regular basis. The PC-OC noted that the authority which can obtain and transmit such information might not always be the central authority.

Another type of additional information that States considered useful in this context concerned the behaviour of the person in prison in the requested State, which can have an impact for sentencing in the requesting State.

The requested State should endeavour to communicate medical and social information regarding the extradited person, as well as information on their behaviour in prison, where this information would be relevant for the authorities of the requesting State. The requesting State should communicate particular needs in this regard as early as possible.

Article 14: Speciality

In complicated cases, conducting legal proceedings following the surrender in a manner which takes into account and respects the rule of speciality (as defined by the Convention or by the 4th Additional Protocol), requires the requesting Party to fully understand the requested Party's decision and its grounds. This is crucial for the on-going cooperation between the two parties as well as a guarantee for the rights of the extradited person. Difficulties may occur in two aspects, alternatively or cumulatively:

- A. The “additional” offences attributed to the extradited person: attribution of facts and offences which did not serve as a basis for extradition vs. modification of facts and offences which might be covered by the extradition decision;
- B. The measures taken against the extradited person: measures which are considered to be “proceedings”, “sentencing” or “detention” and therefore are not allowed in the context of additional offences vs. measures which are allowed, such as mere interrogation.

The decision whether to take a certain act vis-à-vis the risk of violation of the Rule of Speciality is in the hands of the requesting Party and its courts. Nevertheless, it is in the interest of the two parties to avoid an unintended breach of speciality and therefore it is most advisable that in complicated cases and when relevant, the requested Party's central authority would, at an informal level, contribute its insights, based on its national law. Such a cooperation is even more crucial when the extradited person argues that their rights (derived from the requested Party's rights in accordance with the rule of speciality) were breached. No affirmative conclusion regarding alleged violation of speciality by the requesting Party can be reached, if the arguments were not communicated to the requesting Party's central authority for its attention.

When it comes to questions regarding the application of the rule of speciality, direct communication between central authorities should be prioritised and occur at the earliest possible stage.

The central authorities of the requested State should promptly respond to requests for clarification, including at an informal level to help the requesting State in interpreting the extradition decision in the light of the national law of the requested State.

Article 15: Re-extradition

Despite the similarity between requests for exception and re-extradition, the scenario of the latter – as rare as it is – might become more complex as it involves three parties.

When the requested Party (Party A), the requesting Party (Party B) and the third Party (Party C) are parties to a/the Treaty/Convention and all terms of extradition are met, the consideration of the re-extradition request should not pose significant difficulties. However, the request might become rather complicated, when a condition to extradition (such as dual criminality or lack of legal barrier such as prescription) is not fulfilled. While Party B is, and will remain, the requesting

Party, direct communication between Party A and Party C becomes crucial for thorough consideration of the matter. Translation requirements also need to be taken into account in this context, as it could be onerous for Party B to ensure translation into the language of Party A of documentation it received in its own language

The PC-OC considered that direct transmission of information and documents between Party A and Party C would be desirable in these cases, while the continuing involvement of Party B is also crucial.

Consultations between all three parties would be beneficial in cases involving re-extradition, including before submitting the request whenever possible. It is a good practice for Party B's request to be accompanied by information, such as a form or a checklist, drafted by Party C's authorities, detailing the relevant information in first-hand, and not by proxy.

Article 19, paragraph 2: Temporary Surrender

Theoretically, “temporary surrender” – which is contained under Article 19 “Postponed or conditional surrender” – is a sophisticated mechanism which should assist delaying the completion of the extradition, or, instead, completing it under the condition to send the extradited person back to requested Party, thus avoiding conflicts of enforcement interest between parties. Functioning mechanisms of scheduling and prioritizing the conduction of parallel proceedings in two countries should minimize immunity and maximize enforcement. However, the extent of uncertainty regarding future events was always large, and apparently led the drafters of the Convention to assign the determination of the terms of the temporary surrender to the parties involved in such a legal event if and when time comes (terms should be set “in accordance with conditions to be determined by mutual agreement between the Parties”). However, in general, this uncertainty, as well as logistical challenges, limit the usefulness of this mechanism. Nevertheless, during its discussions, the PC-OC noted that some States Parties had reached an extent of mutual trust which allows them, under their domestic laws, to use this practice often, with no notable complications.

The mechanism requires, therefore, a fresh consideration. The PC-OC took three main elements into account in this respect:

- a. The right of the requested Party to make the surrender temporary and conditional on the return of the extradited person to the requested Party means that the return shall not be considered as extradition, and will not bear the legal consequences of extradition;
- b. The condition of return might be set for the purpose of proceedings against the extradited person (temporary transfer of a witness in custody is regulated in the MLA Convention). However, it may not be necessary to issue a warrant of arrest or detention against the extradited person in the requested Party, as their departure from the requested Party is probably involuntary; In any case, any warrant determining preventive measures against the extradited person, anticipating the resumption of their trial upon their return, clearly suffices.
- c. No agreement between the two parties' authorities may bind the court in the requesting Party and prevent the release of the extradited person after being extradited, even though some States considered that the agreement must specify that the person must be kept in detention and sent back to the requested Party in all cases (including, for example, when they are nationals of the requesting Party). The PC-OC recommends that, if risk of flight of the person threatens to jeopardise

the temporary surrender, the parties should consider that their agreement will expire if the person is released in the requesting Party; accordingly, the requesting Party undertakes to return them to the requested Party immediately.

The PC-OC considered that a model agreement could ease and enhance the use of this mechanism (see Appendix I for a model).

Post-Surrender monitoring

One of the legal consequences of the extradition could be a post-extradition monitoring carried out based on earlier provided guarantees. In that case, depending on the essence of those guarantees, which could vary based on the case circumstances, status of the sought person, overall human rights situation in the requesting Party etc., the representatives of the requested State, including diplomats or consulate officers may visit an extradited person and carry out tete-a-tete meetings with them. Moreover, based on the guarantees they could also be allowed to monitor a trial of this person. Requesting such guarantees should be considered a form of co-operation, since without them extradition would not be possible.

Due diligence while enforcing these guarantees is essential in further cooperation on extradition as once the promises fail to be implemented it could result in losing the trust in the provided guarantees thereby endangering positive decisions in extradition cases in future.

In many cases, conditions are set directly by the courts of the requested State, while monitoring is performed and coordinated mainly by other state agencies such as consular personnel depending from Ministries of Foreign Affairs and Prison authorities. Direct communication between such agencies is inevitable. Nevertheless, the PC-OC considered that the central authorities of both parties should stay closely involved in this sensitive and sometimes lengthy process and co-ordinate it, since it is a part of the extradition process and due to its possible implications for cooperation in the future.

When they are needed, guarantees should be provided by the central authorities of the requesting State. The central authorities of the requested State should always co-ordinate the provision of these guarantees (by indicating precisely how they should be worded) and their monitoring.

The central authorities of the two parties should be defined as the relevant interlocutors for any monitoring activity or its effects and results.

Conclusion of criminal proceedings in the requesting Party

The working group saw some benefit in the transmission of the outcome of the proceedings against the extradited person in the requesting Party to the central authority of the requested Party, at least in some cases. While some States provide this information regularly and as a matter of course, many States do not.

The discussion within the PC-OC revealed that many States considered that this would be very useful information, for example from a public safety and security concern where the requested State should be aware that the person may try to re-enter its territory. This information was considered particularly relevant by States where the central authorities act as the litigating body following requests for extradition submitted by requesting States before national courts.

In cases where the requested Party indicates its need to have information about the outcome of the proceedings following extradition, the authorities of the requesting Party should endeavour to provide that information.

Appendix – Template for an Agreement on Temporary Surrender (Article 19, paragraph 2 of the European Convention on Extradition)

Considering that [.....], who is located in the territory of Party B, is sought by Party A for the purpose of prosecution [] and his/her/their extradition to Party A was granted in a final decision of Party B's competent authorities, dated [...];

Considering that [.....]'s presence in Party B's territory is required in order that he/she/they may be proceeded against by Party B's authorities [in... case number...] / in order that he/she/they may serve the sentence of [....] imposed on him/her/them by [the ...court /in case number...];

In accordance with Article 19, paragraph 2 of the European Convention on Extradition opened for signature on 13 December 1957,

The parties agree as follows:

- Party B will temporarily surrender [....] to Party A. The surrender shall take place on [date].
- [....] will be kept in custody continuously during his/her/their stay in Party A's territory. Should a decision to release [...] be rendered by any of Party A's authorities, this agreement shall expire, and Party A will return [...] to Party B without delay, while in custody.
- [...] will be returned to Party B no later than [date] unless the period of his/her/their stay in Party's A territory is extended by the parties, in writing; / as soon as possible after completion of the procedural steps described above;
- all direct costs of the surrender will be borne by Party A;
- the return of [...] to Party B's territory shall not be considered as extradition and shall not bear the legal consequences of extradition.

Optional:

- the time spent in custody in Party A will be exclusively attributed to the proceedings/sentence in Party B / will be deducted, if at all, by each Party in relation to a sentence imposed by it, according to its laws.
- The practical modalities of the surrender shall be arranged through INTERPOL channels.