



Strasbourg, 20 May 2022
[PC-OC/Docs PC-OC 2022/ PC-OC (2022)04E]
<http://www.coe.int/tcj>

PC-OC (2022)04

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

**List of decisions taken at the 81st meeting of the PC-OC
chaired by Ms Joana Gomes Ferreira (Portugal)**

Hybrid Meeting held on 18-20 May 2022

1. Opening of the meeting and adoption of the agenda

After the opening of the meeting by the Chair, the agenda was adopted as reflected on the website. The Chair introduced the new Secretary to the PC-OC, Mr Hasan Bermek.

2. Points for information

The PC-OC took note of the introductory remarks by Mr Jan Kleijssen, Director of Information Society and Action against Crime. He informed the PC-OC about the consequences of the aggression of the Russian Federation against Ukraine and the cessation of Russia's membership of the Council of Europe, including the fact that the Committee of Ministers will be deciding on the precise modalities of the participation of the Russian Federation on future work regarding Council of Europe Conventions open to non-member states, to which Russia remains a party. Pointing to the impact of this situation on practitioners working on the basis of Council of Europe Conventions on co-operation in criminal matters, Mr Kleijssen stressed the importance of the PC-OC as a unique forum for working out common solutions to the situation.

Mr Kleijssen further informed the PC-OC about:

- The opening for signature on 12 May 2022 of the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence, and its signature by 22 States Parties to the Cybercrime Convention;
- Council of Europe work on artificial intelligence, including the fact that the Ad hoc Committee on Artificial Intelligence fulfilled its mandate and has been succeeded by the Committee on Artificial Intelligence (CAI).

The PC-OC took note of additional information provided by Mr Carlo Chiaromonte, Head of Criminal Law, regarding the activities of the CDPC, and notably:

- The completion of the work of the Working Group on the Environment and Criminal Law (CDPC-EC), with a feasibility study reaching the conclusion that a new convention on the protection of the environment through criminal law to replace the 1998 Convention would have an added value. Mr Chiaromonte stressed that the PC-OC would be involved in any future work in this field.
- The first meeting of the Council of Europe Network of Prosecutors on Migrant Smuggling.

The PC-OC also took note of:

- Recent signatures and ratifications of treaties within its remit;
- Information provided on the latest bilateral treaties concluded in the area of international co-operation in criminal matters.

3. Evolution of the website

The PC-OC took note of the information provided by the Secretariat on the Committee's website. It held a discussion on the use of its restricted website and the lists of officials involved in the practical application of the relevant Council of Europe Conventions. It instructed the Secretariat to ensure that delegations review and update this information on a regular basis.

4. Co-operation with non-member states which are parties to Council of Europe Conventions on international co-operation in criminal matters

a. General discussion

The PC-OC held an exchange of views regarding the current state of co-operation with non-member states of the Council of Europe which are parties to its Conventions on international co-operation in criminal matters.

As this was the PC-OC's first plenary meeting following the cessation of the Council of Europe membership of the Russian Federation on 16 March 2022, and as Russia remains a party to Council of Europe Conventions on international co-operation in criminal matters which are open to non-member states, the PC-OC had an in-depth discussion on the practical consequences of this situation on co-operation with Russia. While noting that the outstanding legal and practical implications of continued participation of the Russian Federation in treaties elaborated within the Council of Europe and open to non-member States was still being examined by the Committee of Ministers and would be determined at a later stage, the practitioners shared the approach of their respective national authorities to outstanding requests for co-operation in criminal matters with Russia, on the basis of concrete examples.

The ensuing discussion demonstrated that the Russian aggression against Ukraine had universally led to a significant limitation of co-operation with the Russian Federation, ranging from an outright suspension of all types of co-operation to a considerable limitation of co-operation granted or requested, in particular when

it comes to extradition requests. Many delegations nevertheless reported that there was a need to provide for the possibility of continuing co-operation with the Russian Federation on a case-by-case basis, for instance when life or health of individuals are at stake, or when it comes to matters such as preservation of data. Several delegations voiced the opinion that an authoritative decision to fully suspend the operation of the Council of Europe Conventions on co-operation in criminal matters could only be taken by the Committee of Ministers of the Council of Europe.

A number of delegations referred to recent court decisions in their respective countries following the Russian aggression, already rejecting extradition and MLA requests by Russia, including by overturning previous decisions by lower courts. The PC-OC noted that common elements of reasoning in these judgments included the lack of trust in the will of the Russian Federation to comply with its obligations under international law or satisfy minimum requirements of rule of law in general, as well as the impossibility of monitoring compliance with assurances. Refusals appeared to have been primarily motivated under Article 3 of the European Convention on Extradition and Article 2.b of the European Convention on Mutual Assistance in Criminal Matters. A common problem voiced by delegations was compliance with their “*aut dedere, aut judicare*” obligation, given the difficulty to co-operate with Russia in general.

The PC-OC also took this opportunity to listen to the Ukrainian delegation, which informed the Committee of the current situation in Ukraine regarding international co-operation. The PC-OC took note of the fact that, despite initial disruptions, the Ukrainian institutions are functioning when it comes to sending and receiving co-operation requests, whereas execution may be materially impossible in certain cases where Ukraine is the requested State and that the situation is constantly changing. The Ukrainian delegation confirmed that the preferred communication channels were e-mail, INTERPOL, the Liaison Prosecutor of Ukraine to Eurojust and EJM. PC-OC delegations unanimously re-iterated their commitment to co-operate with Ukraine to the widest extent possible and the readiness of the Committee to provide further assistance within the limits of its competence.

The PC-OC also discussed other examples of co-operation with non-member states of the Council of Europe. It notably listened to the Israeli and Chilean delegations, which informed the Committee about their experience with co-operation under the Council of Europe Conventions, affirming the value of these multilateral instruments for international co-operation.

b. Preparation of a draft policy paper dealing with the question of third States to Council of Europe Conventions on international co-operation in criminal matters

The PC-OC held a preliminary discussion on the issue of possible criteria for the assessment of requests for accession by third States to Council of Europe Conventions on international co-operation in criminal matters presented to the Committee of Ministers, considering ways of promoting a multilateral approach in such cases. It decided to set up a working group composed of the Chair and the Vice-Chair, as well as Mr Johannes Martetschläger (Austria), to start working on a draft document to be discussed at the next meeting of the PC-OC Mod, with a view to its presentation for adoption at the next plenary meeting of the PC-OC. One delegation drew the Committee’s attention to past work conducted by the CDPC on this issue and the PC-OC instructed the Secretariat to provide the members of the working group with the relevant information.

5. European Convention on Extradition

a. Update of the Publication “Extradition: European Standards”

The PC-OC agreed on the usefulness of updating this publication on the basis of new standards developed since its publication in 2006, as well as other relevant developments, such as recent judgments of the European Court of Human Rights. The PC-OC invited its members to help identify an expert who could update the section of this publication on minimum standards in and human rights implications of extradition proceedings, while stressing that this work should not be academic but geared towards the needs of practitioners. It instructed the PC-OC Mod to co-ordinate this work.

b. Discussion on the post-surrender phase

The PC-OC held an exchange of views on the basis of a discussion paper prepared by Ms Yael Bitton and Mr Aviad Eliya (Israel). It warmly thanked the Israeli delegation for its valuable contribution and proceeded to an exchange of views on the issues raised in the discussion paper. These discussions showed a variety of approaches by member States, for example when it comes to the communication of the extradition decision to the requesting State, or to the provision of information regarding time already served by the surrendered person. The Committee considered that these issues would merit further consideration in view of developing some guidance on good practices and instructed the PC-OC Mod to co-ordinate this work.

c. Exchange of experiences on extradition proceedings (including with non-European states)

The PC-OC had an exchange of experiences regarding extradition proceedings, on the basis of concrete cases and practical difficulties encountered by delegations. One of the issues considered was the possibility which exists in certain States Parties to the European Convention on Extradition, to use Article 6.2 of the Convention as a legal basis to enforce a final sentence in case of refusal, whereas most States Parties appeared to require a different legal basis in such cases. The discussions included a more general sharing of experiences regarding the difficulties encountered in the practical application of the principle of *aut dedere, aut judicare*, including where the transfer of proceedings imply significant costs for translation and other logistical problems for the requesting state. Delegations also shared their experience of co-operating with non-European states, in particular when it comes to difficulties regarding extradition requests to certain specific countries. The discussions also included certain issues regarding the diffusion of red notices and the delegations agreed that more information from INTERPOL would be welcome in a future meeting of the PC-OC.

The PC-OC re-affirmed the value of these exchanges for its members and decided to continue these discussions in future meetings.

6. Preparation of a special session with the COP198 on international co-operation on asset recovery

The PC-OC took note of the fact that, owing to the delays in the appointment of a new Secretary to the PC-OC and the cancellation of the PC-OC Mod meeting in March 2022, the special session with the COP198 on international co-operation on asset recovery planned for May 2022 had to be postponed.

The PC-OC decided to re-instruct the PC-OC Mod and the Secretariat to proceed with the organisation of this event in the margins of its next plenary meeting in November 2022, in co-operation with the Secretariat of the COP 198 and on the basis of the issues identified in the list of decisions of its previous meeting.

7. European Convention on Mutual Assistance in Criminal Matters

a. Co-operation with the European Public Prosecutor: assessment of the replies received to the questionnaire and discussion

The PC-OC examined the six written replies to the questionnaire sent out by the Secretariat on 18 January 2022 to non-EU Parties to the MLA Convention on their position regarding co-operation with the EPPO under this Convention, existing obstacles and possible solutions. It took the opportunity of the presence of other non-EU delegations to invite them to share their views and experience regarding co-operation with the EPPO.

The replies, as well as the ensuing discussions, exposed a diversity of situations: seven non-EU States Parties indicated that they could not consider the unilateral declarations made by EU member states as a sufficient legal basis for co-operation with the EPPO, most specifying that this was due to the fact that their national legislation limited mutual assistance in criminal matters to co-operation between States. Three delegations considered that they needed further information and clarity about the competence and working methods of the EPPO to fully determine possibilities of co-operation, one concern being the treatment of the information or evidence to be sent to EPPO and potential access by the authorities of other EU member

States to this information. Two delegations stated that co-operation was possible with the EPPO under their existing legislation, one clarifying that such co-operation would concern the EPPO as a national judicial authority as specified in unilateral declarations, and not direct co-operation with the EPPO which would require a separate, bilateral or multilateral legal basis.

The PC-OC also took note of the declaration read by the French Presidency of the Council of the European Union (appended to this list of decisions), as well as the information provided by Mr Fabio Giuffrida (European Commission) and Mr Florin-Răzvan Radu (EPPO). They maintained the position that, while not excluding the possibility of a new, multilateral legal basis for co-operation with the EPPO under the 1959 Convention in the long term, this should not be to the detriment of co-operation on the basis of the unilateral declarations in the short-term.

The PC-OC noted the positive expectations expressed by several delegations and the representatives of EU institutions that solutions to existing problems could be found in the near future. Acknowledging the uncertainty expressed by several delegations about the functioning of the EPPO and its implications for their legal systems, as well as the general divergence of attitudes and views, the PC-OC considered that it was currently premature to embark on work involving a multilateral solution to the situation, while noting that none of the parties expressed a fundamental opposition to such a solution in principle. It also considered that it would be expedient to await the outcome of bilateral dialogues which are in progress in order to refine its position on this matter.

In the meantime, the PC-OC encouraged the non-EU States Parties who have not yet responded to the questionnaire in writing to do so by 3 June 2022. It also instructed the Secretariat to obtain and share with delegations information about the EPPO and to consider implementing other activities for non-EU member states to mitigate the uncertainties they may have concerning the EPPO.

b. Exchange of experiences on MLA proceedings (including with non-European states)

The PC-OC had an exchange of experiences regarding MLA proceedings, on the basis of concrete cases and practical difficulties encountered by delegations. The discussions notably focused on the use of video conference, given the increased use made of this possibility because of the COVID19 pandemic, which has given rise to new questions. The PC-OC decided to continue these discussions in future meetings.

c. Proposals for provisions in a future Additional Protocol

The PC-OC recalled that it had already retained the following proposals for provisions to be inserted into a future Additional Protocol:

- an update of “channels of communication” to allow for electronic communication
- the “ne bis in idem” principle.

The PC-OC took note of the proposal by the UK delegation to consider updating the provision on the use of video conference under the Second Additional Protocol, given the extensive use that was made of this possibility in recent years.

The PC-OC invited all delegations to send to the Secretariat, in writing, their proposals for possible provisions to be inserted into the future Additional Protocol by 2 September 2022 and instructed the PC-OC Mod to examine these proposals at its next meeting and report to the next PC-OC plenary.

8. Election of two substitute members of the PC-OC Mod

The PC-OC elected Mr Johannes MARTETSCHLÄGER (Austria) as first substitute member to the PC-OC Mod and Mr Ashraf AHMED (Sweden) as second substitute.

9. Dates of future meetings

The Secretariat reminded the PC-OC that the next meeting of the PC-OC Mod would take place on 27-29 September 2022 and that the next plenary of the PC-OC would be held on 15-17 November 2022. It informed the delegations that these meetings are planned to be held in person.

Appendix: Declaration read by Mr Pierre Beckers (France) on behalf of the French Presidency of the Council of the European Union

Member States participating in the enhanced cooperation maintain their position as regards the possibility for EPPO to be designated as a competent authority under the 1959 European Convention on mutual assistance in criminal matters.

While taking note of the counter-declaration made on 1 February 2022, Member States are determined to foster a high level of cooperation with Switzerland, and all the more so given the current context in Europe. The Council of Europe has to actively defend common values in the fight against crime.

In that perspective, Member States have agreed on the following next steps:

- a constructive bilateral dialogue will be engaged with Switzerland, Member States will be kept informed;
- in that light, the Council will consider all possible options, including a possible new declaration, the content and format of which will have to be determined.

The Council considers that the negotiation of a specific instrument on the cooperation between the EPPO and the Member States of the Council of Europe still requires an in-depth analysis, based in particular on evidence of its opportunity.

These operational conclusions will be transmitted to the Chair of the PC-OC.