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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)

Mutual legal assistance in criminal matters and liability of legal persons

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Paragraph 4 of article 1 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS 182) reads as follows: "Mutual assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting Party".

At the 65th Plenary Session I was mandated to draft a short paper with thoughts for reflection on whether: a. the question of admissibility of MLA requests concerning proceedings related to liability of legal entities is covered by the provision mentioned above; b. where that is not the case, whether there is room for initiatives to introduce specific provisions to cope with the said issue (either binding legal provisions or by the means of soft law).

Preliminary remarks.

® Liability of legal entities is a recent achievement worldwide.

® Economic globalization shows that corporations may have activities or services and offices in several countries. Legal entities may act in places others than those where the headquarter is. It should also be stressed that a corporation might belong to a transnational group. In short: it would not be exaggerated to say that a case involving a corporation liability might often have a transnational nature.

® Hence, in order to accomplish the ends of justice States may have the need to seek assistance from other jurisdictions.

® General principle in MLA is that a criminal offence was committed in the requesting State and that in the latter State a criminal proceeding was initiated.

® As a consequence, MLA convention appears to be the proper instrument when a "criminal" proceeding has been instituted in the requesting State against a legal entity. Because the MLA convention makes reference to the requesting State, it would not be a problem where the Requested State does not provide for criminal liability of legal entities (nor, of course, if such State envisages corporate criminal liability). Nevertheless problems might arise in case the request is related to an invasive measure (e.g. a search and/or a seizure) and the requested State made a reservation requiring double incrimination, in that it would be a ground for refusal. At this point of time the only problem is whether the provision contained in article 1 para 4 is sufficient or it requires amendments/integrations. Where the requested State does not provide in its law such a corporate (criminal) liability, it would be hard to state that the recourse to MLA convention is feasible or in any case accepted by the requested State.

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Some points related to Corporate Liability.

- Corporate liability is tailored as criminal or administrative/civil liability, depending on jurisdictions involved.

- Common achievements suggest to conclude that behaviours which do involve general responsibility of corporations are to be punished, either as criminal offences or as administrative offences. Many States consider such liability as criminal, others as para-criminal or not criminal at all. To that extent the maxim *societas delinquere* (*aut puniri*) *non potest* comes at stake.

- It is to be noted that where domestic law provides for criminal proceedings against legal entities there is some assimilation to the criminal proceeding against individuals; to that extent investigations and assessment of responsibility are almost identical for individuals and legal entities.

What is the situation among EU member States (including Switzerland)?

Taking note of the research conducted under the auspices of the EU Commission by RomaTRE University, Sapienza University of Rome, Université Paris 1 Panthéon-Sorbonne of Paris and Universidad de Castilla-La Mancha of Spain[1] the following may be indicated in relation to how the different jurisdictions tailored the liability connected to corporations. As a general description can be argued that most countries do recognize corporate liability as criminal. Others consider such liability as para-criminal; in such cases liability is either specifically defined as para-penal (para-strafrechtliche Lösung in Germany, for instance) or simply defined as administrative liability but still general criminal principle would apply or assessment of responsibility and sanction are under the competence of criminal courts).

Jurisdictions providing for a criminal liability: Spain, Portugal, Ireland, UK (including Scotland), Belgium, The Netherlands, Luxembourg, Finland, Denmark, Estonia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Slovenia, Croatia, Malta, Cyprus, Sweden, Switzerland.

Do not consider corporate liability as criminal, but still consider it a liability *ex crimine* (or: liability for crimes): Austria, Germany, Greece, Italy.

The above is a description by approximation. According to domestic laws, different situations should be further developed. For instance where liability is not defined as criminal/penal, nevertheless coercive measures may be applied such as seizure and confiscation or, like Latvia, liability of a natural person and liability of a corporation may be aggregated, according to Latvian criminal code.

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[1] The outcome of the Research is contained in two volumes under the general title CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAMS; Vol. I is related to *Liability ex crimine of legal entities in Member States* and vol. II to *Toward a common model in the European Union*; editor. Antonio Fiorella, Published by Jovene editore, NAPLES, 2012.

It goes without saying that one thing is criminal liability one other thing is penalties, which are tailored in an adequate way to the nature of corporations (although they might appear similar in consequence: deciding a cancellation of a corporation or its suspension may be considered similar to imprisonment of a natural person).

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Having said that, the problem of whether PC-OC should take on board the issue related to international co-operation where a corporate liability is to be assessed or a consequent penalty or other coercive measure is to be executed, appears to be a problem that deserves to be considered, taking into account globalization and increase of proceedings related to legal entities.

Is para 4 of article 1 of ETS 182 enough?

As said above, the fact that the nature of corporate liability is not considered in the same way among legal systems of the 47 States of the CoE, might give raise to problems.

Are there other legal instruments of the CoE that might solve the problem?

European Convention on the Service Abroad of Documents relating to Administrative Matters (Strasbourg, 24.xi.1977) does not appear to be the solution (apart from the fact that it is limited to the service of documents). It would be sufficient to look at article 1 para 2, which states that "The Convention shall not apply to fiscal or criminal matters". It is well true that declarations are admitted in order to allow the Convention to be used, but according to the wording of the provision it appears that such an exception would apply in limited but not all case; for instance it would probably apply in case of *Ordnungwidrigkeiten*. And again, in such a case, the possible misunderstanding on wording/concept "criminal/para-criminal/civil" might come at stake once more, as one State (e.g. the requested State) might say: it is criminal according to my law.

The title of the **European Convention on Obtaining Abroad of Information and Evidence in Administrative Matters (Strasbourg, 15.III.1978)** might suggest that it could be a (partial) solution. But once again it is in principle (declarations are admitted) excluded for fiscal and criminal matters (article 2).

Furthermore: the two conventions mentioned above do provide for Central Authorities, that may not (usually do not) coincide with the authorities competent for MLA. And often there might be requests for the same fact, coming from the same requesting authority which may be related to natural persons and legal entities at the same time. Even grounds for refusal should be tailored specifically for proceedings related to corporations.

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Problems related to the present issue: does the principle *ne bis in idem* apply (both in the case where both are criminal and one is criminal and the other administrative/civil? That is to say: does the initiation of an administrative penalty on a State stop or prevent the opening of a

criminal proceeding in one other State in order to the same act/activity conducted by the same corporation? That is important for possible ground for refusal.

Here, we have a further problem: does article 6 of ECHR apply? According to some decisions of the Strasbourg Court article 7 applies (administrative sanctions are similar to criminal ones as to not being retroactive, foreseeability etc.): (see case law of ECHR, and in particular the latest decisions that apply the Engel rules[2]).

Conclusion: it appears that the issue at stake deserves consideration. How to solve the problem is a second step.

My suggestion would be to have a hearing with the people that were involved in the exercise financed by the EU Commission and cited under note 1. Where that should be done before or after a reflection among us of the PC-OC is also a question to be decided.

[2] Engel and Others v. Netherlands, 5370/72 §§80-85 (1976) In the determination of criminal charges, Engel v Netherlands set out three criteria to determine meaning of "criminal": a) classification of the offense in the law of the respondent state, b) the nature of the offence, c) the possible punishment.