

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 02/05/2017
[PC-OC/DOCS2017/PC-OC(2017)03]
<http://www.coe.int/tcj>

PC-OC(2017)03
English only

EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMMITTEE OF EXPERTS

ON THE OPERATION OF EUROPEAN CONVENTIONS

ON CO-OPERATION IN CRIMINAL MATTERS

(PC-OC)

**Legal opinion on the development of an E-transfer tool
by the Directorate of Legal Advice and Public International Law**

Introduction

Further to the examination, during the 23rd meeting of the PC-OC Mod, of the replies received to the questionnaire on the possible establishment of an E-transfer tool, the working group decided to instruct the Secretariat to ask for legal advice on the legal basis required to develop an E-transfer tool within the Council of Europe, allowing Parties to the Convention on the Transfer of Sentenced Persons to use it for the purpose of the transfer procedures contained in it, as well as on data protection requirements.

The Secretariat of the PC-OC addressed the Directorate of Legal Advice and Public International Law with the following questions:

- *What would be the legal basis required to develop such an e-transfer tool? The Convention itself, an additional protocol, other?*
- *How could the CoE ensure data protection requirements?*
- *Are there any other legal concerns to be addressed?*

The text of the legal opinion received in reply to these questions is reproduced below.

LEGAL OPINION

Background information

Proposal by Israel

2. The proposal of an e-transfer tool made by Israel, aims to speed-up and streamline the transfer procedures under the Convention 112, to enable direct communication between applicants and central authorities and between central authorities themselves. The E-transfer tool would be an interface enabling easy transmission of information that could be integrated into the Council of Europe website.

3. The tool does not intend to affect the decision whether to grant a transfer request or to deny it. It does not intend to interfere with policies of States in this field, embedded in their legislation and regulations. Therefore, conditions such as submission of hard copies, use of diplomatic channels or receipt of the formal authenticated/in -person consent of the inmate, can still be respected.

Convention on the Transfer of Sentenced Persons (ETS No.112, 1983)

4. Convention 112 intends to facilitate the social rehabilitation of prisoners by giving foreigners convicted of a criminal offence the possibility of serving their sentences in their home countries. It is also rooted in humanitarian considerations.

5. According to the Convention, a transfer may be requested not only by the State in which the sentence was imposed ("sentencing state"), but also by the State of which the sentenced

person is a national (“administering state”). It is subject to the consent of those two States as well as that of the sentenced person.

6. The need for a threefold consent for each transfer led to difficulties in implementation of the Convention. Therefore, the additional Protocol to the Convention of 1997 (ETS No. 167) provides that, consent is no longer necessary, if the person has deliberately sought to frustrate the judicial process by fleeing from justice, or in cases where the judgment in their case includes expulsion or deportation once their sentence is completed.

7. The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Parties to comply with a request for transfer.

Legal basis for the transmission of information by electronic means under Convention 112

8. Requests, replies and supporting documents are dealt with under Articles 5 and 6 of the Convention. They must be in writing and should follow channels of communication determined beforehand.

9. Article 5 of the Convention specifies the form and the channels of transmission to be used for requests for transfer and replies thereto. This Article reads as follows:

“1. Requests for transfer and replies shall be made in writing.

2. Requests shall be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State. Replies shall be communicated through the same channels.

3. Any Party may, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it will use other channels of communication.

4. The requested State shall promptly inform the requesting State of its decision whether or not to agree to the requested transfer.”

10. The transmission of information by electronic means is not explicitly provided for in Article 5 of the Convention.

11. In this respect, it is worth recalling how previous Council of Europe conventions on legal cooperation in criminal matters dealt with the issue of transmission of information by electronic means.

12. The European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959) did not contain a provision for the transmission of information by electronic means. It was the Second Additional Protocol to the Convention (ETS No. 182, 2001) in its Article 4 that opened the way to the use of telecommunications in the transmission of requests and other communications¹.

¹ Article 4 “Channels of communication” of the Second Additional Protocol to the Convention on Mutual Assistance in Criminal Matters (ETS No. 182) amends Article 15 of the Convention. According to paragraph 9: “Requests for mutual assistance and any other communications under this Convention or its Protocols may be

13. In the same line, the European Convention on Extradition (ETS No. 24, 1957) was completed by its Third Additional Protocol (CETS No. 209, 2010) and the Fourth Additional Protocol (CETS No. 212, 2012). Those Protocols provide in for the use of electronic means of communication as well as communication through the Interpol, while ensuring the authenticity of the documents and information transmitted (Articles 8² and 6³ respectively).

14. However, contrary to these conventions, Convention 112 allows States to use other channels of communication by a declaration addressed to the Secretary General of the Council of Europe (see paragraph 3 of Article 5 above). The time for the formulation of such declaration is not limited to the time of signature or the deposit of the instrument of ratification, acceptance or approval. The Convention on Mutual Assistance in Criminal Matters, (ETS 30) allowed also the Parties to choose the channel of transmission they considered the most appropriate (Article 15 paragraph 6). However, the declaration had to be made when signing or depositing the instrument of ratification, acceptance or approval.

15. If we look at the content of Article 4 of the Second Additional Protocol to the Convention on Mutual Assistance in Criminal Matters, “electronic and other means of communication” are included among the “channels of communication”. Therefore, one can conclude that Article 5 paragraph 3 of the Convention 112 opens the possibility for States use of electronic and other means of communication by the formulation of individual declarations in this sense.

Questions to be addressed for the establishment of an e-transfer tool under Convention 112

16. Apart from the question of the legal basis a number of fundamental questions arise in relation to the establishment of an e-tool for the transfer of sentenced persons. These questions can be summarised as follows:

Acceptance of electronic communication by States Parties

forwarded through any electronic or other means of telecommunication provided that the requesting Party is prepared, upon request, to produce at any time a written record of it and the original. However, any Contracting State, may by a declaration addressed at any time to the Secretary General of the Council of Europe, establish the conditions under which it shall be willing to accept and execute requests received by electronic or other means of telecommunication.”

² Article 8 of the Third Additional Protocol to the Convention on Extradition (CETS No. 209) – “Means of communication

For the purpose of this Protocol, communications may be forwarded through electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity, as well as through the International Criminal Police Organisation (Interpol). In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.”

³ Article 6 of the Fourth Additional Protocol to the Convention on Extradition (CETS No. 212) – “Channels and means of communication

1. For the purpose of the Convention, communications may be forwarded by using electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity. In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.

2. The use of the International Criminal Police Organization (Interpol) or of diplomatic channels is not excluded.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that, for the purpose of Article 12 and Article 14, paragraph 1.a, of the Convention, it reserves the right to require the original or authenticated copy of the request and supporting documents.”

17. In some countries, documents concerning the transfer must be delivered through diplomatic channels and cannot be exchanged through e-transfer tools among the Parties. Changes in domestic law may sometimes be necessary. Therefore, not all Parties to the Convention and Protocol will be prepared and willing to joint electronic tool of communication at least at the same time.

18. As an example, even Israel, at the origin of this proposal, has made the following declaration to the Protocol ETS No. 182 which provides for electronic communication:

“The Government of the State of Israel declares that at the present time it will accept requests for legal assistance by means of electronic telecommunication in circumstances of extreme urgency only. Acceptance of a request by electronic telecommunication is on condition that the reasons for such urgency are set forth in the request and that the requesting Party transmits, at the same time, the original request in the usual manner. Israel will not accept requests to serve procedural documents and judicial decisions where such requests are transmitted by electronic telecommunication, as this form of transmittal is, in any case, not suitable for such requests.”

Privacy and security issues

19. One important concern in this respect would be to explore the manner in which the privacy requirements of the offenders and the security of the information are protected since national legislations on this point may be different between States Parties. Some States for example seem to be unable to provide direct access to prisoner transfer data in its data systems.

20. Some technical questions need also to be solved on how will the information be safeguarded, how long will the information be saved in the system and who will have access to what information.

21. In addition, since the information is exchanged on a platform, it is accessible to all the Parties and relates to all transfer procedures, to avoid problems of confidentiality, a system that restricts access to a transfer procedure to the two States concerned should be envisaged.

22. Since in many countries prisoners are not allowed to access to Internet, one possibility could be the platform to be used only between central authorities.

Processing of Personal Data

23. The principles of, and rules on the protection of persons with regard to the processing of their personal data may differ from State to State and have to be taken into consideration in the establishment of the e-transfer tool.

24. The transmission of personal data in the digital age is discussed in various international bodies with a view to harmonising and reinforcing the level of data protection at international level. The Council of Europe Convention of 1981 and its 2001 Protocol on data protection and security (ETS 108 and 181) are being reviewed. The EU has also new rules on this point. The question arises, therefore, as to how much an impact the new instruments will have on the E-transfer project.

25. In addition, issues can arise concerning the participation of the Council of Europe, such as the responsibility for the protection of the data exchanged through the e-transfer tool. In this respect, the Council of Europe cannot be held responsible for the veracity, quality and accuracy of the information exchanged through the e-transfer tool. The Council of Europe will not have responsibility neither for the use of the data/information made by the national actors. However, if the Council of Europe assumes the task of setting up a reliable efficient and secured system, it may be responsible in providing such a system. Another important question will be to determine whether the Council of Europe will act “controller” or “processor” of the personal data and this will depend on the degree of autonomy.

26. In case the project goes ahead, it will be also suggested to submit the draft e-transfer project to the Council of Europe data protection Commissioner for her opinion on whether data protection rules are respected.

Financial issues

27. One should keep in mind the financial implications of such a project and by whom the costs shall be born.

28. This relates not only with the design, development and the implementation of the tool but also with the necessary services to maintain a permanent system enabling States to electronically transmit requests for the transfer of sentenced persons.

Related projects existing at international level

29. Projects have emerged to use IT as a way to cooperate more efficiently. These are, for example the INTERPOL e-extradition and at the European Union level, the e-CODEX.

30. INTERPOL’s e-extradition initiative is a technical platform which intends significantly to speed up and facilitate extradition requests through the world police body’s secure communications channels.

31. INTERPOL Red Notices can be issued at the request of a member country to seek the location and arrest of wanted persons with a view to extradition or similar lawful action. While these Notices are transmitted electronically via secure police channels, the actual request for extradition is still largely dependent on traditional modes of communication – for example, postal mail or diplomatic pouch – which are less secure and less efficient.

32. The e-CODEX is a platform of electronic cooperation in criminal matters. The goal of e-CODEX, as an EU co-funded project, is to improve the cross-border access of citizens and businesses to legal means in Europe and improve the tools for cooperation between legal authorities within the EU. The services made available by e-CODEX are easily accessible for all citizens through the European e-Justice Portal or national portals, and in addition offer a user friendly approach for judicial employees.

33. Before embarking upon the e-transfer project, it would be important to know more about the state of art of the e-extradition and e-CODEX projects as well as the problems they might have encountered and the envisaged solutions. In this context, it should be examined to what extent that project might serve as a model or otherwise be adapted to transfers.

Conclusion

34. The establishment of an e-transfer tool requires first of all a legal basis allowing the use of electronic communication within the Convention 112. This legal basis can be provided either through the elaboration of a second additional Protocol to the Convention 112 or through individual declarations by Parties according to Article 5 paragraph 3 of the Convention 112.

35. Furthermore, since the e-transfer tool would be accessible within the Council of Europe landscape, for work on this project to begin, a specific legal basis other than the treaty would be also necessary. This could be for example a decision of the Committee of Ministers endorsing such a project or an agreement among the member States/Parties and the Council of Europe. The decision/agreement would need to be complemented by the detailed rules not only on the exchange of personal data but also on the role and responsibilities of the Council of Europe.

36. At present, the Council of Europe Action Plan on combating transnational organised crime (2016-2020), provides under Action 2 that the Council of Europe “should organise a conference to discuss the setting up and use of secure communications for international cooperation within the Council of Europe”. The Action Plan was approved by the European Committee on Criminal Problems (CDPC) on 1-4 December 2015 and adopted by the Committee of Ministers of the Council of Europe at its 1249th meeting on 2 March 2016.

37. In addition, and given the complexities mentioned, namely national legislation constraints in various fields, data protection issues, and financial implications, the project could only be developed through a collaborative process among all States Parties or at least among those States willing to take part in it.

38. This project cannot be conceived as an IT tool to be developed exclusively by the Council of Europe and then proposed to the member States/Parties to the Convention 112. On the contrary, the member States/Parties to the Convention 112 have to be willing to take part in the project and to provide with the necessary support for its development.