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EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMITE EUROPEEN POUR LES PROBLEMES CRIMINELS

(CDPC)

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

COMITE D'EXPERTS

SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPEENNES

SUR LA COOPERATION DANS LE DOMAINE PENAL

(PC-OC)

SUMMARY OF THE REPLIES RECEIVED IN 2020 CONCERNING THE EUROPEAN CONVENTION ON THE INTERNATIONAL VALIDITY OF CRIMINAL JUDGMENTS (ETS N° 70) AND POSSIBLE FURTHER DEVELOPMENTS IN MLA

COMPILATION DES REPONSES REÇUES EN 2020 CONCERNANT LA CONVENTION EUROPEENNE SUR LA VALEUR INTERNATIONALE DES JUGEMENTS REPRESSIFS (STE N° 70) ET POSSIBLES DEVELOPPEMENTS SUCCESSIFS EN MATIERE D'AIDE JURIDICTIONNELLE

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1. **<u>CROATIA</u> (reply received on 01/06/2020)**

1 . In your view and/or experience, is the European Convention on the International Validity of Criminal Judgments (ETS n° 70) still a useful instrument? If so, which provisions/elements are most relevant?

2. Which provisions/elements, if any, seem problematic, outdated or missing and would require to be amended, updated or supplemented?

3. If your country is not a Party to the Convention, is ratification being considered? If not, could you indicate the reasons?

Ratification of the Convention is currently not being considered. As a Member State of the European Union, we are applying Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. This Decision replaced the European Convention on the International Validity of Criminal Judgments among Member States of the EU. As for the third States, several bilateral agreements regulate the taking over the execution of criminal judgments, e.g. with Bosnia and Herzegovina, Montenegro, North Macedonia. Furthermore, provisions of the Additional Protocol to the Convention on the Transfer of the Sentenced Persons signed in 1997 with Parties to the mentioned Protocol can in certain cases represent a legal basis for taking over the execution of the foreign criminal judgement.

4. Do you support the idea to insert provisions on cross-border enforcement of criminal judgments in an additional Protocol to the Convention on Mutual Assistance in Criminal Matters?

Taking into account our answer for question no. 3, the provisions from the mentioned applicable legal instruments provide sufficient regulation of mutual recognition of judgements in criminal matters. However, we might be interested to discuss the draft provisions on cross-border enforcement of criminal judgements in an eventual additional Protocol to the MLA Convention.

5. If so, should these provisions aim to allow and ensure cross-border enforcement of criminal judgments in general? If you would prefer a narrower scope, please define.

Practice indicates that it is better to have narrowly defined conditions in order to enable successful and efficient application of the instrument.

2. **<u>FINLAND</u> (reply received on 20/02/2020)**

1. In your view and/or experience, is the European Convention on the International Validity of Criminal Judgments (ETS n° 70) still a useful instrument? If so, which provisions/elements are most relevant?

In our view maybe the ETS 70 has become obsolete and thus superfluous taking into account the coming into force of other instruments in this field. Namely, if we set aside fines, confiscation and disqualifications (article 2 ETS 70) as irrelevant in this context, the desired result might be achieved with minor amendments to the Additional Protocol to the Convention on the Transfer of Sentenced Persons. Both instruments (ETS 70 and 167) deal mainly with a similar set of facts: a sentence involving a deprivation of liberty has been passed in a Contracting State and the person in question resides in another Contrating State. Instead of transferring the person we'd be transferring the sentence for enforcement.

2. Which provisions/elements, if any, seem problematic, outdated or missing and would require to be amended, updated or supplemented?

3. If your country is not a Party to the Convention, is ratification being considered? If not, could you indicate the reasons?

No, see above.

4. Do you support the idea to insert provisions on cross-border enforcement of criminal judgments in an additional Protocol to the Convention on Mutual Assistance in Criminal Matters?

Either that or see 1.

5. If so, should these provisions aim to allow and ensure cross-border enforcement of criminal judgments in general? If you would prefer a narrower scope, please define.

A general approach would be preferable.

3. FRANCE (reply received on 03/07/2020)

1. Selon votre opinion et/ou votre expérience, la Convention européenne sur la valeur internationale des jugements répressifs (STE n° 70) est-elle encore un instrument utile ? Si tel est le cas, quels sont les dispositions/éléments les plus pertinents ?

La France n'étant pas signataire de la convention en question, il ne s'agit pas d'un outil utilisé dans le cadre du traitement des dossiers d'entraide pénale.

2. Quels dispositions/éléments, le cas échéant, semblent problématiques, obsolètes ou manquantes et devraient être modifiés, mis à jour ou complétés ?

La question est sans objet pour la France puisque la France n'en est pas signataire.

3. Si votre pays n'est pas partie à la convention, la ratification est-elle envisagée ? Si ce n'est pas le cas, pourriez-vous en indiquer les raisons ?

La ratification de la Convention européenne sur la valeur internationale des jugements répressifs n'est pas envisagée à ce jour.

D'un point de vue opérationnel, il peut être relevé que la législation française a intégré deux outils qui permettent d'améliorer le traitement des demandes d'entraide judiciaire en matière pénale, à savoir la DC 2008/909 pour la reconnaissance mutuelle des jugements aux fins d'exécution des peines privatives de liberté et la DC 2008/947 sur la reconnaissance des jugements pour les peines de probation et de substitution, toutes les deux du 27 novembre 2008. Ces deux mécanismes couvrent la quasi-totalité des Etats membres de l'UE (sauf Bulgarie et Irlande). La transposition de la DC 2008/909 dans la législation française permet désormais de pouvoir mettre à exécution une peine privative de liberté, même dans l'hypothèse où il n'y a pas eu de commencement d'exécution dans l'Etat de condamnation.

Pour rappel, jusqu'ici, seules les trois hypothèses suivantes permettaient cette mise à exécution :

- dans le cadre de l'Union européenne et en particulier par l'article 4 de la décision-cadre 2002/584/JAI du Conseil du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres : cette disposition permet à l'Etat d'exécution de refuser la remise de l'un de ses ressortissants ou d'un résident à

condition qu'il s'engage à assurer l'exécution de la peine à l'origine de l'émission du mandat d'arrêt européen ;
- dans le cas d'application de l'article 68 de la Convention d'application de l'accord de Schengen ;
- en application de l'article 2 du protocole additionnel à la convention sur le transfèrement des personnes condamnées du 18 décembre 1997 (STCE n°167).

4. Êtes-vous favorable à l'idée d'insérer des dispositions sur l'exécution transfrontalière des jugements pénaux dans un protocole additionnel à la Convention sur l'entraide judiciaire en matière pénale ?

La réflexion sur l'exécution frontalière des condamnations pénales présente un intérêt, notamment en ce que des mécanismes dans ce domaine pourraient permettre d'éviter de recourir de façon systématique à la procédure d'extradition passive et active.

Toutefois, l'introduction de tels dispositions dans une convention consacrée à l'entraide judiciaire paraît discutable et pourrait conduire à limiter la lisibilité de l'instrument. En effet, le domaine de l'entraide judiciaire, qui concerne principalement la façon de mener des investigations, diffère beaucoup de celui de l'exécution des jugements de condamnations en matière pénale. Les enjeux liés à ces deux matières sont très différents, et les conséquences de la coopération sont bien plus significatives à de nombreux égards lorsqu'il s'agit de mécanismes relatifs à l'exécution de condamnations pénales.

Enfin, un travail préalable d'identification des raisons du succès limité de la Convention européenne sur la valeur internationale des jugements répressifs (ratifiée par seulement 23 pays) serait opportun avant d'envisager une réflexion plus approfondie sur l'intérêt de nouvelles dispositions dans ce domaine.

5. Dans l'affirmative, ces dispositions devraient-elles viser à permettre et à garantir l'exécution transfrontalière des jugements pénaux en général ? Si vous préférez un champ d'application plus restreint, veuillez le définir.

Idem cf.supra.

4. GERMANY (reply received on 14/04/20)

Germany has signed the convention ETS No. 70 on the 28. May 1970. The ratification of the convention is not being considered yet.

One reason is, that the German mutual legal assistance law ("Gesetz über die internationale Rechtshilfe in Strafsachen", IRG) already fully reflects these constellations of enforcement assistance in the field without treaties with countries all over the world.

Further more, within the EU, Germany is bound to special legal instruments in the field of enforcement assistance, such as the Framework Decisions on "custodial sentences" (2008/909/JHA), "financial penalties" (2005/214/JHA), "freezing" (2003/577/JHA) and "confiscation" (2006/783/JHA).

5. MOLDOVA (reply received on 29/06/2020)

1. According to our competent authorities the European Convention on the International Validity of Criminal Judgments (ETS n° 70) is a very useful instrument.

2. No problematic provisions or elements were identified in its application.

3. The Republic of Moldova ratified the convention on 20/06/2006.

6. PORTUGAL (reply received on 19/03/2020)

1. In your view and/or experience, is the European Convention on the International Validity of Criminal Judgments (ETS n° 70) still a useful instrument? If so, which provisions/elements are most relevant?

Portugal is not a State Party to this Convention; therefore Portuguese authorities cannot really elaborate on the usefulness of this instrument. However since we do have an internal Law on international cooperation in criminal matters that, among others, has rules on the enforcement of foreign decisions in Portugal and of Portuguese citizens abroad we are most in favor in having an instrument that allows for the execution of foreign decisions. If it is possible to transmit criminal procedures it should also be possible to transmit final decisions, provided they have been rendered with all safeguards respected.

2. Which provisions/elements, if any, seem problematic, outdated or missing and would require to be amended, updated or supplemented?

No experience for the reasons mentioned.

3. If your country is not a Party to the Convention, is ratification being considered? If not, could you indicate the reasons?

As far as we are aware of at the Central Authority the Ministry of Justice is not considering starting the procedure for the ratification of this instrument. Reasons might be the fact that the internal Law has been somehow sufficient.

4. Do you support the idea to insert provisions on cross-border enforcement of criminal judgments in an additional Protocol to the Convention on Mutual Assistance in Criminal Matters?

In principle we consider that the two forms of cooperation are different and should remain separated, addressed in different instruments.

7. SLOVENIA (reply received on 14/07/20)

The Republic of Slovenia ratified the European Convention on the International Validity of Criminal Judgments on 12.4.2016. From the date of the entry into force on 12.7.2016 till now, the Republic of Slovenia has little experience with its use. Based on only a few cases it is not possible to evaluate the effectiveness of the instrument. Since the Republic of Slovenia ratified the Convention, we do not recognize the need to include its provisions in another instrument. In our opinion it would be more appropriate to encourage the other States to ratify the Convention. Ratification of the instrument by a larger number of countries would allow its wider use and, on this basis, also the possibility to assess its effectiveness or any deficiency. The later could be remedied by the adoption of a protocol to the European Convention on the International Validity of Criminal Judgments. In our oppinion it would be useful to ensure cross-border enforcement of criminal judgments and also to extend the scope to the cross-border enforcement of costs of the proceedings and to include the cross-border enforcement of fines

in misdemeanor proceedings, in a similar way as regulated by the instruments of international recognition at EU level.

8. SWITZERLAND (reply received on 03/04/2020)

1. In your view and/or experience, is the European Convention on the International Validity of Criminal Judgments (ETS n° 70) still a useful instrument? If so, which provisions/elements are most relevant?

Switzerland is not a party to that Convention and is of the opinion that due to the relatively low number of cases concerned by ETS 70 as well as the low ratification of the said convention, its usefulness is quite limited.

2. Which provisions/elements, if any, seem problematic, outdated or missing and would require to be amended, updated or supplemented?

As we are not party to that Convention, we are not familiar with the application of this Convention and as such not in a position to respond to that question.

3. If your country is not a Party to the Convention, is ratification being considered? If not, could you indicate the reasons?

Ratification is not considered as Switzerland has internal law allowing our authorities to recognize and execute foreign judgments if conditions of national law are fulfilled. The States with which ETS 70 would be useful to Switzerland are States that did not ratify the Convention either and as such, ETS 70 does not seem to have an added value for Switzerland.

4. Do you support the idea to insert provisions on cross-border enforcement of criminal judgments in an additional Protocol to the Convention on Mutual Assistance in Criminal Matters?

Switzerland is of the opinion that adding provisions on cross-border enforcement of criminal judgments in an additional Protocol to the MLA Convention is not as such the best way to proceed in the sense that it would multiply the applicable instruments with the risks that are linked to a multiplication of legal bases. Another reason is that we are of the opinion that such a subject is not *per se* a part of MLA.

9. TURKEY (reply received on 20/05/2020)

1 . In your view and/or experience, is the European Convention on the International Validity of Criminal Judgments (ETS n° 70) still a useful instrument? If so, which provisions/elements are most relevant?

The European Convention on the International Validity of Criminal Judgments, or considering the purpose it serves, currently implements an important function and plays a complimentary role in other types of conventional judicial assistance.

A judgment that is rendered and finalized in one country is often not enforced for various reasons in the country that has rendered the decision. One of the main reasons for this is the sentenced person not being on the territory of the Sentencing State. Under such conditions, one of the most basic approaches brought by conventional legal assistance methods is the possibility of requesting the extradition of the sentenced person to the Sentencing State.

However, as this method requires prolonged, cumbersome and strict procedural rules, it often does not provide sufficient criminal justice. Nevertheless, considering the fact that the person concerned may not be extradited to the requesting State in cases where he is a national of the requested State, the only option that remains to ensure the prosecution of the person concerned in the country of his State of residence, is to resort to the principle of *extradite or prosecute*. At this point, the transfer of enforcement assumes a complementary role as a separate type of legal assistance, to transfer the enforcement process, which is the continuation of completed proceedings in a state, to another state. In this way, time is saved by not starting the proceedings from the beginning in the state of transfer and as a result, criminal proceedings are executed faster at international level. In addition, social rehabilitation is also ensured, as the personal statuses of the sentenced persons are also considered while determining the state of enforcement of the sentence. Based on the above listed and many other reasons, we view the European Convention on the International Validity of Criminal Judgments (ETS n° 70) as an important legal assistance tool. We consider that by increasing the number of Contracting States and by expanding its scope of application, the benefits the Convention provides will become more apparent.

In addition, in our view, if the provisions on the transfer of enforcement of sanctions involving deprivation of liberty, fines and confiscations, are expressed in clearer regulations that will not lead to different interpretations, more states wouls accede the Convention, whereby the above stated objectives can be attained.

2. Which provisions/elements, if any, seem problematic, outdated or missing and would require to be amended, updated or supplemented?

We outlined the problematic provisions/elements in the Convention as follows:

i. <u>Provisions on the transfer of enforcement of judgments rendered in the absence of the accused do not adequately reflect the differences arising from the national laws of the parties</u>:

Provisions concerning the circumstances, under which courts are allowed to sentence persons *in absentia*, are determined in proportion to the importance, ascribed by States to the right to defense of the accused, under his right to fair trial.

Therefore, court in some countries are entitled to conclude the proceedings if the summoned accused person fails to appear before the court. In other countries, appearance on at least one instance on a hearing is compulsory and if the accused wishes so, he can be held exempt from the remaining hearings. Yet in other States, accused persons are obligated to attend the sentencing hearings.

As provisions in this regard cover the right to defense of the accused person, which is one of the most basic elements of criminal procedure, they generally concern public orders of countries.

Whereas the European Convention on the International Validity of Criminal Judgments (ETS n° 70) accepts some circumstance, wherein under certain conditions judgments rendered *in absentia*, are considered to have been rendered in the presence of the accused (Art.21/3). Nevertheless, the courts of the Contracting States in their criminal proceedings usually take into consideration their national laws with regards to the right to defence of the accused. This situation is an obstacle to the effective implementation of the Convention. Therefore, it is important to rule out those provisions in the Convention, which strictly determine under what

circumstances accused persons have not been judged in absentia. Instead, when States request the transfer of enforcement of any judgments, whether rendered in absentia or not, it would be more appropriate for the requested State itself to decide according to its national laws whether it is necessary for the accused person to give his defense statement again in the requested State. In this way, the process of transferring enforcement would also be simplified. For the judgment, subject to the transfer, is currently assumed to have been issued according to the national laws of the requesting State. After the request for transfer has been made, only compliance to the basic criminal procedures of the requested State will be valid. Therefore, even if a person has been sentenced in absentia in the requesting State, and if the national law of the requested State allows sentencing in absentia, there will be no need for re-taking the defense statement of the sentenced person again and the requested State will be able to decide on the transfer of enforcement only by notifying the sentenced person about the judgment and about his right to be heard/right to objection. On the other hand, if the national law of the requested State requires compulsorily taking the defense Statement of the sentenced person, the person will be summoned for giving his defense statement and the requested State will decide accordingly. Therefore, leaving to the requested State the discretion of deciding whether the defense statement of the sentenced persons will or will not be taken in the requested State, will greatly ease the applicability of the process.

Then there will be no need for detailed provisions, such as what warnings should be included in the notification to be served to the accused in the requested state as provided in Article 23 of the Convention. Because every detail to be introduced to the process of the transfer of enforcement complicates uniform implementation by the countries, carries the risk of contradiction with their national laws and consequently prevents the effective execution of the transfer of enforcement.

ii. In our view, some provisions should not take place in the Convention on the transfer of enforcement, due to the scarcity of their practice, problems in practice, the very different provisions in the national laws of the countries on these subjects, and because they do not adequately reflect the main objectives of the Convention:

For instance, the transfer of enforcement of penalties, specified in the Convention as "*ordonnance pénale*" defined as a type of administrative sanctions, is a field loaded with different problems. Concerning the sanctions, provided for this type of disruptive to the administrative order actions, the national laws of the countries vary significantly from the discretion about double incrimination, how the defense rights of the person will be used and on many other issues. These differences cause passivity in the actions of the States in this regard.

On the other hand, disqualifications are also dealt with in the Convention on the transfer of enforcement. Deprivation of rights involves quite different practices in different countries. While a conviction in some countries may affect only the eligibility as a member of the parliament, in others it can ban the person from working in public services. The Convention leaves the decision on whether to accept a request for such a transfer of enforcement completely on the discretion of the requested State. In addition, countries often record in their judicial records, without the need for a convention and to the extent permitted by their national legislations, the criminal records of their citizens convicted in different jurisdictions, and they can also apply the disqualifications, corresponding to the crime for which the person has been sentenced in the laws of the requested State. In this regard, it is beneficial to exclude the

transfer of enforcement of disqualifications, the application area of which is quite narrow, from the scope of the Convention.

On the other hand, by including the principle of *"ne bis in idem*" within the scope of the Convention, stating that if there is a criminal sentence for an act in one of the parties, another country will not be able to take criminal proceedings on the same act if certain conditions are met. As you know, the international use of criminal jurisdiction of countries is based on different fundamentals such as property, personality, universality and protection principles. In the application of some of these principles some countries have priority over others. In the international arena there is no consensus as to the boundaries within which the countries can exercise their jurisdiction. We believe that the introduction of a meticulous issue like "*ne bis in idem*" to a Convention, the main purpose of which is the enforcement of criminal judgments at an international level, is an obstacle for the countries to become a party to the Convention.

iii. In our view, there are provisions in the Convention that might be contradictory:

Art.10/2 states that the requesting State alone shall have the right to decide on any application for review of sentence. Nevertheless, Art.26 provides that if the person, sentenced in absentia in the sentencing State, files an opposition in the requested State and if the opposition is admissible, the act shall be tried as if it had been committed in that State. In other words, the provision of Art.26 means that the requested State is entitled to also review objections to judgments, while Art.10 provides the opposite of this. Similarly, Art.42 states that the requested State shall be bound by the findings as to the facts in so far as they are stated in the decision or in so far as it is impliedly based on them. This too, contradicts with the provision of Art.26.

The Convention also provides that when the sentencing State requests the transfer of the enforcement of the sentence of a person, who has been prosecuted *in absentia* and his judgment became final, the requested State provides this person the right to object, after notifying him of the decision rendered in the requesting State. The person is also provided with the option to choose the competent court of which state will examine the opposition. If the person chooses his opposition to be examined by the requested State, the limits of the examination to be carried out by the requested State are set out in the Convention. Although Art.26/3 of the Convention provides that in such cases in the new trial that is to be conducted by the requested State, the act shall be tried as if it had been committed in that State, enough explanation is not provided on basic issues such as whether this review includes reassessment of evidence, whether the competent court can decide on the acquittal of the person if the requested State finds the evidence insufficient for conviction, and if such decision is given, what will be the importance of this decision in the requesting State. The interpretations on Art.26 in the Explanatory Report to the Convention, state that in this event the criminal act will be assessed based completely on the laws of the requesting State. Yet Art.42 provides that the requested State shall be bound by the findings as to the facts, stated in the decision of the requesting State.

In conclusion, details of the scope of the judicial review to be carried out in the requested State especially for trial *in absentia*, cannot be not easily understood from the text of the Convention. In our opinion this may cause a hesitance in the implementation of the Convention and may prevent its effective practice by the countries.

3. If your country is not a Party to the Convention, is ratification being considered? If not, could you indicate the reasons?

Turkey is a Member State of the Convention.

4. Do you support the idea to insert provisions on cross-border enforcement of criminal judgments in an additional Protocol to the Convention on Mutual Assistance in Criminal Matters?

In our opinion, provisions in an additional Protocol to the Convention on Mutual Assistance in Criminal Matters (ETS 30) will not contribute to its application.

First, as indicated on page 13 of the Explanatory Report to the Convention, transfer of enforcement is a type of judicial assistance, such as extradition and mutual assistance in criminal matters. Therefore, matters such as the provisions the convention sets out, the rules to be applied, its purpose, some sensitivities that are taken into consideration, etc., differ. In this regard, we believe that just as the issues of extradition, transfer of sentenced persons or MLA in criminal matters have been dealt with in separate conventions, in the same way it is important that transfer of enforcement should be dealt with in a separate convention and not as an additional Protocol to the Convention on Mutual Assistance in Criminal Matters.

Apart from that, the Convention lays down an international cooperation for judicial proceedings for the different stages of the transfer of enforcement and MLA in criminal matters. While transfer of enforcement basically lays down the rules for the enforcement in another country of a sentence, rendered on a criminal proceedings and made final, the Convention on Mutual Assistance in Criminal Matters (ETS 30) mostly involves procedures, proceeding the criminal sentence and the procedures following the sentence deal with subjects like service of process following the pronouncement of the decision, which do not involve the execution of the sentence. This is also stated in the first article of the said Convention. In this regard, the application areas of both subjects are quite different.

In addition, legal concepts, dealt with under the transfer of enforcement, concern subjects that as a rule do not fall within the application field of the Convention on Mutual Assistance in Criminal Matters (ETS 30). For instance, while double incrimination is a rule, required for the implementation of the European Convention on the International Validity of Criminal Judgments (ETS n° 70), it basically is not practiced under the Convention on Mutual Assistance in Criminal Matters (ETS 30). Nevertheless, application of the principle of *ne bis in idem*, is a rule under ETS 70, while the opposite is true for ETS 30.

In conclusion, we do not support the idea of adding a protocol to the Convention on Mutual Assistance in Criminal Matters (ETS 30) and inserting in it provisions on cross-border enforcement of criminal judgments.

5. If so, should these provisions aim to allow and ensure cross-border enforcement of criminal judgments in general? If you would prefer a narrower scope, please define.

See response to Question 4.

10. UNITED KINGDOM

1. See revised responses below.

2. To indicate whether the UK is willing to support the PC-OC Secretariat's proposal to address jurisdiction issues by the two-tier system mentioned by the Secretariat in Doc PC-OC (2019)08rev: "*Exercising jurisdiction is key to ending impunity and ensuring that justice is done. In order to help determine which state has priority, a two tier-system could be considered: (i) make use of the provisions contained in Part IV (plurality of criminal proceedings) of the European Convention on the Transfer of Proceedings in Criminal matters and, if this doesn't work, (ii) use the clearing house (PC-OC) to find a solution with the states concerned." ?* (See attached for reference).

The UK has not ratified the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 073). It is therefore willing to support this proposal in principle to the extent that the content and status of the proposal are consistent with UK policy and law.

3.To indicate whether the UK be in favor of introducing in a possible future additional Protocol to the Convention on MLA provisions as regards jurisdiction, taking into account those contained in Part IV (plurality of criminal proceedings) of the European Convention on the Transfer of Proceedings in Criminal Matters (ETS n° 73:)?

The UK has not ratified the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 073) due to the limitations under UK law to exercise extraterritorial jurisdiction for all offences. That said, as a PC-OC member, the UK would participate to discussions on a possible additional protocol to this Convention and be open to supporting the proposal if there was wider consensus that this would increase judicial co-operation in this area.

Updated UK responses

A. Proper transfer of proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)

1. If your State is not Party to the European Convention on the Transfer of Proceedings in Criminal Matters of 1972, what are the reasons for the non-ratification? Is the effect of the Convention on jurisdiction considered a problem?

The UK is not a party to the convention. Currently, UK jurisdiction for criminal offences is generally territorial i.e. it is concerned with acts committed on UK territory. There are exceptions to the general position where extraterritorial jurisdiction exists, typically where the alleged offender is a UK national or person ordinarily resident in the UK. Extraterritorial jurisdiction is created in UK law on an offence-specific basis and the exercise of such jurisdiction by the UK is more limited than by many other Member States. This convention would constitute a change to the UK's approach to jurisdiction and require a move away from the principle of territorial jurisdiction.

Scotland is able to transfer proceedings on the basis that where another Member State has jurisdiction, then they may be invited to take over jurisdiction. To that extent it falls within the second scenario i.e. ECMLA 1959 art 21.

B. Laying of information under Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)

4. Concerning the use of Article 21 of the European Convention on Mutual Assistance in Criminal Matters of 1959 on *laying of information*:

The United Kingdom handed over a reservation at the time of deposit of the instrument of ratification on the 1959 convention, on 29th August 1991 noting that 'The Government of the United Kingdom reserves the right not to apply Article 21.'

a. How frequently is the possibility to transmit information to another State Party used by your authorities?

There are two scenarios in which a request may be made by the Crown Prosecution Service to another state to take proceedings in respect of offending that is triable in England and Wales:

1. Where for some reason it is not possible to try the person in England and Wales; e.g. if the suspect has fled to his home nation and that nation refuses to extradite its own nationals. In this scenario, inviting the other state to issue proceedings is the only method of the person being prosecuted for the offending. N.B. if extradition is possible, the Crown Prosecution Service will invariably seek the extradition of the person to the UK for prosecution here.

2. Where it is possible to try the person in England and Wales but a decision is made that the offending would best be tried in another state; e.g. transnational offending where a consideration of factors, including Eurojust's 2003 report on 'Which jurisdiction should prosecute', indicates that another state is the best venue to try all the offences.

The Crown Prosecution Service does not keep a record of the number of cases falling with scenarios 1 and 2 above. However, scenario 1 will only arise infrequently, less than 10 times in a year, though we accept this may increase slightly following the UK's departure from the EU. Scenario 2 will arise more frequently given the transnational nature of organised crime, however not often. A decision on the best trial venue is ideally reached through consensus following discussions with the relevant foreign authorities.

Scotland is able to transfer proceedings on the basis that where another Member State has jurisdiction, then they may be invited to take over jurisdiction. This occurs where jurisdiction is based on the nationality of the person or it appears that there may be evidence available in the other jurisdiction which might be better placed to take proceedings.

b. What is your evaluation of the percentage of cases where this information leads to concrete action by/in the requested Party, based on the obligation of the requested Party to give notification of any such action (Article 21, paragraph 2)?

Again, the Crown Prosecution Service does not keep a record of this information. However, it is common for investigators and prosecutors to retain an interest in cases that have been transferred to another state. Often this is necessitated as the foreign authority will require evidence from England and Wales to pursue the prosecution in their courts. It may also arise as a live-link of witness evidence from England & Wales may be required by the foreign authority at the trial or witness care issues may arise when a UK based witness is asked to travel to the other state for the trial.

In Scotland: 90%

c. What are the considerations that motivate the decision to utilise Article 21 (ETS No. 30) rather than to pursue a domestic prosecution?

See answer to 'a' above.

Considerations include greater effective and efficient justice e.g. where there has been an allegation of fraud over the internet and the seller is located in Germany and the buyer in Scotland, jurisdiction can be founded in both jurisdictions. Rather than seek recovery of evidence from Germany and then issue a European Arrest Warrant, we would consider inviting the German authorities to exercise jurisdiction. This avoids the issue of a letter of request and the extradition of a German national where the German authorities would consider the issue of jurisdiction when the EAW was received by them and they may decline to execute the EAW.

d. Do you face any legal or practical obstacles in acting on information laid by another Party with a view to criminal proceedings (including the first stage pre-trial or trial proceedings) of your country? Please provide details.

A practical issue is that papers submitted to the Crown Prosecution Service must be translated into English. On occasion papers are submitted only in the language of the other state. Additionally, the Crown Prosecution Service is not responsible for the investigation of crime in England and Wales. There is a clear distinction in England and Wales between the functions of investigators (including the police, the National Crime Agency, Her Majesty's Revenue and Customs, and UK Visas and Immigration) and the prosecution services (including the Crown Prosecution Service and the Serious Fraud Office). A request by another state to England and Wales to 'transfer' proceedings should ideally be made after contact and consultation with both the relevant UK investigation and prosecution authority.

No difficulty has been experienced where the Scottish authorities have been invited to take over jurisdiction for offences committed abroad where jurisdiction may be exercised in Scotland. If any further evidence is required it will be recovered by the issue of a letter of request.

e. Did you encounter problems with respect to the application of the principle of 'ne bis in idem', either as the requesting or the requested State?

Prior discussions with the foreign judicial authority, e.g. as envisaged by both the Eurojust guidelines and by Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings should alert all authorities to the possibility of 'ne bis in idem' and to enable them to deal with issues arising accordingly.

In Scotland no problems have been encountered with the application of the *ne bis in idem principle.*

C. Transfer of proceedings as an alternative to extradition: the application of the 'aut dedere, aut judicare' principle under Article 6, paragraph 2, of the European Convention on Extradition (ETS No. 24)

5. Concerning the obligation to extradite or prosecute as contained in Article 6, paragraph 2, of the European Convention on Extradition of 1957 (ETS No. 24) – the *aut dedere aut judicare* principle:

a. Please provide information on how often this principle is applied in practice in cases where your state does not grant extradition, or where your extradition request is refused by the requested state.

The UK has no bar on the extradition of own nationals, so does not apply this principle to extradition requests received. The Home Office is not aware of any recent instances where a UK extradition request has been refused solely on the grounds of the person's nationality.

b. Do you apply the *aut dedere aut judicare* principle exclusively within the limits of Article 6§2 of the Extradition Convention, i.e. insofar as the extradition was refused *solely for reason of nationality* or do you widen its application to other grounds for refusal of extradition?

The UK has no bar on extradition of own nationals.

c. Is this principle implemented in your internal legislation?

No.

d. What are the main obstacles to the application of this principle and do you feel a need to address such obstacles through binding or non-binding standards?

The UK considers the bar on extradition of own nationals to be an obstacle to the interests of justice and generally the interests of the victim. Extradition is much preferable to prosecution of the person in the Requested State. Prosecution in the Requested State should be resorted to only where it best serves the interests of the victim(s) and the interests of justice.

e. Does your country contemplate any change in its domestic legislation concerning the scope of application of the *aut dedere, aut judicare* principle? If so, in which direction and to what extent?

No.

f. Have you had any problems regarding the 'ne bis in idem' principle?

No.

g. Can and do you apply Article 6, paragraph 2, with respect to already convicted and/or sentenced persons where extradition is denied on nationality or other grounds, or do you require a further treaty basis to execute a foreign judgment against a convicted person?

No. The UK has no bar on extradition of own nationals.

D. General questions

6. Do you think that there is any need for action at Council of Europe level to tackle positive or negative conflicts of jurisdiction in addition to the existing standards or for recommendations/guidelines to be drafted to improve their implementation?

Scotland: Provided jurisdiction can be exercised elsewhere other than Scotland and that such provides a more effective and efficient forum for prosecution both for the interests of justice and the person who is the subject of proceedings (and not forgetting the rights of the victim) then there is no requirement for any further action.