



EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

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

Overview of proposals on new provisions for the European Convention on Mutual Assistance
in Criminal Matters made since 2002

Prepared by the Secretariat

Overview of proposals

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Proposals for new or updated provisions

1. Strengthening the rights of the individual

1.1 Introduction of the principle of *ne bis in idem* on the European level¹

- The purpose of introducing and embracing the principle of *ne bis in idem* in the Convention is firstly to solve the problem of positive conflicts of jurisdiction. Secondly, it shall improve the protection of the accused and their fundamental right not to be punished twice for the same crime.² It might be necessary to extend the principle beyond the strict boundaries of criminal prosecution. Nevertheless, the final decision about such extension should be entrusted to the judicial authorities to be adjudicated on a case-by-case basis.³
- Where the application of the principle in the specific case results in the determination of a better forum for criminal prosecution, all efforts must be made to transfer proceedings to that forum.⁴
- The introduction of this principle may come along with the need to create a judicial body that is competent to decide cases of jurisdictional conflicts.⁵

1.2 Introduction of a clause referring to the public order of the State receiving the request for judicial cooperation or when the fundamental rights of the individual concerned are at risk⁶

1.3 Clear regulations on ‘double criminality’

- States should also facilitate the treatment of requests made under the Convention on Mutual Assistance and its protocols. The principle of double criminality should not constitute an obstacle to such co-operation.⁷

a) Abolishment and introduction of a list with the most serious crimes common to all CoE member states and establishment of ‘Elements of Crimes’

- One proposal is to abolish the requirement of double criminality between CoE member States to the extent that binding instruments identify, define and regulate crimes common to all member states.⁸ This would be assorted with a clear definition of the most serious crimes. For these crimes, there would be a presumption that double criminality is fulfilled.⁹ This could be achieved by the introduction of a document similar to the legal instrument of the ICC’s “Elements of Crimes”.¹⁰

¹ PC-TJ (2005) 09, Comments on the draft summary report of the first PC-TJ meeting by Piotr Hofmański, 12 January 2005, p. 3.

² PC-TJ (2005) 09, Comments on the draft summary report of the first PC-TJ meeting by Piotr Hofmański, 12 January 2005, p. 3; PC-TJ, PC-TJ (2005) 05, Interim report to the CDPC, 9 February 2005, para. 40.

³ PC-TJ (2005) 10, 20 December 2005, para. 46.

⁴ PC-TJ (2005) 10, 20 December 2005, para. 47.

⁵ PC-TJ (2005) 09, Comments on the draft summary report of the first PC-TJ meeting by Piotr Hofmański, 12 January 2005, p. 3.

⁶ PC-TJ, PC-TJ (2005) 05, Interim report to the CDPC, 9 February 2005, para. 33.

⁷ PC-OC (2006) 17 Rev 2, para. 79.

⁸ PC-TJ (2005) 10, 20 December 2005, para. 37.

⁹ PC-TJ, PC-TJ (2005) 05, Interim report to the CDPC, 9 February 2005, para. 34.

¹⁰ CDPC/PC-TJ, PC-TJ (2005) 03, Report by Turone (Italy), 10 January 2005, p. 34.

- Such approach should also come along with a clarification of ambiguities in the languages of the instruments (“offences” against “facts”).¹¹
- This can also be achieved through bilateral exception clauses abolishing the requirement of double criminality.¹²

b) Replacement with the principle of ‘double prohibition’¹³

- Another solution would be to replace the requirement of double criminality with a requirement of double prohibition, subject to the possibility to refuse a request on grounds of incompatibility with the fundamental principles of the legal order concerned.¹⁴ The requirement of double prohibition acknowledges that in both the States concerned the behaviour giving rise to a request for cooperation remains prohibited, albeit not in the same manner. Thus, the requested State shares the same fundamental evaluation of the act concerned as the requesting State and can therefore accept a temporary restriction to its sovereign rights. From shared values, shared responsibilities are created.¹⁵

1.4 Manifestation and judicial control of procedural (minimum) rights of the accused¹⁶

- This proposal takes into account the increased focus on the rights of the accused and its legally protected interests. Thus, the following procedural rights shall be guaranteed to an accused and taken into account when requesting or being requested for extradition or other assistance:
 - o right to be informed by the authorities of the requested state about the nature and cause of the accusation in the requesting state and about the privilege against self-incrimination (there are some ‘minimum information’ specifically for extradition procedures: access to the file of extradition *stricto sensu*; access to detailed information concerning the application of the specialty rule; access to detailed information concerning the possibility of a simplified extradition procedure subject to the person’s consent, communication of the decision to the person concerned)¹⁷
 - o right to counsel/lawyer in the requested State, including the right to seek legal aid to that effect.
 - o right to look into the complete file/to disclosure,
 - o right to be heard and/or to submit written statements,
 - o rights with regard to evidence, e.g., the subject matter (i. e.: grounds for refusing extradition) to be covered by the evidence, the right of the individual to bring evidence, standard and burden of proof (including the presumption of innocence),

¹¹ CDPC/CDPC-BU, CDPC-Bu (2007) 10, 14 March 2007, p. 8.

¹² PC-TJ (2005) 10, 20 December 2005, para. 40.

¹³ PC-TJ (2005) 10, 20 December 2005, paras 38-39; CDPC/PC-TJ, PC-TJ (2005) 06, Possible Ways to Reduce the Double Criminality Requirement: From double criminality to double prohibition, Report by Lagodny, 4 July 2005, p. 4.

¹⁴ PC-TJ (2005) 10, 20 December 2005, para. 38.

¹⁵ PC-TJ (2005) 10, 20 December 2005, para. 39.

¹⁶ CDPC/PC-TJ, Executive Summary by Prof. Dr. Lagodny, “The Legal Protection of the Accused from a comparative view”, 31-2 February 2005, paras 3-5; Note from the Netherlands to the CDPC on Point 4 of the Order of Business, Proposals Concerning the PC-OC, 2 June 2010, p. 3; PC-S-NS (2002)7, New Start – a report, 18 September 2002, pp. 18-19; CDPC/PC-OC, PC-OC (2006) 9, Modernisation of the European Conventions on int. co-operation in the criminal field, Not to the CDPC, 3 March 2006, p. 3.

¹⁷ PC-TJ (2005) 10, 20 December 2005, para. 19.

- right to have conditions or limitations inserted in the granting decision,
 - right to require the granting authority or the court to render its decision and the execution of it within reasonable time,
 - right to access to a qualified interpreter, including the right to seek legal aid to that effect,
 - right to be informed about the decision of the granting authority or the court,
 - right to appeal,
 - right to redress, including compensation¹⁸
 - for extradition proceedings: the right not to be extradited if the fundamental rights of the person concerned are at risk, including the risk to be subjected to a flagrant denial of justice¹⁹
- these rights shall be codified either: in a comprehensive convention (replacing existing instruments on extradition and mutual legal assistance); a joint additional protocol to the existing instruments on extradition and mutual legal assistance; or a protocol to the ECHR.²⁰
 - this could also be complemented by introducing a “general clause on human rights” in the convention.²¹
 - The jurisprudence of the ECtHR on mutual assistance and extradition should be kept in mind (particularly of Art. 5 (2), (4) ECHR)).²²

2. Jurisdiction

2.1. Introduction of general provisions establishing clear rules on jurisdiction

- This shall resolve the problem of competing jurisdictions and under the supervision of a judicial body created to resolve competing jurisdictional claims or negative jurisdiction conflicts.²³

3. Reservations

- With regard to the topic of reservations there have been made different proposals how to overcome the expansive use of reservations that hinder the application of the Convention and Protocols (some suggestions were referring predominantly to the Convention on Extradition, but are also applicable to this one)

¹⁸ CDPC/CDPC-BU, CDPC-Bu (2007) 10, 14 March 2007, p. 7; PC-OC/CDPC, PC-OC (2005) 06 rev, informal proposals suggested by Per Hedvall (Sweden) on 'The European Convention on Extradition', 27 July 2005, p. 2; PC-TJ (2005)10, 20 December 2005, paras 11-19.

¹⁹ PC-TJ (2005) 10, 20 December 2005, para. 19.

²⁰ PC-TJ (2005) 10, 20 December 2005, p. 14.

²¹ CDPC/CDPC-BU, CDPC-Bu (2007) 10, 14 March 2007, p. 7; High-level conference of the ministries of justice and of the interior, improving European Co-operation in the Criminal Justice field, report presented by Mr. Mammadov (Azerbaijan), 9-10 Nov 2006, pp. 9-10.

²² PC-TJ (2005) 10, 20 December 2005, para. 12.

²³ PC-TJ (2005) 09, Comments on the draft summary report of the first PC-TJ meeting by Piotr Hofmański, 12 January 2005, p. 3.

3.1. Review of existing reservations

- The proposal of reviewing existing reservations should keep in mind that reservations should be limited to specific provisions. Where necessary, reservations should be updated or withdrawn.²⁴

3.2. Creation of a new legal basis limiting or excluding the possibility of future reservations

- Another, more 'radical' proposal is to limit or exclude the possibility of reservations. There are two proposed methods:
 - o Introduce a new legal basis ('sunset clause') that limits the duration of validity of reservations for future reservations to five (or ten years).²⁵ The interest of such a limitation should however be balanced with the interest to have as many States as possible ratifying the instrument and with the necessity of an efficient co-operation.²⁶
 - o Introduce a new legal basis in form of one 'compact international CoE act' that replaces all existing instruments and excludes the admissibility of any reservations (see under 3.1.1.).²⁷

4. Restrictions on grounds to refuse assistance (exclude arbitrary interpretation)

- The proposal suggests limiting the possibility to refuse assistance,²⁸ in particular out of political reasons. Such proposal would take into account that persons charged with the commission of various crimes (i.e. connected with drug trafficking, organized crime, money laundering, fraud) claim to have acted upon political motives in order to avoid liability.²⁹
- It is proposed to introduce a provision stating that the Contracting States shall not consider offences envisaged in the international treaties on combating particular kinds of crimes to which both the requesting and requested States are Parties, as political offences or offences inspired by political motives.³⁰ However, the introduction of a positive legal definition of "political offence", an "offence connected with a political offence" and an "offence inspired by political motives" is **not** considered necessary or practical.³¹

²⁴ CDPC/PC-OC, PC-OC (2007)06, 23 May 2007, p. 9; CDPC/CDPC-BU, CDPC-Bu (2007) 10, 14 March 2007, p. 9; PC-S-NS (2002)7, New Start – a report, 18 September 2002, p. 12; PC-OC (2006) 17 Rev 2, paras 71-72.

²⁵ PC-OC (2006) 17 Rev. 2, paras 73-76.

²⁶ CDPC/PC-OC, PC-OC (2007)06, 23 May 2007, p. 9.

²⁷ PC-TJ (2005) 09, Comments on the draft summary report of the first PC-TJ meeting by Piotr Hofmański, 12 January 2005, p. 2.; CDPC/CDPC-BU, CDPC-Bu (2007) 10, 14 March 2007, p. 9.

²⁸ High-level conference of the Ministries of justice and of the interior, improving European Co-operation in the Criminal Justice field, report presented by Mr. Mammadov (Azerbaijan), 9-10 Nov 2006, pp. 7-8.

²⁹ High-level conference of the Ministries of justice and of the interior, improving European Co-operation in the Criminal Justice field, report presented by Mr. Yuri Chaika (Russian Federation), 9-10 Nov 2006, p. 6.

³⁰ High-level conference of the Ministries of justice and of the interior, improving European Co-operation in the Criminal Justice field, report presented by Mr. Yuri Chaika (Russian Federation), 9-10 Nov 2006, p. 6.

³¹ CDPC/PC-OC, Suggestions by Mr. Vladimir Zimin (Russian Federation) on the modernisation of European Conventions in the Criminal Field, 21 October 2005, pp. 2-3.

5. Expansion of applicability

5.1 The application of MLA mechanisms to requests for DNA samples³²

- This proposal was made under 'practical applications of the Convention', and aims to expand the application of MLA requests in order for a state to also seek mutual assistance for a request of DNA samples of an accused.

5.2 The application of Art. 22 of the Convention on the transmission of information from criminal records³³

- This proposal was made under 'practical applications of the Convention', however, not clarified further. Given the wording of Art. 22 of the Convention on Mutual Assistance in Criminal Matters, it is assumed that the proposal aims at expanding the application of Art. 22 by not only requiring that each state party shall inform any other State Party of all criminal convictions and subsequent measures in the judicial records in respect of the nationals of the latter Party, but also to transmit (further) information from the criminal records of the individual.

5.3 The expansion to requests of assistance in regard to criminal cases involving the criminal, administrative or civil liability of legal persons/entities³⁴

- It is proposed in this regard to introduce a specific provision such as:
 - o "(1) The Contracting Parties shall render to each other mutual legal assistance in proceedings and investigation of administrative matters in respect of legal persons with purpose of bringing them to liability for committing offences including those connected with criminal liability of individuals.
 - o "(2) The Contracting Parties shall render to each other assistance in identifying, freezing, arrest, seizure and confiscation of criminal proceeds and instrumentalities of committing of crime including in cases of non-conviction based confiscation."³⁵

6. Separation of regulations

- Procedures connected with provision of separate types of evidence, namely drugs and a person's DNS sample, need a separate regulation since it concerns customs requirements and human rights.

³² CDPC/PC-OC, PC-OC (2007)06, 23 May 2007, para. 70.

³³ CDPC/PC-OC, PC-OC (2007)06, 23 May 2007, para. 70.

³⁴ PC-OC (2006) 09, para. 10.

³⁵ Russian proposal for discussion of meeting of PC-OC 7.10.13.