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PC-OC Mod (2018)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 25th meeting of the restricted Group of experts
on international co-operation (PC-OC Mod) enlarged to all PC-OC members
under the Chairmanship of Mr Erik Verbert (Belgium)
20-22 February 2018**

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.

2. Points for information of relevance to the work of the PC-OC

The PC-OC Mod took note of the information provided by Mr Carlo Chiaromonte, Head of the Criminal Law and Counter-Terrorism Divisions as regards:

- the difficult budgetary situation of the Council of Europe;
- the first meeting of the drafting group of the CDPC updating the Recommendation (2005)9 on the protection of witnesses and collaborators of justice;
- the adoption by the Committee of Ministers foreseen on 4 April of the Recommendation on children of imprisoned parents;
- the finalisation by the CDPC at its next meeting of the draft Recommendation on restorative justice;
- the revision by the PC-CP of the European Prison Rules;
- the planned organisation in 2019 of a high-level Conference on prison overcrowding;
- the planned revision of the model provisions to include the issue of administrative sanctions;
- the project to discuss the criminal law implications of artificial intelligence;

- the creation by the CDPC of two working groups to deal with the smuggling of migrants; the first group dealing with preventive measures and the second one with international co-operation.

The PC-OC Mod also took note of:

- the terms of reference of the PC-OC for 2018-2019;
- the latest signatures and ratifications of the different treaties within the remit of the PC-OC.

The PC-OC Mod furthermore took note of the information provided by Mr Alexandru Frunza (T-CY Secretariat) on the progress made in the drafting of the second additional protocol to the Budapest Convention by several protocol drafting groups (PDG) and a Protocol Drafting Plenary (PDP). The next meeting of the PDP will take place on 9 and 10 July 2018. The PC-OC representative, Ms Gabriela Blahova (Czech Republic) is invited to assist in the PDP as an observer. Since the draft is restricted, the draft is only sent in advance to members of the PDP.

The PC-OC Mod, underlining the important MLA related issues to be addressed in this draft, decided to ask the Secretariat to ensure the involvement of the PC-OC in this exercise so as to allow its experts to provide comments on the draft in an effective and timely manner.

3. Presentation and content of the PC-OC website

a. Country information and contact points

The PC-OC Mod considered the inventory of country specific information available on the website of the PC-OC. It noted that country information as regards ETS N°141 was still missing for an important number of Parties.

The PC-OC Mod reiterated its decision to instruct the Secretariat to invite experts, prior to each plenary meeting, to update or provide country information, as well as bilateral treaties and contact points, including, where appropriate, contact details of officials specialised in transnational organised crime.

b. Update of the index and summaries of relevant case law of the ECtHR

The PC-OC Mod considered the need to continue updating this important document taking into account several recent judgments issued by the ECtHR since its last update in October 2017.

It decided to:

- invite experts to send proposals for new case law to be introduced to the Secretariat;
- instruct the Secretariat, budget permitting, to ask Mr Miroslav Kubicek (Consultant, Czech Republic) to take these into account and make proposals for a further update of the index and summaries of case law of the ECtHR in time for the next meeting of the PC-OC Mod.

4. Implementation of the Action Plan on Transnational Organised Crime (TOC)

a. Examination of the outcome of the PC-OC working groups to limit reservations to CoE treaties within the remit of the PC-OC

The PC-OC Mod noted that the work undertaken by the three working groups A, B and C engaged in the identification of reservations and declarations that are possibly outdated and/or create obstacles to efficient co-operation, in particular as regards the fight against TOC, was finalised for the groups A and C, while the work in group B, dealing with mutual assistance in criminal matters, was still on-going.

The PC-OC Mod considered that the PC-OC experts who will receive the letters inviting Parties to review reservations and declarations should be given the possibility to ask questions about the reservations/declarations appended.

The PC-OC Mod decided to:

- ask the co-ordinator and members of group B to finalise their work, if possible by April 2018;
- as soon as the work is finalised, instruct the Secretariat to prepare the letters for the PC-OC experts of each Party to the Conventions for signature by the Chair;
- add a footnote to the list to be appended to the letters, indicating that further explanation on the working methods and reservations/declarations identified by the working groups can be obtained via the Secretariat;
- ask the PC-OC experts to report on the follow up given to the letters to the plenary.

b. Consideration of the proposal to prepare a binding instrument as regards international co-operation on the management, the recovery and sharing of assets. Exchange of views with the Secretariat of Moneyval/COP198

The PC-OC Mod had an exchange of views with Mr Lado Lalicic (Moneyval Secretariat) on the proposal to prepare a binding instrument as regards international co-operation on the management, the recovery and sharing of assets. The experts noted the information available on the website of the COP 198 such as the interpretative note of the COP 198 as regards Article 25 para 2 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198, Warsaw Convention) [Doc C198-COP9(2017)INF9] as well as the country information on the national procedures for the application of the convention available on the restricted website.

The PC-OC Mod heard with interest that the COP 198 had decided to proceed to a horizontal evaluation of the implementation of Art 25 of the Warsaw Convention and had sent out a questionnaire to this effect. The outcome of the questionnaire would be evaluated during the plenary meeting of the COP 198 in October 2018. Attention was also drawn to relevant publications, such as a manual on mutual legal assistance, available on the website.

Considering that only twenty contributions had been received to the survey on national legislation, model agreements and practice related to asset sharing and to avoid duplication of work, the PC-OC Mod underlined the importance of continuing close co-operation with the COP 198 and Moneyval and decided to:

- propose to the plenary to resume discussion on this agenda item once the COP 198 has finalised its assessment of the implementation of Article 25 of the Warsaw Convention;
- ask the Secretariat to consider the possibility of allowing access of PC-OC experts to the restricted website of the COP 198;
- ask the Secretariat to introduce links to the relevant publications on the PC-OC website.

5. European Convention on Extradition

a. Preparation of the special session on extradition to celebrate the 60th anniversary of the Convention

The working group discussed the programme of the special session based on the proposals received [Doc PC-OC Mod (2018)03] as well as possible guest speakers and agreed to hold the session on 20 June.

The session would include an introductory presentation on the Convention (lessons learnt and challenges for the future), a presentation on recent trends in the case law of the ECHR of relevance to extradition proceedings followed by a discussion with the Registry of the European Court on Human Rights.

The main topic of the session would concern the need for diplomatic assurances and consequences on the length of extradition proceedings as well as the drafting and the monitoring of assurances. This topic would be addressed by two panels consisting of a moderator, a rapporteur and 3 or 4 other experts.

Ms Blahova (Czech Republic) agreed to be the rapporteur to one of the panels and Ms Barbara Goeth-Flemmich (Austria) agreed to sit in one of the panels. The Chair agreed to moderate the panels and to prepare the discussion papers.

The PC-OC Mod decided to ask the Secretariat:

- to finalise the programme and identify the guest speakers in co-operation with the Chair and send it to the PC-OC Mod for comments;
- to provide information about the event on the website of the Council of Europe.

b. Discussion on the possibility of developing guidelines on the provision of timely information to the Parties requesting extradition on the detention or measures of restriction imposed on the person sought

The PC-OC Mod discussed the possibility of developing such guidelines, taking into account the practice and legislation on alternatives to detention pending extradition [Doc PC-OC(2015)rev4], as well as Rec N° R(86)15 of the Committee of Ministers concerning the practical application of the Convention on extradition in respect of detention pending extradition.

As regards the possible nature of these guidelines, the working group agreed that, at least for the moment, this would be PC-OC guidelines, without excluding the possibility of integrating them into a recommendation of the Committee of Ministers, or even in a future additional protocol, at a later stage.

As regards its scope, it was agreed to cover the entire duration of the extradition proceedings, starting from provisional arrest up until surrender. It was also agreed that detention or alternative means of restraint served the sole purpose of enabling surrender of the person sought to the Party requesting his or her extradition.

The PC-OC Mod decided to:

- instruct the Secretariat to prepare draft guidelines in consultation with the Chair on the basis of discussions held;
- finalise the draft on its shared office space in time for submission to the PC-OC plenary at its next meeting.

c. Possible consequences of the Petruhhin judgment of the CJEU

The PC-OC Mod further discussed the consequences of the Petruhhin judgment, taking into account the opinion of the advocate general of the CJEU with regard to the preliminary ruling requested by Germany in the case C-191/16 concerning the request by the USA to extradite Mr Romano Pisciotti, an Italian national, on the basis of an EU agreement on extradition with the USA.

Considering the interest of the Petruhhin judgment for the application of the European Convention on Extradition, the PC-OC Mod decided to ask the Secretariat to create a file of Petruhhin related judgments, reports and articles on the website under the link to the Court of Justice of the European Union and/or under the heading "tools for implementation" for extradition.

d. The role of INTERPOL in extradition cases. Exchange of views with Ms Maud Olinet Counsel, Office of Legal Affairs, INTERPOL and Ms Riah Ramlogan-Seuradge, the Head of INTERPOL's Notices and Diffusions Task Force (INTERPOL)

The PC-OC Mod had an exchange of views with INTERPOL on the application of the new method used to filter requests for red notices so as to avoid requests that were not in compliance with INTERPOL's Constitution or Rules (the new policy is available on INTERPOL's website).

The INTERPOL representatives explained that last year around 40 000 new requests were filtered, out of which 96% were found compliant. Discussion with the experts revealed many questions, in particular as to the handling of red notice requests concerning refugees and asylum seekers. It was underlined that in case a red notice could not be published, INTERPOL, if requested, could transmit information from the requesting State to the State that granted asylum to the person sought or is considering his or her application for asylum.

Replying to a question on possible disclosure of the content of a file to a person challenging a red notice before the Commission for the Control of INTERPOL files, the INTERPOL representatives explained that the content of such files remain the ownership of the requesting State and would not be disclosed without its explicit consent.

The PC-OC Mod decided to propose that the PC-OC continue the dialogue with INTERPOL so as to ensure the best possible co-operation with this important organisation.

6. Mutual Assistance in Criminal Matters

a. Examination of the replies to the questionnaire on the application of the Second Additional Protocol to the Convention on Mutual Assistance in Criminal Matters and proposals for follow up

The PC-OC Mod considered the 34 replies received (Doc PC-OC Mod(2017)04rev) to the questionnaire, including 6 replies from non-Parties as well as the summary and overview of replies (Doc PC-OC Mod (2017)04ADD rev). The PC-OC Mod considered that the summary accurately reflected the replies received.

As regards the application of the Protocol by the Parties, the PC-OC Mod noted that the possibility for direct communication between judicial authorities foreseen in Article 4 received considerable positive feedback, although some Parties had issued reservations. The PC-OC Mod reiterated its proposal that difficulties in identifying the competent judicial authority, in the absence of an "Atlas" for non-EU States, could be addressed at the future meeting on the interconnection of judicial networks.

The PC-OC Mod concluded from the replies received that the application of Article 8 concerning requests for assistance including formalities that are unfamiliar in the requested State is satisfactory.

As regards hearings by video conference (Article 9), Parties indicated that their experience is generally positive. Some Parties indicated that the organisation of a video conference still faces practical and technical problems. The PC-OC Mod reiterated its proposal to make an update of the inquiry conducted in 2012 on legal and technical aspects of the use of video conferences in mutual legal assistance in criminal matters [PC-OC (2012)01 Rev2].

The PC-OC Mod noted that some provisions of the Protocol had not yet become common practice among Parties, including: Article 11 on the spontaneous sharing of information or Article 12 on restitution of proceeds of crime to the rightful owner. The PC-OC Mod agreed that these provisions would need further discussion in the plenary.

The PC-OC Mod also noted that the existence of multiple reservations hamper the application of Article 16 on service by post, Articles 17, 18 and 19 on special investigation techniques as well as Article 20 on Joint Investigation Teams. The Group underlined the importance of the action undertaken to review and limit existing reservations.

Finally, it was noted that Parties reported little or no experience in mutual assistance in proceedings brought by administrative authorities (Article 1.3) or in hearings by telephone conference (Article 10).

The PC-OC Mod decided to:

- inform the plenary of its findings;
- instruct the Secretariat to invite PC-OC experts to complete or update the inquiry conducted in 2012 on legal and technical aspects of the use of video conferences in mutual legal assistance in criminal matters [PC-OC (2012)01 Rev2]. .

b. Consideration of the survey on MLA for the purpose of proceedings against legal entities (in particular from the perspective of the requesting State) and proposal for follow up

Further to the question raised in discussion papers submitted by Mr Vladimir Zimin (Russian Federation, Doc PC-OC Mod (2014)08) and Mr Eugenio Selvaggi (Italy, Doc PC-OC (2017)01) on whether the existing Council of Europe instruments provide a sufficient basis for the satisfactory execution of MLA requests for the purpose of proceedings against legal entities, the PC-OC Mod resumed the examination of the contributions received to the survey on experiences by member States in this regard [Doc PC-OC Mod (2017) 05 rev2].

The PC-OC Mod noted that after several reminders only 16 contributions had been received to the survey and that they didn't indicate any major problem or experience with regard to MLA requests for the purpose of proceedings against legal entities, including from the perspective as a requesting state. Mr Vladimir Zimin noted that, for example, the Russian Federation would have difficulties to execute an MLA request concerning a legal entity because legal entities have only administrative liability under Russian law. In his view the Convention on Mutual Assistance in Criminal Matters would need to be supplemented with an explicit provision, mentioned in his discussion paper, to provide for a legal basis.

The PC-OC Mod, referring to the related work of the CDPC on model provisions concerning administrative sanctions, proposed to resume discussion of this item once this work has been completed.

The PC-OC Mod decided to submit this proposal to the PC-OC plenary.

7. Convention on the Transfer of Sentenced Persons

a. Discussion on possibilities to draft new guidelines on the transfer of sentenced persons, including an update of existing recommendations and proposals for follow-up

Further to the discussion in the plenary, the PC-OC Mod discussed possibilities to draft such guidelines, considering the note by the Secretariat containing an overview of possible non-binding measures to improve the functioning of the Convention and its additional protocol, including recent proposals received by Parties (Doc PC-OC Mod (2018)01) as well as Doc PC-OC Mod (2018)02 containing a consolidated overview of the norms contained in existing recommendations by the Committee of Ministers (Recommendation R 88 (13) and R (92) 18 on the practical application of the Convention on the Transfer of Sentenced Persons and Recommendation R(84) 11 concerning information about this Convention).

The PC-OC Mod considered that the above documents provided a satisfactory stock-taking exercise and agreed to propose the drafting of a single and comprehensive recommendation to replace and complete the existing ones on the basis of the proposals received and discussions held.

It decided to:

- ask Ms Barbara Goeth-Flemmich (Austria) and Ms Tetiana Shorstka (Ukraine), in co-operation with the Secretariat, to prepare a preliminary draft recommendation to be posted on the shared office space of the PC-OC Mod by the end of April 2018;
- propose amendments to the preliminary draft so as to finalise the draft text in time for the next plenary meeting of the PC-OC.

b. Discussion on the possible establishment of an E-transfer tool and proposals for follow-up

The PC-OC Mod resumed discussion on the possibility of establishing an E-Transfer tool, taking into account the findings of the plenary, in particular the major asset that could be provided by such tool for sentenced persons as well as the doubts as to how such a tool could be developed and hosted by the Council of Europe.

Convinced that secure electronic communication will become usual practice in the future, the experts referred to the very interesting initiative mentioned by Iberred, on the negotiation of a treaty on electronic transmission of international co-operation requests between central authorities. The treaty will apply to all treaties involving central authorities and will be open to accession by third states. It will also lead to the creation of a new secure platform (Iber@) allowing the recognition of the validity of requests via electronic transmission between central authorities.

Reference was also made to the e-extradition and e-MLA initiatives undertaken by INTERPOL.

The PC-OC Mod decided to ask the plenary to:

- invite a representative from Iberred to present the treaty once it has been adopted;
- follow any future developments at national and international level which would facilitate the implementation of the e-transfer tool as well as other forms of secure electronic communication.