



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

<http://www.coe.int/tcj>

Strasbourg, 25 October 2020

PC-OC Mod (2017) 04Bil.rev.3
Extract Q6 Bil

[PC-OC/PC-OC Mod/ 2017/Docs PC-OC Mod 2017/ PC-
OC Mod (2017)04Bil.rev.3 Extract Q6]

EUROPEAN COMMITTEE ON CRIME PROBLEMS
COMITÉ EUROPÉEN POUR LES PROBLÈMES CRIMINELS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
COMITÉ D'EXPERTS
SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPÉENNES SUR LA
COOPÉRATION DANS LE DOMAINE PÉNAL
(PC-OC)

**Extract from the Compilation of replies to the Questionnaire on the application of the
Second Additional Protocol to the European Convention on Mutual Assistance in
Criminal Matters**

as regards videoconferences

**Extrait de la Compilation des réponses au Questionnaire sur l'application du
Deuxième Protocole additionnel à la Convention européenne d'entraide judiciaire en
matière pénale**

concernant les vidéoconférences

Summary:

Question 6: Hearings of suspects, accused persons, witnesses and experts by video or telephone conferences (Articles 9 and 10 of ETS No.182)

Parties indicate that while there is nearly no experience with telephone conferences, the experience with video conferences is generally positive. However, a number of replies highlight that the organisation of video conferences still faces some practical and technical problems.

Some Parties, such as Croatia, Denmark, the Netherlands, Norway, Poland or the United Kingdom issued reservations so as to exclude the possibility of video conferences involving the suspect or the accused person.

Résumé:

Question 6: Auditions de suspects, d'accusés, de témoins et d'experts par vidéoconférence ou par conférence téléphonique (articles 9 et 10, STE n° 182)

Les parties indiquent que même s'il n'y a presque aucune expérience d'auditions téléphoniques, l'expérience des auditions par vidéoconférence est généralement positive. Cependant, le nombre de réponses souligne que l'organisation de la vidéoconférence est toujours confrontée à des problèmes pratiques et techniques.

Certaines Parties, telles que la Croatie, le Danemark, les Pays-Bas, la Norvège, la Pologne ou le Royaume Uni ont émis des réserves afin d'exclure la possibilité de recourir à des auditions par vidéoconférence impliquant le suspect ou l'accusé.

Question 6

What has been your experience in conducting hearings of suspects, accused persons, witnesses and experts by video or telephone conferences (Articles 9 and 10 of ETS No.182) as a requesting state? and in organising them as a requested state?

Quelle a été votre expérience en ce qui concerne l'audition de suspects, d'accusés, de témoins et d'experts par vidéoconférence ou conférence téléphonique (articles 9 et 10 de la STE n° 182) en tant qu'Etat requérant ? Et pour les organiser en tant qu'Etat requis ?

Bosnia and Herzegovina / Bosnie-Herzégovine

In relation to the given inquiry, we can inform you that in the previous period we have recorded a significant progress in terms of processing letter rogatories for witness or guilty party hearings via video calls. Namely, a number of courts and prosecution offices have been trained and equipped both materially and technically over the past period for the provision of this type of international legal assistance, a practice we intend to continue in the coming period. At the same time, hearings via telephone calls have not become usual practice.

Croatia / Croatie

Concerning Article 9, paragraph 9, of the Second Additional Protocol, the Republic of Croatia made declaration that it will not apply the provisions of this Article to hearings by video conference involving the accused person or the suspect.

Hearings of witnesses by video conference are often used and in most of cases successfully conducted. However, problems regarding incompatibility of the equipment and under-capacity sometimes occur. The request for examination of the witness should be sent in original, via regular mail, but further communication (regarding terms, data on technical equipment etc.) most often continues via electronic mail and telephone.

Telephone conference is possible only for the purpose prescribed by the Criminal Procedure Code;

“The State Attorney or the police may check the alibi and other important facts for the institution and conducting of the criminal proceedings by means of a telephone link that allows a simultaneous communication to the interrogated persons (telephone conference).”

Cyprus / Chypre

No experience as requesting state. As requested state, the conducting of such hearings was satisfactory.

Czech Republic / République Tchèque

Judicial authorities of the Czech Republic have conducted several video conferences as a requested country and also as a requesting country. The only problems encountered were the problems of a technical or linguistic nature.

Denmark / Danemark

Please note that Denmark has made a reservation concerning the hearing by videoconference of suspected or accused persons, cfr. Article 9. As a consequence, Denmark has also not issued such requests.

The experience of telephone and videoconference is extremely limited pursuant to the Second Protocol as most requests are received and issued pursuant to the EU-convention. However, Denmark has made an effort to execute the few requests received, sometimes obstructed by different technical difficulties.

Finland / Finlande

We have requested a few video conferences to hear witnesses and defendants. Emails needed to be exchanged, but ultimately they all succeeded. As a requested state we have organized a few witness examinations by video without any problems.

France

Nous ne sommes pas en mesure de faire un retour d'expérience concernant les auditions par téléconférence qui sont peu sollicitées.

Les demandes d'audition par vidéoconférence sont plus fréquentes. L'autorité centrale est surtout sollicitée en amont de leur mise en place afin de répondre à des questions juridiques.

Georgia / Géorgie

Both as a requesting and requested state, Georgia had only few cases when conducting hearings of suspects, accused persons, witnesses and experts by video or telephone conferences were sought. All of these actions were taken in the manner fully in observance of Articles 9 and 10 of ETS No.182. There have been no significant obstacles when conducting the measures referred to above.

Germany / Allemagne

Practitioners mainly report of positive experiences gained with hearings by video conference, both in the context of requests submitted and requests received. In numerous cases, performing hearings by video conference has proved to be a practical solution and in the meantime has become a standard tool in the field of mutual legal assistance.

By way of complying with Article 9 paragraph 2 ETS No. 182, the Federal Republic has declared that pursuant to the basic principles of its legal order, hearing witnesses and

experts by video conference is something that can be done only voluntarily. Nonetheless, although accused persons and witnesses are instructed that participating in such a video conference is voluntary, they have proved willing to make a statement using this technology in large numbers. In cases in which several video conferences are scheduled, involving different courts, for example, a video-conferencing schedule is attached for purposes of planning and coordination, which shows the sequence planned for the video conference.

The difficulties arising are due in part to the technical compatibility of devices; however, it has been possible thus far to deal with the problems arising. Moreover, cases are known in which requests are received on very short notice and it is no longer possible to adhere to the time limits for summoning or in which there is no time to make organizational preparations.

Irrespective of the technical means, it may be an issue that it is not possible to infer from incoming request whether an interrogation by the public prosecutor or by a judge is requested. This may affect how the testimony is taken and how it can be used in the proceedings of the requesting state.

By contrast, no insights have been gained in Germany as regards examinations by telephone.

Ireland / Irlande

In Ireland, video link hearings are arranged in respect of criminal court trials and only in circumstances where it is not desirable or practical for the witness to give evidence in person. In conducting a video link hearing there are certain procedural requirements most notable being:

- A period of at least 8-12 weeks' notice for administrative and practical purposes to arrange the hearing of a witness by videolink.
- The submission of a statement outlining why it is not desirable or practicable for the witness to give evidence in person.

On occasion, the Courts encounter technical difficulties in conducting such hearings. A further difficulty is that it is not always evident from requesting States that the testimony is being provided for a trial.

Israel / Israël

Israel has had increasing experience in conducting hearings of witnesses and experts by videoconference as both a requesting and requested state, pursuant to Article 9 of ETS No. 182. In Israel, testimony via videoconference in criminal proceedings requires either consent of the parties or approval by the court. In most cases when videoconference proceedings have been conducted, both when Israel has been the requested and requesting state, the testimony was successfully provided and has furthered the proceedings.

The primary challenges have been the length of time required to arrange videoconference proceedings between requesting and requested countries, the quality of videoconference facilities and equipment available, and challenges related to language and translation.

Latvia / Lettonie

We have experience regarding interrogation by means of the video conference and it is positive. Special attention shall be paid to the difference of time in both countries, especially if conference is taking place between different continents. We have no experience with the telephone conference.

Lithuania / Lituanie

The Prosecutor's General Office of the Republic of Lithuania has rather low experience in conducting hearings under Art. 9 of ETS No. 182 as an executing state. However, having assessed the experience of video conference executed based on the provisions of other international instruments, it should be said that it is rather sophisticated tool in terms of technical and legal coordination.

There is no practice in relation to hearing by telephone conference.

Republic of Moldova / République de Moldova

No.

Montenegro / Monténégro

Courts in charge of providing mutual legal assistance in criminal matters have technical possibilities for hearing through a video conference link and are complying with the requests of judicial authorities for this type of mutual legal assistance and vice versa.

As regards the application of Article 10 ETS No. 182 and the hearing of suspects, accused, witnesses or expert witnesses through a telephone conference call, requests for this type of mutual legal assistance are not common.

Netherlands / Pays-Bas

The Netherlands does not yet participate in the hearing of suspects by video or telephone conference.

Norway / Norvège

Norway has made a reservation concerning hearing by video conference involving suspects/accused persons, cf article 9 of ETS 182.

The general impression is that the use of videoconference works well, but for outgoing requests it may take some time to get the necessary arrangements in place. Many of the requests received by Norway requesting videoconference are forwarded pursuant to the EU legal framework.

Poland/Pologne

Nous n'avons une très bonne expérience en ce qui concerne l'audition de témoins et d'experts par vidéoconférence en revanche notre loi ne prévoit pas l'audition par conférence téléphonique. En plus vu les principes de la loi polonaise nous ne faisons pas de vidéoconférences ni avec les accusés ni les suspects. La Pologne a réservé que ne procède pas à des vidéoconférences ni conférences téléphonique avec les accusés et les suspects, nous nous limitons à l'audition de témoins et d'experts.

Portugal

Sans doute. La voie directe pour la transmission de demandes d'entraide est utilisée par les autorités portugaises en ce qui concerne leur coopération très abondante avec les autorités suisses. En ce qui concerne d'autres États cette possibilité n'est pas utilisée du l'absence d'information sur les coordonnées des autorités judiciaires compétentes pour recevoir et donner exécution aux demandes d'entraide. Donc, une solution comme l'Atlas judiciaire Européen ou comme l'Elorge suisse serait bienvenue.

Romania / Roumanie

Acting as a requested state

Hearings of suspects, accused persons, witnesses and experts by video link were smoothly conducted irrespectively whether it was requested during the prosecution or trial stage. We have succeeded to arrange such hearings even in very short period of time (within 3 weeks) and also to coordinate and conduct multiple hearings by different RO executing authorities in the same day (same criminal proceeding in the requesting state, hearing of several witnesses located in Romania in different counties).

Acting as a requesting state

We could rate the overall experience as a positive one. However, during the trial stage, we have found difficult to cope with the specific requirements of the requesting state such as given a minimum 8 or 12 weeks of notice prior to the date of the video conferencing hearing. Other practical issues have been related to the information requested by the requested authority to identify and contact the witness. In terms of using video link for the hearing of suspects or accused persons, we have met cases of refusal based on the fact that the requested states declared that it does not accept requests for hearing by videoconference involving the accused person or the suspect.

Serbia / Serbie

Only one court and one PPO in Serbia (both in Belgrade) are equipped for video or telephone conferences, so it can reflect on our ability to promptly conduct hearings when we are requested state.

Slovakia / Slovaquie

The Slovak Republic does carry out hearings of persons via a video conference on the basis of a request of a state. No significant problems occurred while implementing this act.

Regarding the telephone conference, there was no hearing carried out via this medium by the Slovak authorities. The national legislation of the Slovak Republic does not recognize a telephone conference.

Slovenia / Slovénie

Slovenian judicial authorities conducted many videoconferences on the basis of foreign MLA request. In the same time foreign judicial authorities executed almost all requests of Slovenian judicial authorities for conducting hearings of suspects, accused persons, witnesses and experts by video conferences. In two cases Slovenian courts reported that their requests for hearings of persons by videoconferences were not executed due to lack of technical equipment in the requested state.

Sweden /Suède

The Prosecution Authority:

No experience in cases concerning this protocol but in cases under the EU convention, and also in older cases under the 1959 convention, this occurred and occurs infrequently. The major problems faced in practice are more of getting the connection, retaining the connection, having clear pictures and good sound rather than problems of legal nature.

Switzerland / Suisse

Video conference (article 9 of ETS 182):

Pour l'autorité requérante, l'audition par vidéoconférence représente un outil efficace d'audition, permet de garantir le droit de la défense à la confrontation directe et évite la multiplication d'auditions successives (148 CPP). Il garantit en outre que la preuve est directement administrée, et évite des erreurs de traduction.

Pour l'autorité requise par contre, il s'agit d'un outil lourd à utiliser, nécessitant une excellente coordination (tant technique que juridique) avec l'autorité requérante, ce qui impose notamment que les deux autorités puissent se parler préalablement à l'audition (ce à quoi certaines autorités requérantes, notamment judiciaires, sont réticentes). En particulier, la superposition de deux systèmes légaux différents est source d'incertitude et est susceptible de créer des vices de forme qui pourraient rendre le moyen de preuve inexploitable.

Par ailleurs, il existe en Suisse une incertitude juridique sur la compatibilité de cet outil avec le droit suisse. En particulier, lorsque l'audition a lieu pour un tribunal étranger, la procédure d'entraide suisse (décision de clôture + délais de recours) peut avoir pour effet d'interdire au tribunal étranger toute utilisation du témoignage pendant de nombreux mois – ce qui n'est pas forcément compatible avec le but même de l'institution de la vidéoconférence.

For this and other reasons, this measure is hardly used in Switzerland :

- As mentioned above, if the witness is heard for the first time, the immediate knowledge of the witness' statement may circumvent the legal remedies stipulated by Swiss law and infringe fundamental principles of domestic law.
- It is a subsidiary measure. The necessity of measure has to be motivated (art. 9 par. 1 and 3, see also explanatory report). Such motivation is normally missing.
- Most Swiss authorities lack the technical means needed for video conferencing.
- The rental costs for the equipment are often higher than the travel costs for the participants.
- The procedure to be followed is – due to Swiss law – quite complicated.

Therefore, the witness located in Switzerland is often asked to travel to the requesting State for interview. Alternatively, the requesting State is suggested to have the witness summoned in Switzerland and participate in the interview or at least to send the requested Swiss authority a detailed questionnaire of the foreseeable questions.

Nous pouvons ajouter que l'on a constaté à plusieurs reprises que des problèmes d'ordre technique ou procédural dans l'Etat requérant ont rendu impossible la vidéoconférence alors qu'elle était autorisée et que la procédure d'entraide avait été menée pour ce faire. Cela est passablement décourageant pour l'autorité qui exécute la demande.

Telephone conference (article 10 of ETS 182):

No practice so far, as this kind of assistance has not been sought.

Turkey / Turquie

The video conference is a method applied within the framework of not only ETS No. 182 but also the Article 9 of the Law on International Judicial Cooperation in Criminal Matters numbered 6706 in our national legislation. As the requested country, the requests are executed without any problem because our courts have sufficient technical capacity. As the requesting country, it has not been encountered any serious problem so far.

Ukraine

According to the information of the GPO of Ukraine at the request of foreign partners, the competent authorities of Ukraine repeatedly interviewed suspects, the accused, witnesses and experts via video conferences.

The MoJ of Ukraine has experience on processing of incoming and outgoing MLA requests on interrogation of persons by means of videoconference. All the incoming and outgoing MLA requests concerned the interrogation of persons as a witness (none of them concerned the accused persons or experts).

While conducting hearings by means of videoconference the test connection shall be carried out to ensure proper execution of the MLA request and to avoid some technical problems.

Also it is required to state in the MLA requests the information on technical parameters of the equipment used by the requesting state to conduct videoconference (i.e. software, IP addresses, logins and passwords, where necessary etc.).

Under Article 567 of the Ukrainian CPC a hearing upon a MLA request from a foreign competent authority shall be conducted in the presence of an investigating judge in the following cases:

- impossibility for certain persons to appear before the foreign competent authority;
- to ensure the for persons' safety;
- for other reasons specified by investigating judge (court).

Thus in the request shall be noted the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.

Interrogation by videoconference shall be conducted as prescribed by the procedural law of the requesting Party in so far as such procedure is not contrary to principles of the Ukrainian procedural law and generally recognized standards of human rights and fundamental freedoms.

The competent authority of the requesting Party shall be required to ensure participation of a translator in the videoconference.

If during interrogation an investigating judge notices that the interrogator violates the aforesaid procedure, he/she shall inform participants to the procedural action thereon and stop the interrogation in order to take measures to eliminate such violations.

Interrogation shall continue only after the required changes in the procedure have been agreed with the competent authority of the requesting Party.

Interrogation record and audio or video information mediums containing shall be forwarded to the competent authority of the requesting Party.

United Kingdom / Royaume-Uni

Video and telephone evidence is not available for suspects or defendants under UK law, other than in limited circumstances where the request is made pursuant to Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. We have been working with requesting states to ensure they have the right level of technical hardware to support a connection to UK systems. This is not always the case and we make use of private suppliers to provide technical support where an IT bridge is required.

The UK made a declaration on Article 9:

In accordance with Article 9, paragraph 9, of the Second Additional Protocol, the Government of the United Kingdom declares that it will not allow video conferencing to be used where the witness in question is the accused person or the suspect.