

## Third Study Commission Questionnaire 2023

Taiwan

### **-AUSTRIA-**

For 2023, the Third Study Commission, which focuses on Criminal Law, decided to study "Mutual cooperation in the investigation of criminal cases and in the presentation of evidence".

In order to facilitate discussion and to assist us in learning from colleagues, we ask that each country answers the following questions:

**1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year - mutual cooperation in the investigation of criminal cases and in the presentation of evidence in a criminal proceeding at court? Please explain.**

In Austria there are three main legislations relevant to this topic, namely the extradition and judicial assistance law, the EU judicial cooperation law and the police cooperation law. Furthermore, there are bilateral and multilateral agreements regulating mutual cooperation.

The extradition and judicial assistance law (ARHG) establishes a general cooperation with all states regarding extradition and certain acts of judicial assistance under the guiding principle of reciprocity. According to this principle a request may only be followed if it is ensured that the requesting state would follow a similar request from Austria. However, requests that violate public order or other fundamental interests of Austria must not be followed. The reciprocity can be expressed by explicit statements or by coherent behavior.

An extradition is only admissible if it serves to prosecute an intentionally committed crime with a penalty of over one year in both Austria and the requesting state. Other forms of cooperation regulated in this act are consignment of objects or files, citation, transfer of arrested people for the purpose of investigation or taking of evidence, controlled delivery, undercover investigation, take-over of the prosecution and formation of a joint investigation groups.

On the basis of the extradition and judicial assistance law the minister of justice has enacted a regulation regarding the communication between the authorities.

Regarding mutual cooperation within the EU there is a more specific legislation, the EU judicial cooperation law (EU-JZG). It codifies among other things the European arrest warrant, which entitles the judicial authorities of a member state to issue a warrant valid in the entire territory of the EU, which mandates the arrest and extradition of a person for the purpose of prosecution.

The EU-JZG also implemented the European Investigation Order. This order is a judicial decision issued by national judicial authorities that mandates the execution of investigative measures to gather evidence in criminal matters in another EU country, the transmission of investigative results or pieces of evidence or the transfer of arrested people.

Other provisions regard further forms of judicial assistance, such as controlled delivery, undercover investigation or the formation of a joint investigation groups. Furthermore every member state is obligated to establish a contact point as part of the European judicial network, which facilitates the communication between authorities.

Regarding serious organized cross-border crime there is a special agency, Eurojust.

The police cooperation law regulates administrative assistance and acts of national security authorities in other states.

**2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?**

a) Unless transnational agreements stipulate other, the request is carried out through diplomatic channels, which means the authority that finds a request to be necessary (during investigation stage this will be the prosecution, when pending with a court this will be the judge) will transmit the request and necessary documents to the minister of justice. If reciprocity is given and public order or national interests are not endangered, the minister then transmits the documents to the responsible foreign authority.

This does not apply for the European Investigation Order. In this case the prosecution itself is entitled to issue the order until court procedure is pending. Thenceforth the adjudicating court is responsible.

b) In general, the locally competent prosecution is responsible for handling letters rogatories. If the issuance of a compulsory measure is requested that requires court approval under Austrian law - for example in the case of a house search, opening of an account or telephone surveillance - the public prosecution must obtain court approval from the detention and legal protection judge.

As soon as a national court procedure is pending, jurisdiction to execute an European Investigation Order passes over to the adjudicating court. For example, the courts are responsible for issuing information about the court proceedings, a conviction or the execution of a sentence (§ 55 (3) EU-JZG). The court also decides on the execution of an European Investigation Order aimed at the transfer of a detained person (§ 55 (4) in conjunction with § 55g EU-JZG).

Courts and prosecutions are also allowed to transmit personal data on the basis of a cross-national agreement without a specific request if (1) the information regards actions that would permit extradition, (2) the transmission would be admissible to a domestic court or prosecution without request and (3) the information could help to initiate or support criminal proceedings, prevent a serious criminal act or ward danger to the public safety.

**3. If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?**

As already stated under point 2 (b), the competences and procedural rules of the judges in the pre-trial proceedings essentially result from the EU-JZG in conjunction with the general procedural rules of the Code of Criminal Procedure.

**4. What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios.**

At the investigation stage judges are not involved in the taking of evidence from a witness, but become responsible as soon as court procedure is pending.

A witness in Austria may be cited to appear at a foreign authority if it is ensured that the citation doesn't serve to prosecute a different, from the witness committed crime. Arrested people can be transferred with their approval for the purpose of investigation or taking of evidence.

Witnesses may also be interrogated via video-conference according to Art 9 of the Second Additional Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. In this case the requesting judge executes the interrogation.

The role of the judge is in general the same as stated under point 2. If the witness is in arrest, a judge is deciding whether the request to transfer the person will be met.

**5. As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.**

Yes. The legislation clearly states that requests must not be followed if public order or other fundamental interests of Austria are violated. Public order includes fundamental principles of the Austrian legal system, especially basic human rights (which include the right to a fair trial).

**6. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.**

As part of my work as a detention and legal protection judge, I am also involved in extradition and surrender proceedings for the purpose of criminal prosecution or the execution of sentences. Point 1 has already referred to the relevant legal provisions in the ARHG and EU-JZG.

In the extradition and surrender proceedings, the person concerned is to be heard about the extradition or surrender request, and he/she is to be informed of the allegations made

against him and to be informed that he is free to comment or not to comment on the matter and to previously notify a defense attorney. He/She is also to be informed of his/her right to request that a hearing is held on the admissibility of extradition (§ 31 (1) in conjunction with § 29 (3) ARHG; § 18 EU-JZG). If arrest for extradition or surrender is imposed, a defense attorney is required for the further proceedings.

If further information or documents are required from the requesting state in the extradition proceedings, such as information in the case of absentee judgments, this will be requested by the minister of justice from the requesting state by reason of the judges request (request of the regional court) with a reasonable deadline set (§ 35 ARHG). In principle, I have had largely positive experiences with it in the past and the documents were usually submitted on time.

After my decision on the admissibility of the extradition, this is to be sent to the minister of justice, which then decides on the extradition request.

In the transfer procedure according to the EU-JZG, communication takes place directly with the issuing state. Here, too, communication with the other EU countries works very well. I have most contact with the authorities in our neighboring countries Hungary, Slovakia and Germany, but also often with Romania. Cooperation with all of these countries is extremely satisfactory. But I've also had positive experiences with countries like Italy, France, Belgium, Slovenia and Poland.

As described above, I am not directly involved in the preliminary proceedings with requests for legal assistance, but only interventions in fundamental rights ordered by the prosecution are to be approved by the detention and legal protection judge.

During the court proceedings, I have questioned witnesses several times, mainly from other EU countries, via video conference. In this context, both the Austrian provisions on the questioning of witnesses in accordance with §§ 153ff StPO and any provisions announced by the requesting states must be observed.

Eisenstadt, 14<sup>th</sup> July 2022

Mag. Gabriele Nemeskeri, Judge

Member of the Austrian Association of Judges