NOTE

from: General Secretariat
to: Collective Evaluation Working Party

No. prev. doc.: 13838/98 EVAL 13 ELARG 102

Subject: Analysis of evaluation material on Hungary, Poland and Rumania in connection with judicial co-operation in criminal matters. \(^{(1)}\)

1. Introduction

It is disappointing that more Member States did not provide material in relation to the issues covered by this paper. The material which has been provided has been invaluable but in many areas information remains incomplete. It should also be borne in mind that in countries where so much has changed so fast in recent years, current information is vital, and there is always a danger that in respect of some of the information relied on, things may have changed since the documents were compiled.

2. Accession Partnership

In the area covered by this document, the *acquis* requires the applicant states to implement all EU instruments adopted under Title VI of the Treaty on European Union. Further, certain Council of Europe instruments are regarded as being essential in connection with the *acquis* as they are directly linked to EU instruments. In particular, in relation to judicial co-operation, it is necessary to have regard to

\(^{(1)}\) Bold text (other than headings) indicates revised text.
a. Convention on Extradition 1957  
b. Second Protocol to the Extradition Convention 1978  
c. Convention on Mutual Legal Assistance in Criminal Matters, 1959  
d. Protocol to the MLA Convention 1978  

Additionally there are other instruments which are also considered essential for effective judicial co-operation, and are covered by the acquis. These include instruments dealing with the protection of witnesses, the protection of those who co-operate with the judicial authorities in the fight against international organised crime, and the Corruption Convention.

The state of ratification of these principal instruments listed above is demonstrated in the table below.

A: The country has already ratified the convention.  
B: The country will ratify the convention within the next 60 days.  
C: The convention has been submitted to the national Parliament with a view to ratification.  
E: The convention is currently under examination by a body outside the immediate legislative departments of the competent ministry, for example, a law reform consultative committee.  
G: Expected date of ratification if not yet ratified.
<table>
<thead>
<tr>
<th>Title of Instrument</th>
<th>A plus date of ratification</th>
<th>B</th>
<th>C</th>
<th>E</th>
<th>G expected date of ratification, if not yet ratified</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. European Convention on Extradition, Paris 1957</td>
<td>H:23.04.93 PL:15.06.93 RO:14.05.97</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Agreement on Illicit Traffic by Sea, implementing Art 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg 1995</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>H(1) RO: 31.03.99</td>
</tr>
<tr>
<td>7. Convention on the Fight against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna 1988</td>
<td>H:01.03.96 PL:30.04.94 RO:15.12.92</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. European Convention on the Suppression of Terrorism, Strasbourg 1977</td>
<td>H:02.10.96 PL:30.01.96 RO:04.03.97</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(1) After EU Membership
3 Hungary

3.1 General comments on documentation

In general, there was a limited amount of documentation available describing the extent to which Hungary currently conforms to EU Member States criteria in relation to judicial co-operation in criminal matters, the functioning of the judiciary in relation to criminal matters and the rule of law.

The main source documentation is:

a. a report prepared for the evaluation exercise by a Member State, dated summer 1998,
b. a Report by the Commission dated 28.11.97 on Judicial Co-operation in penal matters, (Doc. 13036/97, JAI 38, PECOS 185)
c. a Report on the JHA General Expert Mission to Hungary and the Commission's Opinion on Hungary, dated June and July 1997 (with a short update dated October 1998) and
d. Factual report from a Member State, dated November 1998 (SN 4954/98)

The extent to which developments currently projected are referred to in these documents makes it clear that the situation in Hungary is changing rapidly, and underlines the need for a greater quantity of up to date information.

Subsequent to the meeting in December 1998, supplementary material was received from a number of sources. The main material dealing with judicial co-operation is contained in material from individual Member States, usually dealing with other aspects of accession criteria as well. Additionally, it has now also been possible to have regard to Hungary's own answers to the screening process currently being carried out.

3.2 The current situation, and major problems.

There is agreement in the available documentation about the problems which confront Hungary in the field of criminal law. Statistics may not be authoritative, since their basis is unclear, but the figures provided indicate a growth of organised crime (up 23% in 1997 on the previous year), a growth of corruption (up 66%), and a general lack of modern equipment. One source indicated that the independence of the judiciary had to be ensured, and the functioning of the Judiciary improved, while another gave the impression that the general level of judicial staff encountered was high, although a lack of resources (computers etc) inhibited their effectiveness. The question of whether institutional corruption had penetrated the judiciary is not addressed.

Recent sources confirm that criminal activity has increased greatly in Hungary, including smuggling of drugs and trafficking in arms.
3.3 Legal position

Hungary has, since the beginning of the 1990s, embarked on an ambitious legislative programme, and has now signed and adopted the major instruments of international co-operation into its domestic legislation. There is, however, one major exception to this, and that is the 1990 Strasbourg Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Although the latest documentation reveals that Hungary has now signed the Convention, it has not yet implemented it into its own legislation, but hopes to do so by the end of 1999. Hungary was evaluated by the Council of Europe in relation to its application of anti-money laundering procedures, in October 1998, but there is as yet no report available on the situation there. This is a document which will have to be examined in due course.

From the most recent documentation, in relation to the ratification of the 1990 Convention, it is apparent that it will be necessary to change internal laws on money laundering before the Convention can be ratified. The necessary legislative provisions are contained in a legislative package which is currently before Parliament. Hungary still expects the law changes to be made by the end of 1999.

3.4 Judicial co-operation

Hungary has signed and implemented the 1959 Convention on Mutual Legal Assistance in Criminal Matters, together with its 1978 Protocol, and the 1957 European Convention on Extradition, along with its two Protocols. However, its failure to date to ratify the 1990 Strasbourg Convention is a marked weakness in its international armoury against all types of criminality, especially serious crimes, and in particular in the field of drug trafficking. The Commission's material from 1997, however, indicates that in 1994 Hungary introduced provisions to prevent money laundering. There is nothing in the current material to indicate exactly which provisions have been introduced to date, and how they will "prevent money laundering".

Despite Hungary's ratification of the 1957 and 1959 Conventions in 1993, there appears to be little material about the operation in practice, however, of judicial co-operation in criminal matters or extradition. The Commission's Report indicates that requests have to go through the Minister of Justice, and that there is no provision for direct transmission between competent judicial authorities, (except with Poland, the Czech Republic and the Slovak Republic) although "the possibility for this for the future is not excluded". This position is at odds with Article 15 of the 1959 Convention, which provides for direct transmission of requests, and there is no further information given as to why the Hungarian legislation does not provide this assistance.
The procedure for obtaining assistance in criminal matters is not developed in any of the material, and there must remain doubts, in view of the general comments made elsewhere about the adequacy of resources, as to the ability of the Hungarian authorities to provide assistance to the level of their international obligations in this area, perhaps more especially so in cases of serious or organised crime where assistance may be urgently required. This comment is supported by other material which suggests that there is a general lack of knowledge of relevant Council of Europe initiatives.

Although some Member States have given detailed figures for their experiences of Mutual Legal Assistance with Hungary, by and large the figures are very low. One Member State put the figure of Commission rogatoires at 1 or 2 per year. For extradition, there were perhaps 3 requests from Hungary, as against one request by the same Member State. Another Member State recorded 22 Commission rogatoires to Hungary over a 7 year period, and 45 from Hungary in the same period.

Hungary’s own evidence on the subject is that while the service of documents for other states works in general quite well, co-operation in evidence taking could still be improved, since procedures can be rather long, and co-operation is not always as good as it could be.

3.5 The functioning of the Judiciary and the Rule of Law

From the information available, it would appear that the judiciary is adequately structured to perform its functions effectively in respect of criminal matters. However, there is a comment in the documentation that "the functioning of the judiciary (should be) improved", but there is nothing in the supporting material to show in what way its current functioning is ineffective. Further material in this area is obviously necessary.

There is information contained in one of the recent sources to the effect that although the previous government proposed a new layer of appeal courts to increase the efficiency and ease the burden of the Supreme Court, the new government has decided against this proposal. The new government has however declared that the most important thing is to speed up the judicial process, and proposes instead an increase of staff and funds at the courts of first instance as a more efficient way of achieving this purpose.
An example of the overburdening of the courts systems is provided. Because of the "clogging" of the judicial system, judges often resort to taking the maximum time allowed by law between trials, and instead of forcing witnesses who do not appear voluntarily, trials are postponed. Further, there is no witness protection programme in Hungary, and in some cases this has led to witnesses not presenting evidence.

Hungary itself acknowledges that judicial procedures tend to be too long, with periods of detention on remand before trial of between one and one and a half years being quite common. Hungary also acknowledges that although in principle the rule of law is respected in all proceedings of the judiciary, in practice, some deficiencies might occur. In particular, Hungary explains that in its eastern areas, small communities favour "a climate of collusion" and there are sometimes "fruitful attempts by interested parties of influencing investigations and proceedings either by force or by money etc."

4. Poland

4.1 General comments on documentation

The documentation concerning Poland was of a more detailed nature than that concerning Hungary, and gave a much clearer impression of the system and the institutions, and the problems they currently face.

The main sources were
a. a report, dated summer 1998, prepared for the evaluation exercise by a Member State
b. a report of a Member State dated 30 October 1998, also prepared specifically for the evaluation exercise
c. the Report of the General JHA Expert Mission to Poland in June 1998,
d. a Report by the Commission dated 28.11.97 on Judicial Co-operation in penal matters, and
e. Factual report from a Member State, dated November 1998 (SN 4954/98)

Apart from several short submissions, there was no other substantial input from Member States.

Subsequent to the meeting in December 1998, some further material from Member States has been received, and in addition, it has also been possible to have regard to Poland's answers to the screening process currently being carried out.
4.2 The current situation, and major problems

The picture of the current situation of crime is painted differently according to the different documents. The Criminal Justice System is on one report described as "worrying", as a result of the continuing increase in the demands made on it since 1989, with limited resources. Other documentation merely remarked on the need for improvements to the equipment and training in the Courts, particularly at the administrative level. A third source describes the judicial structure itself as leaving nothing to be desired. With such differing pictures painted, more information is clearly essential.

There are clear signs, according to one recent source document, that the use of amphetamines and other drugs in Poland is increasing. The use and possession of drugs was made a criminal offence in 1997.

Although the level of criminality has more than doubled between 1993 and 1997, it still remains between 2 and 4 times lower than levels in western Europe. Despite this, prison populations are around double those in western Europe, a phenomenon which is explained by the particularly rigorous sentencing policy of the Polish judiciary.

4.3 Legal position

Since the ending of the Communist era, Poland has undergone dramatic legislative changes, and the reform programme is still continuing, with the introduction, as recently as September 1998, of a new Penal Code, a new Code of Penal Procedure, and a new Sentencing Code. Up to date information about how these are actually working is needed.

One of the main practical problems identified in various material is the failure to introduce effective money laundering legislation, since although Poland has now signed the Strasbourg Convention of 1990 (5 November 1998), the legislation to introduce it in Poland is still to implemented. Since the plan appears to be to create a governmental agency with responsibility for dealing with information on money laundering, there are major budgetary implications for the proposals. In the meantime, existing legislation concerning bank secrecy appears to protect the criminal. An evaluation of the situation in Poland will be carried out by the Council of Europe in May 1999, and consideration of that report will in due course be necessary for the purposes of the current evaluation. At this stage, it may be sufficient to note that organised groups of criminals, of foreign extraction, are targeting Poland for money laundering activities.
Another problem identified is that in Polish law it is not an offence merely to belong to a criminal organisation, since there has to be effective participation in criminal activity before there can be any liability. Details of how Polish law could be brought in line with, particularly, the Joint Action to make participation in a criminal organisation in itself illegal, are not available.

Recent sources suggest that the institutional organisation of the judicial system conforms broadly to Western standards, and the new criminal code reinforces the rights both of victims and suspects, and observes Human Rights obligations. However, there remain certain obstacles in the effectiveness of the operation of the current criminal system, most importantly in the fight against organised crime. In particular, Poland has still to implement the 1990 Strasbourg Convention relating to money laundering (signed in November 1998), although the new Criminal Code extends the measures which can be used to fight money laundering. In relation to the Convention, Poland's position is that it is unable at present to support all the financial implications of its implementation, particularly in regard to the formation of a specific organisation charged with the control of financial transactions. The implementation is therefore still many months away. Confiscation of property is not currently contemplated by the Polish authorities.

The new Code of Criminal Procedure contains a series of procedures designed to facilitate the fight against organised crime. In particular, there are new provisions relating to the protection of witnesses and the interception of telecommunications.

4.4 Judicial co-operation

As with Hungary, there is little or no information about how judicial co-operation actually works in practice. Although Poland is a signatory to the major relevant international instruments, and has also concluded bilateral treaties with other countries, there is no description of how mutual legal assistance in criminal matters works in practice. One source suggests that direct transmission of requests is permissable, but there is no practical example of cases where this may have successfully occurred. The documentation both contains the comment that "specific steps are needed before Poland can play an effective role in international judicial co-operation," and on the other hand, also has material which suggests that its implementation of the 1959 Convention is without particular problems.
The main problems touched on this area are a lack of specialist staff and poor language skills, but without details of how these affect the operation of international co-operation, it is not possible to assess the size of the problem.

There is still limited evidence about the functioning in practice of international judicial co-operation in Poland. Some evidence from Member States suggests that, of the small number of requests received/sent to Poland, more are received than are sent. Another Member State notes that in a seven year period, it sent 32 requests to Poland, and received 119. There is also a comment in one of the source documents about the lack of translations, so that the Member State itself has to seek translations from Polish.

In relation to extradition, Poland has experienced few problems in the implementation of the 1957 European Convention. It is intent on modifying its legislation to enable simplified extradition in the future.

4.5 The functioning of the Judiciary and the Rule of Law

The Polish judicial system conforms broadly to western European standards. The independence of the judiciary is guaranteed by the Constitution and by law, and judges undergo training which is equivalent to western standards.

The ability of the Polish judiciary effectively to fight organised crime is still handicapped by the slowness of judicial procedures and the inadequacy of resources, both financial and human, available for the administration of justice. The new criminal legislation has however introduced simplified procedures to attempt to reduce the delays in bringing matters before an appropriate tribunal.

The major criticism about the effectiveness of the criminal justice system, which is well documented, is about the adequacy of support staff and services, which appear to be totally inadequate. There are a number of specific references to the delays in the criminal justice system currently in Poland, which may or may not be attributed to such inadequacies. Legislation permits the pre trial detention of those accused of criminal offences for up to two years, and there are references to the frequency with which those who are charged have to be liberated at the end of that period without trial. Such delays can only bring the legal process into disrepute.
Although there is some material indicating the independence of the judiciary, and its quality, a passing comment indicates also refers to reports on corruption in connection with a more speedy handling of certain criminal cases. More information in this area is necessary to be certain that the judiciary is truly independent.

The new Constitution entered into force in Poland in October 1997 (and therefore postdates some of the written material available). This Constitution confirms Poland's position as a country with a firm dependence on the rule of law as a basis for its activities.

5. Romania

5.1 General comments on documentation

The principal documentation available to be examined was the following.

a. a Report prepared for the evaluation exercise by a Member State, dated summer 1998
c. Annex to the Phare Report on Romania
d. National Programme for Romania's Accession to the EU, June 1998
e. Factual report from a Member State, dated November 1998 (SN 4954/98)

5.2 Current situation, and problems

Of the three countries currently under consideration, the development of Romania has been the slowest since the changes which occurred less than 10 years ago. The available documentation makes it clear, however, that a project to prepare a new penal code and a code of penal procedure is now under way. Examination of these in due course will be of the utmost importance.

The Accession Partnership with Romania highlights that Romania has to make efforts to implement measures to combat corruption and organised crime (among other things) in 1998. Romania is of high strategic importance as in international drugs route between the East and Europe, and there is a high level of crime associated with this trade.
At present, the documentation reveals that Romania has no legislation to prevent money laundering, and that the current banking rules and strict banking secrecy are actually conducive to fraud and to the concealment of other illegal financial transactions. There are no indications in the documentation available about when anti money laundering legislation will be enacted in Romania.

5.3 Legal position

The documentation revealed that Romania has still got major problems with organised crime, and in particular, with money laundering and the confiscation of the proceeds of such offences. Romania will be evaluated by the Council of Europe in April 1999 as far as its compliance with the anti money laundering legislation is concerned, and the report following that evaluation will need to be studied carefully.

A further criticism is made in the documentation about the lack of appropriate penal legislation, which leads in some cases to inappropriately lenient sentencing. There are no further details on this aspect.

5.4 Judicial co-operation

The available documentation gives little information about the practical functioning of mutual legal assistance in criminal matters, and from other information available, it is to be inferred that such are the day to day problems encountered in operating the criminal justice system for domestic purposes that foreign assistance takes a low priority. This is borne out by Romania’s national programme for Accession, which features as one of its priorities the need to "initiate procedures for ratifying relevant conventions, (such as the MLA Convention)". As a result of the fact that the major international conventions have not yet been ratified, such requests for assistance as are made are made through diplomatic channels, and numbers are very limited.

Up to date documentation on the operation of judicial co-operation in criminal matters is inevitably scant, since the major international instruments in the field have only just been (or in the case of Mutual Legal Assistance are just about to be) implemented. However, the one document which refers at all to actual cases of mutual assistance indicates that there are no cases remaining unanswered, or of long delays in replying. There is no indication of the number of requests made, however.
In the field of extradition, the only practical information is in relation to requests to and from Austria, and here, Austria made one request, and received in return 17 requests for extradition from Romania.

5.5 The functioning of the Judiciary and the Rule of Law

The documentation indicates that the problem in Romania is not so much the independence and efficiency of the judicial system as its ability to function, and that any broad scale positive development will be impossible until there has been a comprehensive reform of the justice system. It is clear from the documentation that the structure of the judicial system itself is in need of revision, and detailed information is needed as to the steps being taken by Romania to improve this situation. Phare funding has already been made available in some of these areas, and information on current progress is required. The general impression from the documentation is that the criminal justice infrastructure remains in need of considerable improvement, while recent progress is not to be ignored.

As far as the rule of law is concerned, there is little information, but in view of the substantial programme of reform which is currently under way, much of it under the aegis of European funding in any event, it is likely that current reform will be based firmly on the precept of the rule of law.

6 Conclusions

6.1 In the area of judicial co-operation, the information available is patchy. In relation to all three countries, such information as there is reveals three legal systems undergoing a period of enormous change, with attempts within the space of a few years to implement changes which the rest of Europe has taken more than half a century to develop. The infrastructures are weak, and do not easily support Western European procedures, which have become dependent to a great extent on the availability of technology. But the various countries have shown determination to proceed this far, and their commitment to progress further cannot be in doubt.
In all cases, however, there is a lack of practical examples of how judicial co-operation will work, once the new legislation is in place, or how newly introduced legislation is operating at present. There are further marked weaknesses in the anti money laundering procedures in each of the three countries, and the measures to implement the 1990 Strasbourg Convention will have to be carefully examined. In respect of all three countries in this respect, however, it would be appropriate to await the reports by the Council of Europe evaluation teams which either have been or will shortly be prepared.