

## **Note to the European Parliament by the Council**

as requested at the trilogue meeting of 25 May 2011

The Council is in favour of a compulsory ground for jurisdiction related to nationality but cannot accept a similar rule for habitual residence.

Drawing a distinction between nationality and habitual residence as the criterion for establishing extraterritorial criminal jurisdiction can be justified for the following reasons:

1. A person cannot lose his/her nationality against his will. Usually, the main reason for losing nationality is the acquisition of another nationality (depending on the question whether the laws of the States involved allow the possession of double nationality). Residence in a country other than that of one's nationality depends on a residence permit. Residence permits may be withdrawn, in particular for reasons related to the commission and conviction of criminal offences.

So, whereas a national of a State, when prosecuted and convicted of an offence committed abroad, will (be entitled to) stay in that State and can during imprisonment be prepared for his/her return into the free society of that State, third-country residents, when prosecuted and convicted of an offence, are likely to lose their permit (right) to stay after having served a sentence, precisely as a result of that conviction and be expelled.

Rehabilitation efforts in relation to such persons during their term of imprisonment are in such cases futile and such imprisonment may not fulfil one of the basic objectives of the penitentiary system of the State in question.

2. In order to cope with these kinds of problems, it is often advocated to allow for the possibility of having the enforcement of sentences imposed on foreigners transferred to their countries of origin. This requires, however, the existence of agreements or other binding arrangements between the State of conviction and the State of origin of the offender. The number of such bilateral agreements between Member States and third countries is rather limited, although some multilateral, e.g. Council of Europe and United Nations, conventions may apply. Moreover, not every EU Member State is equally interested in concluding such agreements with particular third countries, for various reasons.

3. Third-country residents are free to decide whether they want to continue their residence in one State or establish their residence elsewhere. When establishing extraterritorial criminal jurisdiction over third-country residents, the national legislator will have to decide under which conditions a residence can be considered as "habitual" for these purposes. Moreover, it will have to address the question whether such jurisdiction can be exercised:

- when the offender was a resident at the time of commission of the offence, but has moved elsewhere at the time of prosecution;
- when the offender was a resident elsewhere at the time of commission of the offence, but has become a resident at the time of prosecution;

- whether such jurisdiction can still be exercised if the resident moves elsewhere during the investigation and prosecution phase.

When, in a Directive, requiring the establishment of extraterritorial criminal jurisdiction over third-country residents, these questions are not addressed, one runs the risk of widely diverging implementing laws which defeat the objective of having "common" minimum rules.

4. Most Member States refuse or are not allowed to extradite their own nationals to third countries (the situation is different in the relations between the Member States pursuant to the Framework Decision on the European Arrest Warrant). However, in order to avoid impunity they can, and do, establish extraterritorial jurisdiction over their nationals and would be ready to bring proceedings against them at the request of the country of the *locus delicti* (*aut dedere aut iudicare*). Unlike for nationals, member States would extradite third-country residents to third countries, in particular the country where an offence has been committed. The risk of impunity does therefore not present itself in the same way as in relation to nationals.

5. When nationals of a Member State, being suspected of having committed an offence in third-country X, are resident in another country (another Member State or another third country), there are in principle no legal obstacles to get those nationals extradited to the Member State of their nationality (since most States accept extraterritorial criminal competence based on nationality). However, when third-country residents of a Member State, being suspected of having committed an offence in third-country X, are found in another country (another Member State or another third country), it will be much more difficult to get them extradited to the Member State of residence. This because under many laws and treaties on extradition a State requested to extradite a person may refuse to comply with such a request if the requesting State bases its request on the exercise of a form of extraterritorial jurisdiction ("residence") which does not exist in the requested State in relation to the same type of offence. And indeed very few third States have established extraterritorial criminal jurisdiction over residents.

6. One should also bear in mind that the age of sexual consent has not been and cannot be harmonised by EU law. This in itself makes the habitual residence a ground for jurisdiction which would create many problems but would solve very few.

What would be the effect of introducing habitual residence as a compulsory ground for jurisdiction from the point of view of applicable law and the age of legal consent? If a national of one Member State (for instance Italy), where the age of sexual consent is not exceptionally high, obtains a residence permit in another Member State where this age is high (for instance in Malta – 18 years), this person would have to respect Maltese rules even outside Malta, also when she or she returns in the country of nationality. Therefore an Italian teenager perfectly in compliance with Italian law may be theoretically prosecuted in Malta for having a consensual relationship in Italy while he or she is on vacation there, and this would be triggered by the fact that the person has habitual residence in Malta. This would breach a number of fundamental principles, such as legal security and non discrimination.

If the act were to take place in a third country, the “offender” would have to know the applicable rules and the limits of the lawful action in the country of destination as well as that of the nationality and of the habitual residence. Failing to respect all three sets of rules, it may well happen that the person is convicted in three states. If the person respects two countries’ rules but would breach the third, he or she would be found guilty in two and not guilty in the third country. (All states apply their own rules). An Italian national with a Maltese residence card travelling to Thailand respects the rules of Italy and Thailand will have to be prosecuted by Malta even if this action does not breach Italian or Thai law, provided that Malta has its own different rules with regards to the same act, and Italy would be obliged to extradite its own national to Malta under the current EAW system.

7. Overall, the Council believes that sex tourism can be best addressed through extraterritorial criminal laws that apply to EU nationals, but for permanent residents the same legal solution cannot apply. Here, member States can only find solutions via cooperation agreements with the state of origin, for example by transferring procedures or by extraditing residents. The Directive could call on member States to find such solutions in a Recital.