

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 12/05/2015
[PC-OC/DOCS2015/PC-OC(2015)09E Draft Guidelines...]
<http://www.coe.int/tcj>

PC-OC (2015)09
English only

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

**DRAFT GUIDELINES TO THE DRAFT MODEL REQUEST FORM FOR MUTUAL ASSISTANCE IN
CRIMINAL MATTERS**

Prepared by Mr Eugenio Selvaggi (Italy)
in co-operation with Ms Joana Ferreira (Portugal), and Ms Astrid Offner (Switzerland)

INTRODUCTION¹

At the last PC-OC Mod meeting (17-19 February, 2015) the group decided to “ask its rapporteur on MLA, Mr Eugenio Selvaggi, in co-operation with the Chair and in consultation with Ms Astrid Offner and the Secretariat, to prepare draft guidelines for presentation at the next plenary”. It was also agreed to keep the guidelines as short and practical as possible.

The following is a proposal of guidelines for possible presentation at the next PC-OC plenary².

MLA consists in assisting other jurisdictions (that are limited by national borders) in making justice. MLA is usually established on legal basis (international instruments), but good will in co-operating and assisting is crucial as well. Hence, two main guiding principles are to be taken into due account, i.e.

1. (*from the side of the requested State*): to treat the foreign request with the same efficiency and promptness with which you would expect others to execute one of your requests;
2. (*from the side of the requesting State*): do not expect a specific measure you would put in place at national level to be executed abroad, but rather focus on the result you want to obtain (for instance: if at home you would issue a seizure warrant for bank documents, the foreign requested jurisdiction might reach the same result with a *subpoena duce tecum*, i.e. the order given to the owner to produce to the court the relevant documents).

Where the case is urgent, reasons for urgency should be clearly stated (e.g. the suspect is in custody, there is a danger for the evidence to be destroyed or tempered, etc.).

When seeking assistance from another jurisdiction, the first thing to do is to check the appropriate and relevant convention the specific request is to be referred to. In this regard, it is of interest to know that:

1. The PC-OC committee was of the opinion that while the requesting State should indicate the relevant convention to be applied, the requested State should not consider itself bound to such a formal reference as it should be bound to any convention in force between the two States (the matter was examined in relation to the 1957 extradition convention: once the request mentioning the said convention only is received, the requested State is entitled to examine it under the terrorism convention as well; and therefore apply one or the other convention). However, the 1959 Convention on Mutual Assistance in Criminal Matters contains the obligation for Parties “to afford each other the widest measure of mutual assistance”.
2. Sometimes the assistance sought might result of a combination of different conventions, being applied concerning sectors which are governed by specific conventions, i.e. MLA plus money laundering, cybercrime, trafficking in human beings, medical counterfeiting, sport manipulation conventions. For instance, when obtaining information or evidence as far as the electronic world is concerned, including the search of websites and freezing of electronic data or IP addresses and traffic data, reference to the Cybercrime Convention is crucial, although MLA might not be

¹ Made by Mr Eugenio Selvaggi, rapporteur on MLA, member of the PC-OC Mod

² I have also made use of a paper dated 2006 (see PC-OC Mod (2006) 06, *Possible Format for a GUIDE that Practitioners might consult*). Please, note that this proposal is limited to content; layout, type etc. is still to be examined. Also the usefulness of putting the relevant links in the presentation in order to go directly to the site concerned is to be examined.

Please also note that the footnotes that appear in the present paper are just for the convenience of the discussion and are not meant to be part of the guidelines (unless otherwise decided by the PC-OC).

totally excluded. In the case of an investigation concerning banks, finances etc. recourse to Money Laundering Convention in addition to the MLA mother convention might be advisable.

3. The text of a given convention might not be exhaustive so it is crucial to check reservations and declarations made by Parties to the convention. Often reservations have the effect of limiting obligations arising from the legal instrument (for instance, double criminality in the case of search and seizure). By means of declarations Parties indicate which bodies would be considered judicial authorities at home.
4. Looking at signatures and ratifications is very important (some conventions do not enter in force before a certain number of States have signed or ratified them).
5. A look at the CoE's recommendations and resolutions might be useful. The reading of the explanatory report to a given convention is always a useful tool. The CoE has published a volume containing the result of the discussions and the opinions of the PC-OC, the Committee in charge of the monitoring of the conventions in criminal matters [[click here ?](#)].
6. Last but not least: knowledge of the ECHR case law is also crucial [[click here ?](#)].
7. For general information on the law of the other State please note the following convention: the European convention on information on the foreign law (Additional Protocol to the European Convention of 1968, dated Strasbourg, 15 March 1978, which extended the provisions of the latter to criminal law). It should be borne in mind that the more you know about the legal system of the other State the greater the possibility of having your request executed.
8. For further information it might be useful to contact the CoE's Network for JC [[click here ?](#)].
9. Sometimes preliminary contact with the Contact Points of the Network or with liaison magistrates (where they exist) is crucial in order to tailor a request in a proper manner and to have it successfully executed, also taking into account that evidence taken abroad which is not admissible in the country where the investigation or the trial are carried out is completely useless. In this regard specific formalities may be indicated in the request (taking a statement under oath, the serving of a summons personally to the individual concerned, the presence of officers from the requesting State during the execution, etc.).
10. It should also be borne in mind that some States might have bilateral relations (by means of a treaty or a convention) with other States or might be bound to obligations arising from multilateral instruments or acts having the same effect (i.e. EU instruments or CIS).
11. Keeping in mind the difference between judicial co-operation and police to police co-operation is also important. A number of elements should be taken into consideration in this regard: 1. organisation of investigative bodies both in the requesting and in the requested State; 2. the need to have the evidence taken in a manner that is admissible at trial; 3. sometimes it is more effective to go through the police co-operation, at least before a formal request for MLA is made (for instance in order to check whether a certain person or a certain object is in a given country).³
12. The following websites and links might be of some use when preparing a request for MLA:
 - www.coe.int; www.coe.int/tcj; www.echr.coe.int
 - EU, (such as Europe.eu.int/eur-lex/, curia.eu.int/ etc.) including Court of Justice and EJN (in particular ATLAS)
 - UN
 - Interpol
 - International Court of Justice
 - PACO (and all relevant websites such as gmt, economic crime etc.)
 - IBERRED
 - Etc.

³ The issue came at stake in the PC-OC at the beginning of the 90s when the UK (that had recently joined the MLA convention) explained that requests for conversation taping were a matter for the police. But other experts clarified that in their jurisdiction such a measure is taken by a judge. Therefore, in order to have the transcript of the taping used at court a decision of a court is necessary.

A request to check whether a certain individual is in a given country, in order to place a request for extradition, could for instance be more efficiently and promptly complied with via police to police co-operation rather than via a formal rogatory commission.

As a useful document doc. PC-OC(2001)20rev (Judicial co-operation versus police co-operation) might be considered in this regard (the document appears to be re-distributed January 2013).

2nd Protocol to 1959 MLA Convention, in relation to special investigative techniques

To some experts the 2nd Protocol appears as introducing police co-operation in the framework of MLA. Actually the reason behind the specific provisions contained therein is to ensure a safety umbrella for actions that, while in substance lie within the police domain, nevertheless require to be vested with a legal/judicial aspect in order to ensure both respect of fundamental rights and admissibility at court, should that be necessary; furthermore, such police actions carried out outside a legal basis, although seldom used, might carry criminal and civil liability for police officers. Said measures are: cross-border observations, controlled deliveries, covert investigations.

Because of the very specific nature of the actions sought via co-operation under the 2nd Protocol, it is crucial to look at reservations and declarations, in particular in order to check which competent authority the request is to be addressed to (this is usually or often the police authority).

Hearing by video conference requires previous contacts between the competent bodies involved and other information of a technical nature, including equipment and time zone.

GUIDELINES

Title of the request :

a. Content

The title should be short and clear. It is very important to indicate clearly and precisely the purpose of the request at the beginning of the form to ensure that competent authorities within the requested State will know immediately what is expected from them. For this purpose, the title should indicate the nature and range of activities. If an operation name is used in a system of a requesting State, such name should be indicated in the title.

b. Reference numbers (Procedure n°)

This information should be included at all stages. It will ensure the immediate connection with previous requests and will facilitate the follow-up given to the request, in particular when communicating results.

c. Where applicable, indicate the urgency

This specific indication at the beginning of the request will underline the expectation of the requesting authority regarding rapid procedures in the requested State and its prompt response.

1. Requesting authority

- *The official title of the requesting authority*
 - *Address and contact details*
-

There might be technical issues requiring clarification or further information before the execution of the request. This may be directly performed through e-mail, fax, or phone without formulating formal requests for additional information. Indicating a contact person may also be useful in this context, in particular in cases of missing information or documents

Please note that the 2nd Additional Protocol to the Convention on mutual assistance in criminal matters enables direct contacts. It is crucial to provide contact details of the prosecutor or other officials making the request without restricting this type of information to heads of offices.

- *Language*
-

2. Requested authority

- *Official title of the requested authority*
-

- *Address*
-

In order to find the appropriate requested authority and address see the country information on the PC-OC website: http://www.coe.int/t/dghl/standardsetting/pc-oc/Country_information2_en.asp In the European Union, an Atlas for the identification of the requested authority exists and may be useful for the application of the 2nd Additional Protocol and in particular to identify direct contacts.

3. Object and reason

Information on the following points should be clear and as precise as possible to fully describe the object and reason of the request for assistance.

- *Type and purpose of request*
-

- *Legal basis of the request*
-

This information will depend on the decision of the requested State to decide which legal acts apply but many countries, however, have established the regular practice of indicating the legal basis at the beginning of the request. It may take the following form: “Referring to Article of the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)...”. In addition to the Convention, an explicit reference of any relevant co-operation treaties based on reciprocity should be made, including relevant UN Conventions and/or bilateral treaties which were adopted to facilitate the application of the European Convention on MLA.

It is important to note that the general rule mentioned above is limited by two exceptions which were taken into account to justify the inclusion of this information on a regular basis:

- The request is based on a CoE legal act covering specific types of crimes, the corresponding legal basis shall be indicated. In particular, when the Money Laundering Convention of 1990 applies, the text of the statutory provisions the requesting authority relies upon shall be indicated in so far as coercive action is requested (art. 27 para. 1 letter d of the Convention cited);
- This indication might contribute to the proper execution of the request and avoid misunderstandings by the requested authority.

- *Type of Offence*
-

This part of the form should clearly indicate the facts related to the offence to motivate the request for assistance and the relevant provisions which legally qualify the offence in the requesting State (e.g. in the case of a murder under Article... of the Criminal Code).

Note : Propose minimal description of the facts because in the legislation of the member States of the MLA-Convention, the state/denomination of an offence may be different and/or an offence may be different and/or the provisions are not always congruent.

- *Description of the stage of criminal proceedings*
-

It is also important to indicate the stage of proceedings, including if possible its expected time frame. For example: pre-trial/trial stage, investigation led by: (insert the title of the competent authority), the criminal proceedings *in rem* (when the suspect is unknown or against a particular person). It should also be mentioned if the request is made for so-called quasi-criminal cases.

- *Indication how the requested measures/the evidence sought are linked to the proceedings conducted in the requesting state*
-

.....

- ***Where applicable :***

- *Justification of urgency*
-

The current practice shows that while many requests are marked as urgent, the urgency is not always justified. This leads to important delays based on the lack of attention by requested authorities to urgent or very urgent, but unmotivated requests. To respond adequately to the urgent nature of the demand, it seems fundamental to provide clear grounds for the urgency. In other words, a system requiring the motivation of the urgency may help the requested authority prioritise urgent requests on the basis of the facts justifying the urgency.

Reasons for urgency may be justified, in particular, by the fact that:

- The suspect/accused is in custody;
- Proceedings will take place shortly and it was not possible to request for MLA earlier;
- There is a risk of the evidence's imminent change of location or destruction.

- *Indication of a requirement to be notified about the date/place of the execution of the request as well as on the presence of particular persons with their contact details*
-

It is very useful for the requested State to obtain this type of information at an early stage within the request itself to ensure that the requested measures are implemented appropriately and as expected by the requesting State within the required time frame.

- *Information on previous communications*
-

It is important to include at the beginning of the request any relevant and useful information which could facilitate the execution of the request. For example, it may be important to mention any available

information on previous police cooperation within the case, communications with EUROJUST, communications with the European Judicial Network's contact points or PC-OC contact points.

4. Persons concerned

▪ *Information on a person*

It is important to indicate clearly and precisely any personal information on the person concerned mentioned above in particular:

- Name;
- Alias;
- Gender;
- Nationality;
- Address: the requesting State should provide any known addresses, including those differing from the official place of residence;
- ID number;
- Date and place of birth: a date of birth may be substituted by the birth number if it is used in the requesting country;
- The position in legal proceedings which is particularly crucial;
- Indications of any restrictions to the personal liberty of the person to be heard.

For experts, however, it is not required to indicate any alias or date of birth.

▪ *Information on a legal person*

Where a request concerns a legal person, the following relevant information should be included:

- Name;
- Registration number;
- Address of the seat and different branches: The address of the seat means the address commercially registered which is frequently a postal box and does not correspond to the place where the person carries out its business activities. The address of such place, including of headquarters and different branches should also be provided;
- Contact details of the person authorised to act on behalf of the company: it may be found in a commercial register by a requested authority, it is still helpful to indicate such details in the request. In addition, it is important to note that such persons may change over time.

5. Measures requested

A. Letters rogatory

1. Facts and legal information about the offence

As a general rule, requests should be as detailed and comprehensive as possible to ensure that the requested authority has the necessary information for the effective execution of the request. However, information should be limited by its relevance and its impact on the execution of the request. This is also important for practical reasons to restrict the length of the request forms in particular where requests will have to be translated.

- *Summary of the relevant facts indicating time, place and manner of commission of offence*
-

It is important to clearly and briefly describe any available and relevant information concerning the offence including the facts and number of victims.

- *Legal qualification of the offence with relevant provisions including the range of penalties applicable*
-

Concerning details of legal provisions and the maximum penalty applicable for the offence, there is no need to provide the whole wording of a provision which should be limited to the specific type of the committed offence (murder, fraud etc.). However, in certain circumstances, in particular when requiring coercive measure or if a request for MLA is sent after a long period of time for an old case, it may be necessary to include the precise wording of relevant provisions. For the mentioned “old” cases where assistance is requested after a long period of time, information on the lapse of time within which the requested State should take any action is important.

- *Clear description of the links between the offence and the person and between the offence and the evidence sought*
-

In addition, it is crucial to describe clearly and precisely the facts of the case in connection with the person concerned and the measures requested.

.....
 - ***Where applicable :***

- *Damage caused by the offence*
-
- *Information on victims*
-
- *Where necessary, provisions on lapse of time*
-
- *Any other additional information which may assist the requested authority in carrying out the request*
-

2. Types of measures

This part of the form contains measures to obtain evidence.

- a. Hearing/questioning of witnesses, experts, suspects, accused persons and other persons : specific modalities
-

- *1. Hearing/questioning performed by the requested authority*

- *Indication of the competent authority which should perform the hearing*
-

Unless a specific request is made by the requesting State, a hearing is carried out in principle on the basis of the law and by the competent authority of the requested State which may be police officers, a prosecutor, magistrate or judge or any other authorised official. Where legislation of the requesting State contains specific requirements for a hearing, the latter should indicate clearly and precisely the formalities and procedures which should be followed in the requested State while specifying the relevant provisions, in particular where States are parties to the 2nd Additional Protocol (see Article 8).

- *Indication of the status of the person to be heard*
 - *Information on rights and obligations (for instance-hearing under oath/affirmation or the right to be assisted by a lawyer/interpreter) to be notified to the person to be heard*
-

In many cases, the requesting State demands that the requested authority notifies a person to be heard of his or her rights and obligations depending, as mentioned above, on the status of the person concerned. Such requirement should be included in the request or attached to it. Furthermore, the requesting State may also request for specific formalities and procedures to be observed within the frame of execution: for example, it may request the presence of the defence lawyer of the accused person, to notify the rights and obligations before a hearing, to request a person to sign each page etc. In such a case, the request must indicate the necessity of following procedures of the requesting State in the requested State.

A request should clearly and expressly indicate whether the application of Article 8 of the 2nd Additional Protocol is expected. In this case, the requested State should apply the requested formalities and procedures which are not contrary to the fundamental principles of the requested state. However, the requested State may accepted to execute the request without being based on Article 8 of the 2nd AP.

It should also be noted that in some countries witnesses do not have a right to remain silent when interrogated but their statements will not be used against them in proceedings. It is important therefore that requesting authorities indicate if such procedures are acceptable or alternatively specify that the results of the hearing will be used as evidence before a court.

It should be noted that the Convention on Mutual legal assistance provides for hearing under oath if the law of the requested party does not prohibit it. Therefore this type of assistance should be made available on the basis of the EC on MLA. In addition, Article 8 of the 2nd Additional Protocol establishes flexibility since it will help its Parties solve possible conflicts where the requesting State makes this type of request which is not recognised in the requested State. If a requesting State wishes to hear a person under oath, it should be clearly indicated in the form itself. Where such measure is not recognised and used in the

requested State but is not contrary to fundamental principles of the requested State (in particular if Article 3 para 2 MLA is applied) a requesting State should indicate the procedure to follow. It is also advisable to provide the wording of the oath where the requesting State is aware that the requested State does not regulate this issue.

- *List of questions to be asked*

It is clear that this list should not be exhaustive and restrictive but should only be indicative. A person heard may provide information, which requires further questions or clarifications. The competent authority of the requested State usually has sufficient skills to initiate further questions which prevent additional hearings and the extension of proceedings in the requesting State.

- ***Where applicable :***

- *Indication whether the person to be heard requires protection (including details on possible existing agreements between both Parties on this issue)*

If the person concerned is a witness who requires protection, the requesting authority should indicate it in the request. If an agreement already exists to protect the witness, the reference of relevant documents or arrangements should be included in the request.

- ***2. Hearing/questioning by video conference***

The form should contain technical, practical and legal information. In addition to the information provided in the form in general, the following information should be provided:

- *Indication of reasons why it is not desirable or possible to attend in person*
- *Name of the judicial authority or of the persons conducting the hearing/questioning*
- *Details concerning practical arrangements (technical information on available means, proposals concerning payment of costs, contact details for technical contact person, etc.)*

- Technical information on the means available for video conference (such information may also be provided at a later stage), a proposed date and time for trial connection (it is advisable to check whether the connection works in advance);
- Proposals concerning the payment of costs of hearing by video conference. It may be also underlined that due to practical reasons, certain countries demand a billing address in the requested State together with a confirmation that it accepts payment. Although a request to pay for the video conference may be justified, as a matter of principle, such a requirement should not be included in the form.

- *Notification of rights and obligations of the person to be hear/questioned*

If needed, the notification of rights and obligations of a person to be heard, including the right not to testify (according to the national law of the requesting state).

- *Dates/time proposed*
-

.....

- ***Where applicable:***

- *Indication of the necessity of an interpreter*
 - *Indication of measures to protect the person to be heard/questioned*
 - *Indication if the suspect or the accused person consents to the hearing/questioning*
 - *List of questions to be asked*
-

It is recommended to indicate questions in advance – a competent authority of a requested state will be mainly active at the beginning of the hearing, but it also checks whether a hearing is arranged in compliance with its fundamental principles. If questions are indicated in advance, the requested state may for instance indicate that certain questions (or the way how questions are formulated) could raise some difficulties.

.....

- ***3. Hearing/questioning by telephone conference***

Taking into account that in many States a hearing by telephone conference is not possible, this specific type of hearing is only applicable subject to the conditions of the national law of the requested State or the requirements set by Article 10 of the 2nd Additional Protocol, including the condition concerning the competence of the requesting State to conduct the hearing on the basis of its own laws. It is particularly important in the request to state expressly that the person concerned is willing to take part in the hearing.

- *Indication of the name of judicial authority or the persons who will be conducting the hearing/questioning*
 - *Indication that the witness or expert is willing to take part in a hearing/questioning by telephone conference*
-

b. Obtaining evidence

.....

- ***b1. General measures***

It should be underlined that search and seizure are subject to stricter conditions than for other mutual assistance measures because they have a direct impact on individual fundamental rights. Therefore, in many countries a specific authorisation/order from a judge or, where applicable, a prosecutor is needed.

- *Identification of items to be provided*
-

Search and seizure

- *Type of search: body searches/house searches/other premises*
-

Searches refer to various situations including body searches, house searches or of other premises. Each specific situation may require the application of various measures/orders to execute the request in the requested State. Therefore, it is essential to clearly specify in the form which type of search is being requested.

- *As far as possible, precise identification of the person, or premises to be searched (location, interest for property, bank accounts)*
-

Although body searches are not very common, a person to be searched should be duly identified. As regards searches of premises, it is very important to know whether premises to be search are used for housing, business or for other purposes. Car searches are also possible. Therefore it is very important to provide relevant, clear and precise information to allow a requested authority to perform a search (and to obtain an order/authorisation from a competent authority). For houses/other premises the exact address will be required, as well as the name of the owner of such premises (a company may have rented certain premises). For car searches, the car should be identified by its known features (type, colour, number plate, registered number and any other relevant information). It is important to ensure that the request indicates all available bank details in order to allow the requested State to identify the accounts in question (sort code, account numbers, etc.) and specify the period for which the information is requested.

- *Identification of documents, records, data, property to be seized*
-

What should be seized should be clearly and, as far as possible, precisely described in the form. If a request is too general, it may prevent the requested authority to take any action, due to restrictions imposed by its national law. If seizure concerns computer data, it is important to indicate the type of data (e.g. accountancy documents of a firm X for a period from year A to year B). It is further important to note that if the offence is computer-related, the Convention on Cybercrime (ETS No. 185) may apply, as well as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime if the offence relates to money laundering (ETS No. 141) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198).

- *Where applicable:*

- *Information relating to bank accounts in the requested State*
 - *Restitution: indication of articles obtained by criminal means which should be at the disposal of the requesting State to be returned to their rightful owners*
 - *Give details on the links between the person, the foreign proceedings and the requested measures e.g. the place to be searched*
-

- *b2. Specific measures*

• **Electronic data**

Information for specific measures provided by the Convention on Cybercrime

The Convention offers the possibility of requesting mutual legal assistance regarding provisional measures such as the expedited preservation of stored computer data which Parties are compelled to apply at national level.

There will be no major differences between the content for both requests for provisional measures (stage 1) and for measures regarding investigative powers (stage 2) and a traditional request for search and seizure, except concerning the following information:

- For stages 1 and 2 requests: a clear description which is sufficient enough to identify the targeted data (nature of data), the location of the computer system (a computer may be in one branch of a company while data is on servers in headquarters), and its custodian. The easiest situation is when data can be found on a hard disk or any portable storage of data, such as a mobile phone using computer programmes, blackberry, etc.

- For stage 1 requests: indication of the reasons to preserve such data and the grounds to believe that there are risks of loss or modification, as well as the indication that a request for search and seizure will follow.

It is important to underline that it is possible during the execution of the request to preserve data to discover the existence and involvement of a service-provider in a third State. In this case, the requesting State may initiate other requests addressed to other States.

Whether or not a requesting State requested provisional measures for the preservation of data (stage 1), the requested State is compelled to execute a stage 2 request to search or similarly access, seize or similarly secure, and disclose such data stored by means of computer system located within its territory.

It is important to note that there are ongoing discussions regarding the application of Article 32.b) of the Cybercrime Convention concerning trans-border access to stored computer data with consent or where publicly available where a Party may, without the authorisation of another Party but with the consent of the responsible authority, access or receive electronically stored computer data located in the other Party. Some States do not consider that this provision relates to international co-operation, however other States express the opinion that in such cases requests for MLA should still be sent.

Finally mutual legal assistance may be provided on the basis of applicable treaties and/or national legislation concerning real-time collection of traffic data or interception of content data. Similarities may be found with measures for the interception of telecommunication data. In general such co-operation requires important co-ordination as well as arrangements concerning technical support and costs.

➤ **Preservation of data**

- *Adequate information to identify the relevant data to be preserved including its location (custodian of the stored computer data; location of a computer system)*

- *Grounds to believe that there are risks of loss or modification*

- *Indication that MLA request will follow*

➤ **Search or similar access, seizure or similar securing, or disclosure of data**

- *Specific purpose*

- *Identification and location of data: time and place of communication in case of real time collection or interception, technical data necessary to perform such action*

- *As far as possible, precise identification of the person, or premises to be searched while giving details on the links between the person, data and place to be searched*

- *Contact point*

.....
 - ***Where applicable:***

- *Information on a request for the preservation of data*

• **Seizure and Confiscation of criminal assets**

Information for specific measures provided by the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ETS No. 141]:

Assistance (reference here is made to coercive measures) may be requested when a decision on confiscation exists, but also in cases, where criminal proceedings have been instituted, but not finalised. The freezing of assets as well as seizure are frequently used for this purpose. In case of seizure in view of confiscation, the requesting state is encouraged to indicate the time-line of proceedings including the expected timing of the request for confiscation.

To justify a request for coercive measures, it is crucial that the requesting State always quotes the text of the relevant statutory provisions or where this is not possible, indicates at least the relevant law applicable. It should also indicate that the measure sought or any other measures having similar effects can be taken in the territory of the requesting state under its national law.

In addition to the general information mentioned above, the requesting State should indicate existing evidence leading to the belief that the property is located in the requested State including by establishing a clear connection between the property and the requested State. To ensure the expected execution of the request, the requesting authority should describe precisely any particular procedure the requesting Party wishes to be followed.

Furthermore, where appropriate, it is crucial to indicate the maximum amount for which recovery is sought. In cases of seizure in view of confiscation it should also be indicated, whether any similar request was sent to other countries and/or which were executed (it means only part of a total property of a person should be seized and consequently confiscated). The maximum value of property (including money) which will be confiscated should be included.

It should be noted that this Convention provides a separate chapter on the notification and protection of third parties' rights which, in the absence of specific provisions, provides a legal basis for international co-operation in the fulfilment of notification requirements, if States do not have other legal basis. Such notifications may contain court orders to seize property, the execution of the order, the seizure of property in which third party rights are vested, seizure of registered property etc. (for further details see explanatory report to the Convention). Direct service may be authorised on the basis of the law of the

notifying State, in cases where it is important to act quickly or in respect of notification of judicial documents which are of a less important nature.

- *Reasons to believe that a property is located in the requested State*

- *Indication of the procedures the requesting State wishes to follow*

- *Indication that the measure sought or any other similar measures can be taken in the territory of the requesting State under its national law*

- *Attachments: true copy of confiscation order and statement of grounds for order, attestation that confiscation is enforceable*

.....
 - ***Where applicable:***

- *Where confiscation takes the form of a requirement to pay a sum of money corresponding to the value of the property, inform on the maximum value of the property to be seized*

- *Attachment of documents proving that third parties had the opportunity to claim rights*

- *Information on similar requests sent to other States*

- *Information on earlier requests for obtaining evidence / for restraining assets or seizing objects connected with the present request (name of the defendant/sentenced person)*

c. **Obtaining information from financial institutions**

Information to be provided here can be found in the chapter on search and seizure.

- *Details of the financial institution (name of the bank or financial institution, address of branch where the account is held)*

- *Account number*

- *Indication of the period for which the information is requested*

- *Reasons to believe that the account is held in the requested State*

d. **Obtaining telephone/IP data**

- ***d1. Information concerning telephone data***

- *Indication of the telephone number*

- *Information concerning the holder of the telephone number*

- *Information on the period for which the telephone data are required*

- ***d2. Information concerning IP data (computer website, IP addresses)***

In such cases the website address, e-mail address and other relevant information (such as provider data) should be contained in the request where such data is available to the requesting state.

- *Indication of website address/e-mail address/any relevant information including the provider*

- ***Where applicable:***

- *For traffic data, information on the period for which the IP address was used*

e. **Conducting of expertise**

- *Information on the expertise sought*

The nature of the necessary information for this specific area of high technicality will depend on national requirements.

- ***Where applicable:***

- *List of questions to be answered by the expert*

f. **Wire-tapping**

- *Any relevant information on the status of the person and on the link between the measure and the ongoing investigation relating to legal requirements of the requesting State*

The nature of the necessary information for this specific area of high technicality will depend on national requirements.

- ***Where applicable:***

- *Information on the time-frame*

g. Special investigation techniques

- *Cross-border observations*
- *Controlled delivery*

In the event that this is a “controlled delivery” in the traditional sense, of a drug deal:

1. please note that if delivery is to a destination other than the requesting State, in this case more than one request is likely to be necessary;
2. flight details (if it is not a direct flight, then details of both flights);
3. identification of the courier (whether it be a police informant or undercover police officer) accompanying the drugs;
4. materials requested: chain of evidence report for the drugs.

In the event this is a "controlled delivery" of a drug seized abroad, the requesting State may:

1. ask if the country requires the drug to be accompanied by a police officer, or if it can be sent directly? If so, details of the police officer handling the drugs;
2. request the chain of custody report for the drugs;
3. request the laboratory report of the drug sample of the drugs (once seized).

- *Covert investigations*
- *Joint investigation teams*
- *Description of the crime(s) and connection with the requested country*
- *Purpose of establishing JIT*
- *Who could participate in the JIT (names and official positions)*
- *Proposal for a coordination meeting (place and date)*
- *NB: agreement for a JIT will be drafter after all parties agreed on the establishing of the JIT. The a*

3. Specific modalities of execution

- *Where applicable:*

- *Necessary formalities and procedures under the law of the requesting State and guidance*

It should be specifically stated in the form if a requesting State wishes that the requested State follows specific procedures and requirements to execute the request. In addition, in accordance with the 2nd Additional Protocol, the wording of applicable provisions should be included as well as guidance on their

application which may be restricted if such procedures and requirements are contrary to the fundamental principles of the legal system of the requested State.

- *Presence of official and interested persons from the requesting State and name and title of such persons*
-

A requesting State should indicate whether the presence of officials and interested persons is required and indicate the reasons and purpose. It should also provide contact details of such persons and their legal position in the case. Further details may be given at a later stage.

- *Request to conduct the hearing/questioning by officials*
 - *Timeframe for execution*
-

It may be useful to add specific deadlines which are set by the requesting State to ensure that the requested State will respond adequately to its needs, in particular when the request is urgent. Furthermore, it should specify if any dates should be avoided (e.g. there is no flight, or a prosecutor has another duties etc.) when the requested State considers dates for execution of a request.

- *Co-ordination between relevant and competent authorities (contact persons)*
-

It is also recommended to send the particular request informally in order to have it checked by representatives of the requested State before it is sent officially.

- *Costs*
-

Article 20 of the MLA Convention solely allows the refunding of the expenses which were necessary for the attendance of experts in the territory of the requested Party or for the transfer of a person in custody. Details of such expenses should be included in the request form and should be as precise as possible.

- *Language to be used*
-

Article 16 of the MLA Convention and Article 15 of the 2nd Additional Protocol, as well as bilateral treaties regulate issues related to the translation of the request and its annexed documents, including procedural and judicial documents to be served. It is always advisable to check also bilateral agreements before a translation of a request is made. Where translation is required and/or where the services of an interpreter will or will not be arranged by the requesting authority, all relevant details should be included, in particular, the language required. See also the country information on the PC-OC website: http://www.coe.int/t/dghl/standardsetting/pc-oc/Country_information2_en.asp

- *Indication of requirement to keep confidential the fact and substance of the request*
 - *Indication of rules to ensure data protection*
-

To obtain the consent of the requested State, the requesting State should specify if the transferred data will be used for any other purposes than those authorised by Article 26.1) on the basis of the principle of data protection which includes the purpose of proceedings, or for preventing an immediate or serious threat to public security. It is important to describe as precisely as possible the purpose and reasons of this request in part 3.

4. Modalities for the transmission of evidence

- *Indication whether originals are needed*
-

The evidence concerned here relates to property, copies or records or documents requested for pending criminal proceedings or to execute letters rogatory. If originals are needed, it should be expressly stated in the request form in accordance with Article 3 and Article 6 of the MLA Convention.

- *Preferred means of transmission to be used by the requested State (courier, liaison officer, diplomatic representative, etc.)*
-

B. Service of judicial documents

1. Information common to all requests of service

As mentioned in the explanatory report of the European Convention on MLA, it should be specified if a personal appearance is requested or only recommended. Furthermore, it is essential to give any accurate and exact information on the time and place of the hearing. As seen in practice in various States, it may be useful to provide an alternative date for the hearing.

Request for service of documents, in particular summons to appear as a witness or expert, should respect the wording of Article 8 MLA, which provides for guarantees for the immunity of these persons. Unfortunately practice shows, that judicial authorities frequently use national forms which contain information on sanctions for non-appearance.

Various other documents may be served for witnesses, victims or prosecuted persons. Therefore it is important to specify clearly in the request the nature of the document to be served.

It should be noted that this form does not apply for requests of service by post. Article 16 of the 2nd Additional Protocol provides sufficient guidance concerning the conditions set for this specific service.

- *Type of service required*
 - *Specification of documents to be served*
-

.....
- *Where applicable*

- *Information on witness protection*

- *Safe passage issues*

- *Requirement for confirmation of service*

- *Requirement if service fails*

- *Approval of assumption of costs*

2. Information required for summons to appear

The authority which issued the summons should be clearly named and the summons should be duly signed by an official of the competent authority. For the purpose of establishing the authenticity of the request, it is important to identify precisely the competent judge or prosecutor or any other competent official, as well as the seal of a particular office.

For summons to appear, the approximate allowances payable and the travelling and subsistence expenses refundable should be included. Furthermore, the requirement to notify the person concerned of any particular rights should be clearly described.

Request for service of documents, in particular summons to appear as a witness or expert, should respect the wording of Article 8 MLA, which provides for guarantees for the immunity of these persons. Unfortunately practice shows, that judicial authorities frequently use national forms which contain information on sanctions for non-appearance.

- *Date of appearance*

- *Time and place of hearing*

- *Where applicable*

- *Alternative date of appearance, time and place of hearing*

- *Approximate allowances payable and the travelling and subsistence expenses refundable*

C. Temporary transfer of a person in custody

Before, and sometimes after, the request is sent to the requested State, the different competent authorities generally discuss issues regarding temporary transfer. The application of a temporary transfer requires a high level of co-ordination between police, prison and judicial authorities. In many cases, decisions on temporary transfer are made by judicial authorities and modalities are agreed between police authorities. Some countries, however, expect information on the chosen types of escort, as well as

of secured accommodation or even details of proposed arrangements for collecting and returning the prisoner. Differences between countries on their levels of expected information may create practical difficulties. It is recommended, therefore, to establish minimum standards concerning information which should apply to all cases.

- *Type of transfer: to the requesting or the requested State*

- *Proposed dates for transfer and return*

It is important to specify the place of transfer and the period of time during which the person concerned should be present in the requesting State which should take into account the time needed for the transfer of the persons depending on his or her geographical situation.

The requesting State should also expressly guarantee that the person concerned will be kept in custody in the requesting state while specifying the date of his or her return.

- *Place of transfer*

- *Purpose of transfer (e.g. witness, confrontation)*

.....

- ***Where applicable***

- *Confirmation that the person concerned will remain in custody*

- *Statement of consent of the person concerned*

- *Indication whether transit is required*

- *Contact person(s) responsible for the transfer*

D. Extracts from judicial records

- *Identification of the person whose judicial record is requested*

This part concerns solely communications of extracts from and information related to judicial records in accordance with Article 13 MLA. It does not cover measures for the exchange of information from judicial records described in Article 22 MLA as amended by the Additional Protocol. Therefore, it should be clearly stated whether the request concerns a criminal (para. 1) or non-criminal case (para. 2) while describing the type of information required.

.....

- ***Where applicable***

- *Indication in case the request is made in a non-criminal context*

6. Final information

- *Any other information which the requesting State considers important*

- *Contact person (name, contact details, language)*

- *List of enclosures*

- *Seal, name, function of the official, date and signature*
