

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 22/10/2015
[PC-OC/DOCS2015/PC-OC(2015)09 rev.2 Draft Guidelines...]
<http://www.coe.int/tcj>

PC-OC (2015)09 rev.2
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)

Finalised by Ms Yael Bitton (Israel), Ms Joana Ferreira, Ms Imbi Markus (Estonia)
and Ms Marieke van der Burg (Netherlands)

INTRODUCTION

Mutual legal assistance (MLA) consists in assisting other jurisdictions (that are limited by national borders) in making justice. MLA is usually established on a legal basis (international instruments), but goodwill in co-operating and assisting is crucial as well. Hence, two main guiding principles are to be taken into 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 requested jurisdiction might reach the same result with a *subpoena duces tecum*, i.e. a court summons ordering a person to produce in court certain designated documents or evidence).

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

When seeking assistance from another jurisdiction, the first step to take is to identify the appropriate and relevant convention. 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 is based on a combination of different conventions, for example, the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), the Convention on Cybercrime (ETS No.185) the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211), the Council of Europe Convention on the Manipulation of Sports Competitions (CETS No. 215). For instance, when obtaining digital information or evidence, including the search of websites and freezing of electronic data or obtaining information on the user of an IP address or on traffic data, reference to the Cybercrime Convention is crucial, although MLA should not be excluded. In the case of an investigation concerning banks, finances etc. recourse to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) or to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) in addition to the European Convention on Mutual Assistance in Criminal Matters might be advisable (see Mutual Legal Assistance in COE treaties [PC-OC \(2015\)03](#)).
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, for example, which bodies are regarded as the competent judicial authorities.

4. It is also very important to review the signatures and ratifications of the relevant conventions (some conventions do not enter into force before a certain number of States have 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 useful.
6. On the PC-OC website you will find essential country information on the procedure applicable in each State Party: [Country information](#)
7. Last but not least: knowledge of the ECHR case law is also crucial: [Case law of the European Court of Human Rights](#).
8. For general information on the law of the requested State please note the following convention: the European Convention on Information on Foreign Law (ETS No. 62) and its Additional Protocol (ETS No. 97) 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.
9. For further information it might be useful to contact your national PC-OC representative. Sometimes preliminary contact with liaison magistrates (where they exist) is crucial in order to formulate a request in a proper manner and to have it successfully executed. This can avoid a scenario where evidence is obtained abroad in a manner which may render it inadmissible in the requesting State. 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. Please note that some States might be bound to obligations arising from bilateral or multilateral instruments or acts having the same effect (for example, instruments from the European Union or the Community of Independent States).
11. Keeping in mind the aforementioned need to obtain evidence in a manner that is admissible at trial, it may sometimes be more effective to go through police to 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).
12. An increasing number of States have delays in replying to MLA requests because, *inter alia*, they are overburdened with requests. This is a consequence of the increasingly transnational character of crime. In light of the above, it may be useful for States to bear in mind proportionality. Proportionality requires consideration by the requesting or issuing state, primarily by its judicial authorities, of the balance between the purpose and need of the measure requested and the seriousness of the offence, the length of the penalty and the degree to which human rights of the concerned person are affected.
13. Due to the very specific nature of the investigative measures requested under Articles 17 to 20 of the Second Additional Protocol of the Convention on Mutual Assistance in Criminal Matters, it is crucial to look at reservations and declarations, in particular in order to check to which competent authority the request is to be addressed.
14. Finally, the PC-OC website contains "useful links" to other websites of relevance when preparing a request for MLA: www.coe.int/tcj

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 the competent authorities within the requested State 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 a name should be indicated in the title.

b. Reference numbers (Procedure n°)

This information should be included at each stage. It will ensure an 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 level of urgency and/or confidentiality

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. A justification of the urgency is to be mentioned under part 3. Where a very high level of confidentiality is requested due to ongoing investigations, this should also be indicated. Further explanation or specific requirements on confidentiality may be indicated under part 5Aiii "Specific modalities of execution".

1. REQUESTING AUTHORITY

- *The official title of the requesting authority*
-

- *Address and contact details*
-

It is important for the requesting state to indicate a contact person to whom the requested state may seek clarification or further information. For this reason, the requesting authority should provide direct contact details including e-mail, fax, and/or phone

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 can be found on the website <http://www.ejn-crimjust.europa.eu/ejn/> and may be also useful for the application of the 2nd Additional Protocol in order 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*
-

It is useful to point out, as early as possible in the MLA request, on which legal basis (general or specific) it is done. It may take the following form: “Referring to Article of (f. ex.) 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. This indication should contribute to the proper execution of the request and avoid misunderstandings by the requested authority.

It is important to note that the general rule mentioned above is limited by 2 exceptions which were taken into account to justify the inclusion of this information on a regular basis:

- When the request is based on a CoE legal instrument 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).

- Type of Offence

This part of the form should clearly indicate a minimal description of 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) because the state/denomination of an offence may be different and/or an offence may be different and/or the provisions are not always congruent.

Furthermore, a statement of facts is necessary if the requirement of double criminality has to be reviewed in the specific case, for instance if the request aims at coercive measures.

- Description of the stage of criminal proceedings

It is also important to indicate the stage of proceedings. 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, [bearing in mind Article 1 paragraph 3 of the Second Protocol to the MLA Convention.]

- Where applicable:

- Justification of urgency

A motivation for the urgency of the request 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;
- There is a need for co-ordination with other requests and /or requests to various countries / prior consultations.

- *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 (taking into account a reasonable term for the execution).

- *Information on previous involvement of law enforcement officials and their contact details*
 - *Information on previous communications/ MLA requests (including reference numbers)*
-

It may be important to mention any available information on previous police co-operation within the case, communications with EUROJUST, communications with the European Judicial Network's contact points or PC-OC contact points. But also, to mention whether prior MLA requests have been sent (including reference numbers).

4. PERSONS CONCERNED

- *Information on a person*
-

It is important to indicate clearly and precisely any personal information on the person concerned, primarily the suspect (if available):

- 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.

- *Information on a legal person*
-

Where a request concerns a legal person, the following relevant information should be included (if available):

- 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 a place, including headquarters and different branches should also be provided;
- Contact details of the persons authorised to act on behalf of the company: even if it may be found in a commercial register by a requested authority, it is still helpful to indicate such details in the request.

Please note that such persons may change over time.

5. MEASURES REQUESTED

A. Letters rogatory

i. 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. It is also important for practical reasons to restrict the length of the request forms in particular where requests must 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, containing at least the time, place and manner of the commission of the offence as well as the suspected author.

- 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 a 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.

- Clear description of the links between the offence and the person and between the offence and the evidence/measures/criminal assets sought in the requested State.
-

In addition, it is crucial to describe clearly and precisely the facts of the case in connection with the person concerned and the evidence/ measure/ criminal assets requested. It should be explained how the evidence, measures or criminal assets sought are linked to the proceedings conducted in the requesting state.

- *Where applicable :*

- Damage caused by the offence
-

- Information on victims
-

Indication of victim(s) and request to inform the victim(s) on the possibility of presenting a request for compensation and the time limits to do so.

- Where necessary, provisions on lapse of time
-

For “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 action is important so as to draw attention on the need for a speedy execution of the request.

- Any other additional information which may assist the requested authority in carrying out the request
-

ii. Types of measures

This part of the form contains specific measures that could be requested by means of mutual assistance in criminal matters.

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

- **a1. 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 the 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 (for instance witness or suspect). Such a 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 as long as they are not contrary to its own fundamental principles. However, the requested State may accept to execute the request without it being based on Article 8 of the 2nd Additional Protocol.

In the case of witnesses it is important to indicate if they should be heard under oath and what would be the legal consequences should they remain silent or not speak the truth.

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 European Convention on Mutual Assistance in Criminal Matters (MLA) or, on the basis of Article 8 of the 2nd Additional Protocol. If a requesting State wishes to hear a person under oath, it should be clearly indicated on the form itself. Where such a measure is not recognised and common in the requested State but is not contrary to the fundamental principles of the requested State (in particular if Article 3, paragraph 2 of the MLA is applied) a requesting State should indicate the procedure to follow. It is also advisable/ to provide the wording of the oath.

- *Indication of questions to be asked*

It is clear that this overview of (possible) questions should not be exhaustive and restrictive but only indicative. A person heard may provide information, which necessitates 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, a reference to relevant documents or arrangements should be included in the request.

a2.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 conducting the hearing/questioning*
-
- *Details concerning practical arrangements (technical information on available means, proposals concerning the payment of costs, contact details for technical contact person, etc.)*
-

- Technical information on the means available for a hearing by video conference (such information may also be provided at a later stage); a proposed date and time for a trial connection (it is advisable to check whether the connection works in advance); the use of forms if available; an indication of the working language during the trial connection;
- Proposals concerning the payment of costs of hearing by video conference. Referring to Article 20, paragraph 2, as introduced by the Article 5 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182), the requesting authority usually refunds the costs, unless it is agreed otherwise.

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

If needed, the notification of rights and obligations of a person to be heard, for example the right not to testify (according to the national law of the requesting state) and the legal consequences when these rights and obligations are not observed.

- *Dates/time proposed*
-

Clarification on the exact time is particularly needed when there is a time (zone) difference (GMT/CET/UTC) between the requesting and the requested state.

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

- *Indication of the necessity for 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*
-
- *Indication of questions to be asked*
-

In some cases it may be useful to indicate questions in advance. The competent authority of a requested State will be mainly active at the beginning of the hearing, but should also check 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.

- **a3 Hearing/questioning by telephone conference**

- *Indication of the name of the 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*
-

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.

b. Obtaining evidence

- **b1. General measures**

It should be underlined that search and seizure are usually subject to stricter conditions than other mutual assistance measures as they are more invasive procedures, and as such have a direct impact on individual fundamental rights. Therefore, many countries may require additional materials, such as a specific authorisation/judicial order/prosecutor's affidavit. To verify this, a requesting state is advised to check the country information available on the website of the PC-OC before sending the MLA request.

- *Identification of items requested*
-

Please mention the location of the items to be seized, where possible.

- **Search and seizure**

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

Searches refer to various situations including body searches, house searches, car searches or searches of other premises. As each specific situation may require the application of various measures/orders to execute the request in the requested State, it is essential to clearly specify in the form which type of search is being requested and for which purpose (for either evidence or seizure/ confiscation).

- *As far as possible, precise identification of the person or premises to be searched (location, etc.)*
-

In order to facilitate the task of the requested State to perform a search (and to obtain an order/authorisation from a competent authority), it is recommended that all available information should be provided to help to identify the person to be searched. Similarly, for the search of houses or other premises an indication of the exact address, if known, is extremely helpful as well as the name of the owner of such a premises (a company may have rented certain premises) and information whether the

premise is used for housing, business or for other purposes. For car searches, relevant information could concern type, colour, number plate, registered number, etc.

- *Identification of documents, records, data,*
-

The items to be seized should be clearly and, to the greatest extent possible, precisely described on the form. If a request is too general, it may prevent the requested authority from taking any action, due to restrictions imposed by its national law. If the seizure concerns computer data, it is important to indicate the type of data (e.g. accountancy documents of firm X for a period from year A to year B). It is also important to note that if the offence is computer-related (the offences established in accordance with Articles 2 to 11 of the Convention, other criminal offences committed by means of a computer system or any other offense if the collection of evidence in electronic form is required), the Convention on Cybercrime (ETS No. 185) may also 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:**

- *Give details on the links between the person, the foreign proceedings and the requested measures e.g. the place to be searched*
-
- *Copy of the warrant order issued by requesting authorities*
-

- **b2. Specific measures**

b2.1. Electronic data

Information for specific measures provided by the Convention on Cybercrime

The Convention on Cybercrime (Budapest 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 are 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, or for obtaining a forensic image, except concerning the following information:

- For stage 1 and 2 requests: a clear description which is sufficient 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 the headquarters), and its custodian. The simplest scenario is when data can be found on a

hard disk or any other 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 an 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 has 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.

Finally mutual legal assistance may be provided on the basis of the 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 the computer system, etc.)*
-

Article 16.1 of the Budapest Convention allows “expeditious preservation of specified computer data”. Thus, the data to be preserved have to be specified. Besides, the immateriality of this type of evidence requires a very concrete identification of the sought data.

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

Digital or electronic evidence is particularly fragile, in the sense of volatile – it can very easily be deleted or altered. However, this is not the case in all situations. In many cases, the data are secure and there is no risk that they will be manipulated.

Expedited preservation is an urgent measure, requiring the requested State to act very expeditiously. There is thus a particular need to justify the urgency.

- *Indication that an MLA request will follow*
-

Preservation of data is a provisional measure that does not provide immediately and directly any type of evidence to the investigative authorities of the requesting State: the sought information is just “frozen” until a proper and formal MLA request is sent. In the absence of this MLA request, on one hand, the requesting State cannot obtain the data; on the other, the requested State does not have the possibility to know if the preservation is still needed or not.

Thus, giving an indication that an MLA request will follow is a kind of compromise for the requesting State.

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

- *Specific purpose*

As said before, the immateriality of computer data requires the very concrete identification of the sought data. This is the only way to avoid, on one hand, the wrong data being seized; on the other, undue/unnecessary data, violating privacy and other individual rights, being seized.

- *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*

- *To the greatest extent possible, precise identification of the person, or premises to be searched while giving details on the links between the person, data and the place to be searched*

- *Contact point*

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

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

As mentioned above, the expedited preservation of data is a provisional measure that will end once a proper and formal MLA request is sent. Most of the time, the sought information wouldn't be available following an MLA request, unless it was previously preserved. Thus, indicating any previous request for the preservation of data is crucial. At the same time, apart from the MLA request that requires the seizure of data, the requesting State does not have any other information allowing that State to know if the preservation is still needed or not.

b2.2 Seizure and/or confiscation of criminal assets

Information for specific (provisional) 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 (Article 13 of ETS No.141), but mostly in cases where criminal proceedings have been instituted, but not finalised (Articles 11 and 12, provisional measures). The freezing of assets as well as seizure are frequently used for this purpose, by means of mutual assistance in criminal matters. In cases of seizure in view of (future) confiscation, the requesting State is encouraged to indicate the current state of the proceedings, as well as a general timeline of upcoming proceedings, including the expected timing of the request for confiscation. As a main rule, for many States, it may be possible to submit a request by mutual legal assistance for provisional measures (seizure); however, there is a broader range of practice regarding confiscation: for some States, in order to realize the actual confiscation, a separate request for transfer of the execution of a judgment must be sent. For other States, it is also possible to proceed with confiscation within the context of mutual legal assistance in criminal matters. It is highly advisable to

always first check the country information available on the PC-OC website and to contact the relevant persons in the requested State before formally submitting a request.

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 that 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 assets are located in the requested State. As the degree of proof required ranges between countries, requesting states should provide clarifications regarding the evidentiary threshold required.

To ensure the expected execution of the request, the requesting authority should describe precisely any particular procedure the requesting Party wishes to be followed. Practice shows that many States have different legal mechanisms regarding confiscation, ranging from a value-based or object based system of confiscation, to administrative or civil confiscation, containing *in-rem* procedures, or even non-conviction based confiscation. Explanation on the specific legal requirements and procedures may help for the requested State to execute the request.

Furthermore, where appropriate, it is important to indicate the maximum amount for which seizure 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 the 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 the notification of judicial documents which are of a less important nature.

- *Reasons to believe that assets are located in the requested State*

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

Please provide information on the legal system (seizure/ confiscation procedure) of the requesting state

- *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 the seizure/confiscation order and statement of grounds for order, and where applicable, attestation that confiscation is enforceable,*
-

The Convention does not formally require such a copy in the phase of seizure (provisional measure). However for confiscation this copy is always required (see Article 13, paragraph 1)

- *Information relating to bank accounts in the requested State*
-

.....

- ***Where applicable:***

- *Where confiscation takes the form of a requirement to pay a sum of money corresponding to the value of the assets give information on the maximum value of the assets to be seized*
-

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

If the requesting country is aware of third parties or potential third parties, residing in the jurisdiction of the requested State, it is useful to provide contact details for these third parties in order to facilitate service.

- *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)*
-
- *Restitution: indication of items/articles obtained by criminal means which should be at the disposal of the requesting State to be returned to their rightful owners*
-

c. Obtaining information from financial institutions

The information to be requested 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*
-

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.

d. Obtaining telephone/IP data

Data protection requirements, such as laid down in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), and the fact that service providers have a limited period of storage of data, should be taken into account.

- ***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*

This information is important taking into account that service providers have a limited period of storage of data.

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

- *Indication of the IP address, which user's identification is sought (when the IP Address is known), of the time-stamp (day and time of the use), and of the name of the ISP*
 - *- Indication of the name and address of the suspect (when he/she is known, but the concrete user's IP Address is not known) and, if known, the date and time of use and the name of the ISP*
-

If the purpose of the MLA request is to obtain the identification of the user of an IP address (when the IP address is known), it is essential to indicate the date and time of the use (time-stamp) and the name of the Internet Service Provider owning that IP Address.

When the IP address is unknown and the identification of the concrete IP used is requested, the name and address of the suspect and also the date and time of use of the sought IP must be indicated.

- ***Where applicable:***

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

The period will specify, giving as much detail as possible, the date and time of use (including seconds, if available) as well as the time zone.

e. Conducting of expertise

- *Information on the expertise sought*
-

Proposals concerning payment of costs / transport difficulties or limitations, for instance evidence, weapons, explosive devices or dangerous chemical substances.

The nature of the necessary information for this specific area of high technicality will depend on national requirements. The expert should be informed that he/she could be summoned to testify at trial.

- ***Where applicable:***

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

f. Interception of communications

- *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*
 - *Information on the period for which interception of telecommunication is requested*
-

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 (See Appendix 1 to the model request form)*
 - *Controlled delivery (Appendix 2 to the model request form)*
 - *Covert investigations (Appendix 3 to the model request form)*
 - *Joint investigation teams (Appendix 4 to the model request form)*
-

iii Specific modalities of execution

.....

- ***Where applicable:***

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

It should be specifically stated on 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 officials and other relevant persons involved from the requesting State and the name and title of such persons*
-

A requesting State should indicate whether the presence of officials and other relevant parties (experts, witness/ victim) 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*
-

- *Time frame for execution*
-

It may be useful to add specific (reasonable) 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 be specified if any dates should be avoided (e.g. there is no flight, or a prosecutor has other duties, etc.) when the requested State considers dates for the execution of a request.

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

It is also recommended to have prior consultations with the requested State and to send a draft or informal copy in order to have it checked by representatives of the requested State before it is sent officially.

- *Costs*
-

Article 20 of the European Convention on Mutual Assistance in Criminal Matters 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. The Second Additional Protocol extended this provision by a 2nd paragraph stipulating that costs of phone or video conferences, costs relating to interpreters and witnesses and their travel expenses are also to be borne by the requesting authority, unless agreed otherwise. 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 also to check 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 the existence and substance of the request confidential*
-

As a main rule, the content of requests for legal assistance is always confidential. However, in certain instances, it may be necessary for the requesting State to emphasize the requirement to keep the request

confidential for instance in order not to jeopardize the investigation, since this may lead to a “closed session” treatment in the requested state (i.e. at the court executing 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.

iv. .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 or certified documents 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.)*
-
- *Advance copies*
-

When the requesting country was present during the execution of the request, it may request to receive copies of relevant reports in advance, before this is sent via the formal channels.

B. Service of judicial documents

i. 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. Furthermore, it is essential to give any accurate and exact information on the time and place of the hearing. It may be useful to provide an alternative date for the hearing.

Various other documents may be served for witnesses, victims or suspects. 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*

ii. 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 of the MLA Convention, which provides for guarantees for the immunity of these persons. Therefore it is not advisable to use standard national forms.

- *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*

- *Visa requirements*

- When the person to be summoned needs a visa to be able to enter the country to give a testimony, the requesting state should mention this, or prepare arrangements for this.

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 type 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. The use of alternatives, such as hearing by video conference, could also be considered.

- *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 manner 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)*
-

- *Statement of consent of the person concerned*
-

.....

- ***Where applicable***

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

- *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 of the MLA Convention. It does not cover measures for the exchange of information from judicial records described in Article 22 of the MLA Convention as amended by the

Additional Protocol. Therefore, it should be clearly stated whether the request concerns a criminal (paragraph 1) or non-criminal case (paragraph 2) while describing the type of information required.

- ***Where applicable***

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

Article 13, paragraph 2 enables the transmission of information on judicial records for cases other than criminal matters, provided that this is possible according to the law, regulations and practice of the requested State.

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 of enclosures*
-