Funded
by the European Union

EUROPEAN UNION

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

MUTUAL LEGAL ASSISTANCE MANUAL

PROJECT ON CRIMINAL ASSETS RECOVERY IN SERBIA (CAR SERBIA)

Funded
by the European Union

EUROPEAN UNION

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

Publisher
Council of Europe
Office in Belgrade
Španskih boraca 3, 11070 Belgrade
www.coe.org.rs

This publication has been prepared within the framework of the "Criminal Asset Recovery Project in Serbia" (CAR Serbia), funded by the European Union and implemented by the Council of Europe. Special thanks to the Council of Europe experts from Sambei, Bridger & Polaine Ltd. and to the experts from Serbian state institutions who significantly contributed to its final outcome: Republican Prosecutors Office (Ms Gordana Janićijević and Ms Zorica Stojšić), the Financial Investigation Unit (Mr Nebojša Tramošljika and Mr Vlatko Božović), Belgrade Appellate Court (Judge Radmila Dragičević-Dičić), Special Department of the Belgrade High Court (Judge Aleksandar Vujičić) and to the Directorate for the Management of Seized and Confiscated Assets (Mr Vladimir Ćeklić).

Circulation
50 copies

ISBN 978-86-84437-57-2

Preparation and printing
Dosije studio, Belgrade

MUTUAL LEGAL ASSISTANCE MANUAL

Belgrade
March 2013

For more information on the subject of the publication, please contact:
Economic Crime Cooperation Unit
Action Against Crime Department
DGI – Directorate General Human Rights and Rule of Law
Council of Europe
Email: contact.econcrime@coe.int
Internet: www.coe.int/economicrime

TABLE OF CONTENTS

Overview 7

Mutual Legal (Judicial) Assistance and Administrative (Informal) Assistance: General Principles and Application 9

MLA and the International Framework 47

Using MLA and Administrative Assistance to Trace and Recover Assets 70

Should MLA be Sought or Should Proceedings be Brought in Another Jurisdiction? 84

Annex 1: Judicial and Law Enforcement Networks 87

Annex 2: Useful Web Links 99

Annex 3: Proactive and Covert Investigations: ECHR 101

Annex 4: Egmont Group: Best Practices for the Exchange of Information Between Financial Intelligence Units 110

OVERVIEW

General

In all states, organised crime poses a major threat both at the economic and social levels. In addition to the efforts to address crime within individual states there is an ever increasing need to be able to combat criminal activity that extends beyond national borders. As national law enforcement agencies continue to succeed against those involved with organised crime, practical experience has shown that the same criminals extend their operations beyond national boundaries where they believe the chances of detection are much reduced. This is, perhaps, particularly the case of those who seek to hide their monetary criminal profits.

National boundaries, of course, are not a barrier to serious organised criminals and they should not be a barrier to law enforcement. States and agencies working together with other states to reduce these barriers will not be welcomed by serious organised criminals, but will clearly be welcomed by governments, law enforcement agencies and the public.

Organised crime is complex. Whilst it is convenient to identify and investigate crimes by sector, to do so exclusively oversimplifies the position .Experience has shown that most criminal sectors are tied together by themes such as money laundering and firearms, and those committing the crimes are sufficiently flexible to change their activity according to environment opportunities and the risks they perceive. It is important that the law enforcement effort is equally flexible.

Economic/financial crime, corruption and the activities of organised criminal syndicates are, increasingly, transnational offences; as such, investigations into them regularly require prosecutors and judicial police to gather evidence across borders.

Equally, in a world of financial networks that may straddle many states, the mounting of a purely domestic financial crime or corruption case will very often demand evidence from foreign jurisdictions.

Against that background, the framework and procedures within which both formal assistance (referred to as „mutual legal assistance") and administrative cooperation (sometimes referred to as „mutual assistance" or „informal assistance") are obtained are often bewildering and very often depend on the attitude and opinions of those 'on the ground' to whom the request is made. With that in mind, what are the real and practical difficulties and what are the solutions?

The major challenges are increasingly international mobility of offenders, the use by them of advanced technology and international banking for the

commission of offences, and a framework of prosecutorial and law enforcement co-operation that is often slow, unwieldy and, in many regions, still lacking the networks of practitioners and officials necessary to facilitate the process.

Those using this manual should always have in mind that it is more necessary than ever for law enforcement and judicial authorities to co-operate and assist each other in an effective way if investigations, prosecutions and judicial proceedings are to run their true course.

Practitioners should take comfort from the fact that many states have enacted laws to enable them to provide assistance to foreign jurisdictions and, increasingly, have obligated themselves to do so in treaties (both multi– and bilateral) or agreements on mutual legal assistance in criminal matters. Such treaties or agreements usually list the kind of assistance to be provided, the requirements that need to be met for affording assistance, the obligations of the co-operating states, the rights of alleged offenders and the procedures to be followed for submitting and executing the relevant requests.

MUTUAL LEGAL ASSISTANCE (JUDICIAL) AND ADMINISTRATIVE (INFORMAL) ASSISTANCE

General Guidance

Definitions and Overview

Mutual legal assistance (MLA), sometimes known as 'judicial assistance' is the formal way in which states request and provide assistance in obtaining evidence located in one state to assist in criminal investigations or proceedings in another state. The state making the request is usually referred to as the 'requesting state', whilst the state to whom the request is made is the 'requested state'. Mutual legal assistance is designed for the gathering of evidence, not intelligence or other information.

A request for intelligence should be made through administrative assistance; that is to say, police to police or prosecutor to prosecutor. Administrative assistance is sometimes referred to as 'informal assistance', as it does not involve the issuing of the formal letter of request that forms the basis of a mutual legal assistance request.

Administrative assistance can, and should, also be used when making evidence-gathering requests to a state where no coercive power (e.g. a warrant or court order) is required to be exercised in order to obtain the evidence. Such an approach reduces the risk of delay and will be welcomed by most states. In this context, it is important to remember that, although administrative assistance is sometimes referred to as 'informal assistance', it does not mean that the form of the evidence obtained is informal or non-evidential; on the contrary, an evidence request complied with administratively/informally should present the evidence in the same form as if it was gathered in answer to a formal letter of request.

One further use of administrative assistance should also be noted at this stage: An administrative or informal approach should be the first step in any evidential request of complexity in any event, even where it is always the intention to issue a formal letter of request. By beginning on a police to police, or prosecutor to prosecutor basis, the requesting state will have the opportunity of discussing the form and the requirements of the letter with the requested state before the letter is finalised; that will better ensure that it addresses all matters that the requested state needs and that avenues of enquiry are narrowed down as much as possible in advance of the formal request. It will also help the authorities in both states to build networks and contacts.

Prosecutors and investigators sometimes have recourse to mutual legal assistance without exploring whether administrative, that is to say, investigator

to investigator/prosecutor to prosecutor mutual assistance would, in fact, meet their needs. It is often forgotten that the state receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously**. Prosecutors must thus ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.**

The extent to which states are willing to assist even with a formal request does, of course, vary greatly. In many cases, it will depend on a particular state's own domestic laws, on the nature of the relationship between it and the requesting state and, it has to be said, on the attitude and helpfulness of those officials to whom the request is made. **The importance of excellent working relationships being built up and maintained trans-nationally cannot be too greatly stressed.**

Examples of some types of administrative assistance

Although no definitive list can be made of the type of enquiries that may be dealt with informally, some general observations might be useful:

- If the enquiry is a routine one and does not require the state of whom the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.
- The obtaining of public records, such as land registry documents and papers relating to registration of companies, may often be obtained administratively. Such documents might even be available as open source material, so always check.
- Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.
- A witness statement may be taken from a voluntary witness through an administrative request, particularly in circumstances where that witness's evidence is likely to be non-contentious.
- The obtaining of lists of previous convictions and of basic subscriber details from communications and service providers that do not require a court order may also be dealt with in the same, informal way.

In looking at the above, however, variations from state to state must always be borne in mind.

Examples of enquiries where a formal MLA request is likely to be required

Equally, it is possible to draw up a guidance list of the sorts of request where a formal MLA letter will be required:

- Obtaining testimony from a non-voluntary witness,
- Seeking to interview a person as a suspect,

- Obtaining account information and documentary evidence from banks and financial institutions,
- Requests for search and seizure,
- Internet records and the contents of emails,
- The transfer of consenting persons into custody in order for testimony to be given.

Confusion can be avoided if prosecutors and investigators have proper regard to the parameters of the conventions and treaties that relate to mutual legal assistance. **It should be remembered that the regime of mutual legal assistance is one for the obtaining of evidence; thus, the obtaining of intelligence and the locating of suspects or fugitives should usually only be sought by way of administrative assistance to which, of course, agreement may or may not be forthcoming.**

Note: A mutual legal assistance request cannot be made for the arrest of a fugitive. Such a request is strictly the domain of extradition.

Administrative Assistance

It is sometimes forgotten just how many types of evidence and other material may be obtained informally. For example, some States have directories of telephone account holders available on the internet (although consideration will need to be given as to whether it is in a form that may be used evidentially).

It should be remembered that, although the means of making the request is administrative or informal, the material that can be sought is evidential and in admissible form. The word 'informal' is not being used in the present context in relation to the product itself, simply in relation to the way in which the request is made and the route by which it is communicated. The whole rationale is to avoid being subject to, and indeed adding to, the delays very often inherent in the formal MLA procedure. The message is: administrative assistance is capable of being the appropriate route not just for information or intelligence, but also for gathering many types of evidence in proper admissible form to use before a court.

Often a degree of lateral thinking is required. For instance, it might be quicker, cheaper and easier for the requesting state's investigators to arrange and pay for a voluntary witness to travel to the requesting state to make a witness statement, rather than the investigators themselves travelling to take the statement. Similarly, if the consent of the state in which the requesting state's embassy is situated is obtained, witness statements may be taken by investigators at that embassy.

Taking matters one stage further, many States have no objection to an investigator/prosecutor of the requesting State telephoning the witness, obtaining relevant information and sending an appropriately drafted statement by post

thereafter for signature and return. Of course, such a method may only be used as long as the witness is willing to assist the requesting authority and in circumstances where no objections arise from the authorities in the foreign State concerned (from whom prior permission must be sought).

Any consideration of administrative assistance should not overlook the use to which such assistance can be put in order to pave the way for a later, formal, request. It might, for instance, be possible to narrow down an enquiry in a formal letter of request by first seeking informal assistance. For example, if a statement is to be taken from an employee of a telephone company in a foreign company, administrative measures should be taken to identify the company in question, its address and any other details that will assist and expedite the formal process. It is sometimes overlooked, but should not be, that an expectation always exists among those working in the field of mutual legal assistance that as much preparation work as possible will be undertaken by informal means.

There are certain key considerations which a prosecutor must consider when deciding whether evidence is to be sought by informal/administrative means from abroad:

- It must be evidence that could be lawfully gathered under the requesting State's law, and there should be no reason to believe that it would be excluded in evidence when sought to be introduced at trial within the requesting State;
- It should be evidence that may be lawfully gathered under the laws of the requested State;
- The requested State should have no objection.

The potential difficultly in failing to heed these elements might be that (in States with an exclusionary principle in relation to evidence) such evidence will be excluded; in addition, but of no less importance, inappropriate actions by way of informal request may well irritate the authorities of the foreign State, who might therefore be less inclined to assist with any future request.

The golden rule must be: ensure that any administrative informal request is made and executed lawfully.

To make the administrative process most efficient:

- Maintain a good relationship i.e. execute lawfully.
- Avoid inappropriate informal request as this will irritate the authorities.
- Use informal assistance rather than legal assistance if possible as it is quicker
- Use informal assistance to pave the way for formal assistance, do all the background research so that a focused and targeted formal request of MLA can be made.

Building Networks

Obtaining material via the route of informal assistance is likely to be more easily achieved if positive and collaborative relationships have been built with key individuals in other states. Such relationships can be developed by investigators and prosecutors by arranging, with other states, joint training courses, mutual exchanges of personnel, seminars and regional information exchange sessions. A more formal approach is the agreeing of a memorandum of Understanding (MOU) between investigative agencies from two or more states.

Further progress can be made by appointing law enforcement liaison officers in other states. Such liaison officers would have to have access, in accordance with the laws of the host state, to all agencies within the state with relevant responsibilities.

Formal Requests (Mutual Legal Assistance)

In criminal matters, there is no universal instrument or treaty which governs the gathering of evidence abroad. However, the building blocks for formal requests are the conventions, schemes and treaties that states have signed and ratified. For instance, in the field of corruption investigations, the UN Convention against Corruption makes specific provision for mutual legal assistance and the encouraging of approach to international cooperation in criminal matters that would be as permissive as possible.

Before a formal request can be made and MLA provided, there must be a legal basis.

The legal bases include:

- Multilateral instruments, including general MLA conventions (e.g. the Council of Europe Convention) or penal instruments (e.g. the UN Convention against Corruption)
- Bilateral treaties
- Schemes or voluntary arrangements, such as the Harare Scheme for Commonwealth states
- National law, with or without a requirement for reciprocity
- Reciprocity/Comity

Prosecutors or judges making a formal request should always assert the international obligation of a requested state to assist where such an obligation exists by way of international instrument. Equally, the authority upon which the letter of request is written should also be spelt out.

Similarly the person making a request must take care to ensure that his or her own domestic law allows the request that is actually being made. For instance, a piece of domestic legislation might, in fact, disallow some requests or type of requests that many conventions, treaties or other international instru-

ments would appear to allow. For some states, the domestic legislation will have primacy. To make a request otherwise than in accordance with domestic law in such circumstances will be to be invite challenges, or arguments for the exclusion of evidence thereby obtained.

Prosecutors and prosecuting authorities are recommended to make early contact with a counterpart in the State to which the request is to be made. Notwithstanding the existence of a convention or treaty with a broad and permissive approach, the requested state may well have entered into reservations that limit the assistance that can in fact be given. For instance, some States have reserved the right to refuse judicial assistance when the offence is already the subject of a judicial investigation in the requested State. **The key principle must be this: regard should always be given to the fact that a requested State will have to comply with its own domestic law, both as regards whether assistance can be given at all and, if so, how that assistance is, in fact, given.**

The Form of the Letter of Request

The requesting authority should compile a letter that is a stand-alone document. It should provide the requested State with all the information needed to decide whether assistance should be given and to undertake the requested enquiries. Of course, depending upon the nature of those enquiries and the type of case, the requested State may be quite content for officers from the requesting State to travel across and to play a part in the investigation.

A problem that occurs in all jurisdictions in respect of both incoming and outgoing requests is that of timing and of delay. A request may takes weeks, sometimes months, and occasionally, and unfortunately, years to execute. As soon as sufficient grounds emerge to warrant the making of a request abroad and the need for such a request is clear, then the letter should be issued.

It is important that urgent requests be kept to a minimum and that everyone involved in the process should appreciate that an urgent request is urgent and unavoidably so**. If a request is urgent the letter should say so clearly (both in the heading and body of the letter) and in terms that explain the reasons why.**

Principal conditions to be satisfied within the Letter of Request

The material conditions to be satisfied within the letter of request may be summarised as follows:

- If the requested State requires an undertaking of reciprocity on the part of the requesting State, then this should be given. (In this respect, common-law countries are usually more restrictive than those with a civil code).
- A general prerequisite is the criminalisation of the act in both the requesting and requested State (the dual-criminality rule). This should therefore be addressed within the letter.

- The assistance must relate to criminal proceedings (whether at an investigative stage or after court proceedings have begun) in the strict and accepted sense; that is to say, an investigation or proceedings against the perpetrators of a criminal offence under ordinary law.
- Although it need not be specifically asserted within the letter, a prerequisite for formal assistance is the guarantee of a fair trial and respect for the fundamental rights laid down in the e.g. International Covenant on Civil and Political Rights (ICCPR) and regional human rights instruments (e.g. European Convention on Human Rights (ECHR), where applicable) within the legal system of the requesting State.
- Some requested States may require an assertion that the request does not relate to fiscal, political or military misdemeanours.
- The letter must contain a description of the facts which form the basis of the investigations/proceedings. Such a description must be as detailed as possible and should indicate in what way the evidence being sought is necessary.
- If the requesting and requested State is each a party to a relevant multilateral or bilateral agreement, then the international instrument concerned should be referred to and explicitly relied upon.

Although a request is executed by the Competent Judicial Authority of the requested State in accordance with its own laws and its own rules and procedures, very often it will be possible for the requesting authority to make an express request that the requested State apply the requesting State's rules of procedure.

If such a request is available to the requesting authority, advantage should be taken of it. The reason is obvious. A fundamental difficulty, often overlooked, is that different States have different ways of presenting evidence. The whole purpose of a request is to obtain useable, admissible evidence. That evidence must therefore be in a form appropriate for the requesting country, or as near as possible to that form as circumstances allow. It should be made clear, therefore, by the requesting state in what form, for instance, the testimony of a witness should be taken. The requested state cannot be expected to be familiar with the rules of evidence-gathering and evidence-adducing in the requesting State.

Further to the above, instruments may contain a provision to the effect that the method of execution specified in the request shall be followed to the extent that it is compatible with the laws and practices of the requested State. If in doubt, the requesting authority should provide examples of what is required to the requested authority.

Thus, when a letter is submitted to a state, its central authority (or relevant competent authority) must be satisfied, itself, that the preconditions stipulated in its national law have been met. It is very important to say that all the stated process-related actions requested by a foreign state must be undertaken in accordance with national legislation, and when forwarding material collected on

the basis of the request submitted by a foreign judicial authority, it is important to stress that such evidence has been collected pursuant to national legislation.

Requests made to a foreign state

Where national authorities extend a letter of request to a foreign authority, or submit a request without a formal letter, they will be obliged to approach such foreign authority expressing its utmost respect and reverence, to enter the file number of their case, elaborate and describe in detail all the facts, state the legal qualification of the crime or event for which international legal assistance is sought, submit relevant excerpts from the law pertaining to that particular crime, give all information on the person about whom information is sought, elaborate on the reasons why it is important to undertake the said action in the procedure before the national authorities, offer guarantees that the information received from the requested party will be used for the purpose of conducting a procedure for which the collection of information or investigative activities are sought, submit, together with the letter of request, means of ascertaining that the accused is the same person on the photographs as well as the citizenship certificate.

It is necessary to give a very detailed description of reasons and grounds for reasonable doubt, in order to avoid the return of the letter of request as incomplete. In addition, the important point is that prior to submitting the letter, it should be ascertained whether it would be possible to obtain the necessary information in another way (for example, by searching the Internet for the purpose of finding the registration number of a particular company, by calling certain contact points in bilateral cooperation under the Memorandum of Understanding for the purpose of precisely defining the manner in which the letter should be submitted, how the exchange of information on the legislation is to proceed, what are the provisions referring to the statute of limitations, and whether that particular offence constitutes a crime in the requested party, what is the punishment prescribed for such crime and the notification that the letter will be forwarded).

In the conclusion of the letter of request, so as to confirm the reciprocity, national state authorities should offer assistance to the foreign authority in the future and list all their contact information such as telephone number and e-mail address in order to facilitate the communication between the judicial authorities.

Particular Problems Experienced when Mutual Legal Assistance is sought in Economic Crime, Corruption and Organised Crime Cases

Influential Target

If an investigation involves an influential politician or business figure in the requested State, or if a powerful suspect in the requesting State has allies in the requested State, the assistance sought may never be provided. The requested

authority may, for instance, cite "national interest" or immunities/jurisdictional privilege enjoyed by certain sections of the community (e.g. ministers of the government or judges).

This challenge is not an easy one to overcome. However, some practical steps can be taken. First, as much information and detail should be obtained as to who in the requested State may be trusted, and as to what are the most accurate sources of information. It might be that embassies in the requested State will be in a position to answer this, but the requesting State's FIU might also be able to assist. Second, the requesting authority must get to know the requested state itself in the widest sense, particularly its political and legal systems, whilst putting aside any prejudice or preconceptions. The same applies to the officials themselves who will be liaised with during the process. Third, the requesting state can seek assurances from the requested state. Although assurances are sometimes broken, there is always pressure on a state to ensure that guarantees are respected. Fourth, there can be a reminder given to the requested state that there is always a next time. That the requested state today may well be tomorrow's requester is always a powerful motivator; indeed, it is one of the unspoken driving forces in international co-operation.

Appeals

In some States, the person in respect of whom the request for mutual legal assistance is made is able to appeal against the sharing of evidence with the requesting authority. When such an appeal is available it may well cause lengthy delay. In those European States which have traditionally enjoyed favourable tax and banking conditions, for instance Liechtenstein and Switzerland, an appeal avenue is available in relation to the disclosure of information on financial position etc. In those countries, in addition, institutions such as banks may have similar rights of appeal.

Requests for Freezing and Confiscation

Requests for the freezing, confiscation and repatriation of proceeds of crime have traditionally caused particular difficulty. UNTOC made some inroads and UNCAC has addressed these issues in detail and has provided fresh obligations. However, it is still the case that no internationally binding legal instrument sets out a comprehensive mandatory regime for the repatriation of assets. [See the section, below, on confiscation requests]

Search and Seizure

Search and/or seizure generally can be problematic. Essentially, the authority making the request should be careful to provide as much information as possible about the location of the premises etc. **But it must be remembered that different jurisdictions set different thresholds.** Search and seizure is a powerful

weapon for investigators. **It must be assumed that the requested State will only be able to execute a request and search/seizure if it has been demonstrated by the request that reasonable grounds exist to suspect that an offence has been committed and that there is evidence on the premises or person concerned which goes to that offence. These "reasonable grounds" should be specifically set out within the letter therefore.**

Generally, it will not be enough simply to ask for search and seizure without explaining why it is believed the process might produce evidence. For a request within Europe, it is undeniably good practice to have written regard to the core principles of the ECHR, namely necessity, proportionality and legality. Interference with property and privacy in European States is now usually justifiable only if there are pressing social reasons such as the need to prosecute criminals for serious offences. Even if all these factors are addressed, it may well be that the searching of the person and taking of fingerprints, DNA or other samples will have less chance of success in some jurisdictions. It is, therefore, to liaise with the requested state on this point specifically before a request is issued.

Important additional information to include in a request for search and seizure of evidence

1. The full address or a precise description of any place to be searched.
2. Details of how the place to be searched is connected with the case or the suspected person.
3. Any information available which indicates that the material requested may be held on computer.
4. Full details of the specific material or type of material to be seized (it will not usually be sufficient to simply state "evidence relevant to the investigation").
5. A full description of the criminal conduct concerned. (Requests for search and seizure are generally subject to a need for dual criminality).
6. An explanation why the material requested is considered both relevant and important evidence to the investigation or proceedings.
7. Why the evidence is thought to be on the particular premises or in the possession of the particular person concerned.
8. Why the material would not be produced to a court unless if the natural or legal person holding the material was ordered to do so by means of a witnesses order/summons. (This is to help ensure that the request is less likely to fail or be subsequently subject to subsequent legal challenge.)
9. Appropriate undertakings for the safekeeping and return of any seized evidence.
10. If it is anticipated that the searching officers may come across confidential material (i.e. medical records or similar that might have special

status in the requested state, or legally privileged material) during the course of a search.

11. Any other information which would be of operational use to the executing authority in connection with the execution of the request.

Investigations and Proceedings of Sensitivity

As financial crime and corruption becomes increasingly sophisticated and transnational, and as more and more cases involve a link with organised crime, it may well be that there are extremely sensitive aspects to an investigation. Nevertheless, it may be that that sensitive information will have to be included in a formal request for assistance in order to satisfy the requested authority. At the same time, the disclosure of prospective witnesses and other information that could be exploited by criminals, organised crime or those who are otherwise corrupt, needs to be weighed in the balance.

In reality, the system for obtaining mutual legal assistance, globally, is inherently insecure. The risk of unwanted disclosure will be greater or lesser depending on the identity of the requested state. When considering the matter, those making the request must have regard to duty of care issues which arise for them. **Sometimes, difficulties can be avoided by the issuing of a generalised letter which leaves out the most sensitive information but provides enough detail to allow the request to be executed. If the sensitive detail proves to be needed, the letter may be supplemented by a briefing given personally by, for instance, the requesting prosecutor to the receiving prosecutor. Exceptionally, consideration can be given to the issuing of a conditional request for mutual legal assistance; in other words, a request that is only to be executed by the requested authority if it can be executed without requiring sensitive information to be disclosed.**

A Letter of Request Checklist

If one was to put together a checklist for the requester on what must be included within the letter of request it would include the following:

- An assertion of authority by the author of the letter;
- Citation of relevant treaties and conventions;
- Assurances (i.e. as to reciprocity, dual criminality etc);
- Identification of defendant/suspect;
- Present position re the criminal investigation/proceedings;
- Charges/crimes under investigation/prosecution;
- Summary of facts and how those facts relate to the request being made;
- Enquiries to be made;
- Assistance required;
- Signature of the author of the letter.

Important First Steps in an Investigation (Reactive or Proactive) Likely to Require a Request to Another State

Key activities/approaches

The following guidance is intended to be of assistance once the prosecutor has opened a file on the investigation of economic or organised crime requiring the assistance of /cooperation with another state.

Commencement of an investigation: It is advised that an investigative strategy is written by the prosecutor. This will provide clarity as to the aims of the investigation, and what activity it is proposed to undertake to achieve its objectives, for example, to conduct surveillance on the targets, to undertake a financial investigation. It will also provide an audit trail for future reference.

Briefings/Debriefings: It is critical that all those engaged in an investigation are kept fully informed as to its progress and direction of travel. If prosecutors/investigators are not kept fully informed mistakes and duplication of effort are likely to occur. A record should be made of such briefings.

Completion of Decision Logs: Good practice has shown that key decisions in an investigation should be documented in a decision log. The log may show for example why it is considered necessary to conduct surveillance against an individual(s) and why there is a need to conduct a financial investigation.

The completion of such logs is considered to be important in all major investigations, particularly those that involve the deployment of covert techniques, such as the deployment of an undercover officer. The record will be able to show why it was considered necessary to deploy an undercover officer and the fact that issues such as proportionality have been considered. They are also helpful when engaged in a long term and protracted investigation where the rationale for a particular decision/course of action may be required in a subsequent court case, months or even years later.

Media Strategy: Increasingly in both developed and developing countries the media is becoming involved in the debate on crime. Where a particular investigation is likely to draw the interest of the media, such as a politician under investigation, it may be advantageous to liaise with the media sooner rather than later. Media that is left to speculate as to what is occurring on a particular investigation can be damaging to the investigation. Also a media that is not properly and accurately briefed can be manipulated by those who are seeking to undermine a particular investigation.

Particular Issues Relating to the Flow from Intelligence to Evidence

Careful consideration needs to be given as to what material is shared with the prosecutor at the time the request to open a criminal investigation is made. Any material that is not shared with the prosecutor at the outset could lead to difficulties in the future as far as disclosure of material is concerned.

The following is intended to offer some practical guidance as to some of the considerations that could be made both prior to and whilst an investigation of serious crime is taking place.

Before an Investigation commences:

- Are you satisfied that the information justifies the launch of an investigation?
- Is the information single strand intelligence or is it corroborated by other intelligence? Whilst it is accepted that an investigation could commence on the existence of single strand intelligence it is far better if other corroborative information can be identified.
- Are you satisfied that the information is genuine and is not rumour or mischief making by the source of the information.
- Where the intelligence is recorded and will it made readily available to the investigators and the prosecutor?
- Is there a need to develop the intelligence further, before considering the deployment of other resources?
- What and what type of resources will be required to conduct the investigation and are those resources (including financial considerations) readily available?
- What intelligence/information is shared with the prosecutor when you are requesting for an investigation to commence?
- Has any police activity taken place before the prosecutor agrees to open a file? If yes what information will be shared with them at the outset?
- From the evidential point of view, when you are building the case you need to be clear as to from what point the investigation started and particularly what information/ intelligence was available at that time. Increasingly, defence counsel are examining to what is often refered to as the 'front end of an investigation' i.e. access to and scrutiny of the material available to you at the time you make the decision to commence an investigation. This is particularly the case where the evidence against an individual subsequently, proves to be strong. Defence counsel will often use the tactic of trying to undermine initial police activity. If he succeeds, it has the potential to throw doubt on strong evidence.

Practical Steps by those intending to make a request to a foreign state

A number of sources (the latest of which is UNODC's Technical Guide to UNCAC) have addressed what steps should be taken by a person intending to make an MLA request. A distillation of these is as follows:

- As a practical matter, the prosecutor or judicial authority requesting assistance will need to recognise that the case it is pursuing is much more important to it than it is to the requested State Party. It is vital, therefore, that the requesting state makes strenuous efforts to make it as easy as possible for the requested state to respond positively;
- The requesting authority should Identify the substantive and procedural requirements in the requested state for the provision of assistance (since this is often highly resource intensive, it may be necessary to select the highest priority cases and engage external legal assistance to ensure that the research is thorough and accurate. All the more important therefore if the assistance of the requested state can be sought on this);
- The requested state should be contacted directly to ensure that the request will be sent to the proper authority;
- Discuss the request informally with the requested state in advance, which may require the submission of a preliminary draft of the request, so that the requested state can draw attention to errors or advise on the best way to make the request;
- After transmission, follow up the request to ensure it arrives safely, contains no errors and is being appropriately dealt with.

Matters for the Prosecutor or Judicial Authority to Have in Mind Before Issuing the Letter

In addition to the above, practical measures which are aimed at ensuring smooth execution of a request, it must also be emphasised that the prosecutor or other judicial authority that is to issue the letter of request must satisfy itself of the following **before** the letter is issued:

- Whether an offence has been committed or there are reasonable grounds for suspecting this to be so and which offences are under investigation;
- The subjects of the investigation;
- The assistance sought and its relevance to the investigation;
- The identity of any competent overseas authority that is, will, or may be able to give assistance (when dealing with EU states, the issuer of the letter should ideally identify the court with jurisdiction over the area where the evidence is sought and the person who is expected to give assistance);
- Is the proposed enquiry permitted by national law in the requesting and requested state?
- Is the proposed enquiry permitted under the relevant convention, treaty or other international instrument that is being cited within the letter?
- Has enough factual information about the case been given to provide a proper basis for the assistance to be sought?

- Does the assistance to be sought amount to little more than a „fishing expedition"? (In particular, if any coercive measures (such as a search warrant) are likely to be needed in the requested state, it is highly likely that a judicial authority will have to be satisfied that the enquiry is more than just speculative, that there are grounds for believing that the evidence exists or can be made available. The issuer of the letter should, therefore, state in the letter of request the basis for believing that this is so and show a legitimate and clear nexus between the facts and the assistance sought);
- What value will the assistance sought have for the investigation or proceedings? MLA is a time-consuming process, not just for the requesting judicial authority, but, in particular, also for the executing judicial authority, for which it can also be both human and financial resource-intensive. The issuer should consider whether the assistance sought is likely to be proportionate to the case and should explain in the letter of request what bearing the assistance sought will have upon the case;
- Can the assistance be obtained by other means? Judicial authorities should not use MLA for enquiries that could be made by other, less formal, means;
- Can the assistance that is sought be realistically given? Some enquiries that could not be undertaken easily in one state might be relatively straightforward in another. For example, France and Belgium keep centralised banking records, whereas the UK does not;
- Can the assistance be given in the time available?
- Is the assistance sought likely to produce admissible evidence?
- What are the consequences of issuing an LOR? Would making the request create unacceptable/unjustifiable security risks? Would seeking assistance risk revealing a sensitive investigation? Some jurisdictions are unable to carry out investigations without notifying those concerned/those being targeted, others are able to do so. Each jurisdiction will have different criteria governing whether or not secrecy can be maintained.

Common and avoidable problems: Matters to note

- One of the concerns most frequently expressed by representatives of the competent judicial authorities of states is of delays in execution, or refusal of requests for inconsistent reasons;
- There are a number of recurring causes for delay or refusal. These include: letters of request transmitted which lack precision, letters in which there is no nexus between the summary of the facts and the assistance being requested, poor quality of translation into the language of the requested state;

- Sometimes the evidence requested is unavailable or delayed because, for instance, it is in the possession of a third party, such as a bank, or is 'historical' and therefore archived or destroyed;
- Frequently letters of request fail to set out the contact details of those undertaking the investigation in the requesting state;
- The requesting state should always consider the likely effect in the requested state of executing a request where an ongoing investigation is taking place in the requested state;
- Many of the difficulties encountered are simply commonplace errors occurring through inexperience or poor practice. Building specialisation and creating a network of contacts amongst practitioners helps reduce the chances of mistakes being made.

Grounds for Refusal

The granting of mutual legal assistance by a state is an exercise of sovereignty. There is, therefore, a general discretion to refuse assistance; although, of course, where MLA is sought on the basis of a treaty, whether bilateral or multilateral, that discretion is subject to the obligations contained therein.

The principal difficulties, however, are less outright refusal, but, rather, delay and the often cumbersome process involved in making and executing a formal request. The importance of building 'networks' and of consultation between requesting and requested state is, then, paramount. Indeed, the international imperative is to encourage states to address concerns they might have in executing a request by adopting measures short of outright refusal.

Such measures could include attaching conditions to execution of a request or postponing execution (where, for instance, the enquiries requested would be likely to prejudice an ongoing domestic criminal investigation in the requested state). Moreover, in circumstances where a state is minded to refuse a request, it should notify the requesting state and give reasons, and, where practicable, it should then consult with the requesting state before reaching a final decision (in the hope that the bar to assistance is capable of being resolved through discussion). Indeed this consultative approach is specifically provided for in the MLA provisions of recent instruments.

Different international instruments contain some common and some different grounds for refusal. Similarly, states vary as to the grounds for refusal set out in domestic law and, indeed, different states may take different approaches in relation to the same ground.

It is, for obvious reasons, a basic principle of MLA that a state is able to refuse a request if to execute would be contrary to domestic law. Accordingly, those instruments that address MLA often contain a specific provision to that effect. In addition, though, it is always important to ascertain what grounds for refusal are contained within the national MLA law(s) of the state to whom a request is to be made.

When they sign up to international arrangements to provide MLA (whether bi-lateral treaties or multi-lateral conventions), states undertake to give assistance in accordance with the terms of the arrangement. Most, if not all arrangements specify grounds for refusal.

Whether or not assistance is given in response to an individual request for assistance will be a matter for the competent authority of the state from which assistance is sought (usually, but not always, a court or investigating magistrate). If assistance is refused there is usually little, if any, scope for negotiation.

In practice, refusal is rare and is most likely to occur simply because the request cannot be executed at all, perhaps due to insufficient information to establish the whereabouts of the evidence or a witness. Occasionally assistance may be refused for legal reasons, perhaps because in the receiving state the conduct complained of would not be an offence, the assistance sought would not be lawful, or the subject of the request has already been acquitted or convicted of the same offence.

Given that most MLA requests will be made pursuant to a treaty, it is worthwhile to have in mind the sort of discretionary refusal powers that MLA treaties, and treaties containing MLA provisions, provide to contracting states. A good example for present purposes is the 1959 CoE Convention, which provides, at Article 2, that assistance **may be** refused:

a) if the request concerns an offence which the requested state considers a political offence, an offence connected with a political offence, or a fiscal offence. (However, the position in relation to Fiscal Offences has been modified by the Additional Protocol to the 1959CoE Convention – „the Fiscal Offences Protocol". In effect this prevents refusal on the grounds that an offence is regarded by the executing state as a fiscal offence.);
b) if the requested state considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

It should be noted that:

- The 2000 EU Convention supplements the 1959 CoE Convention. Thus, the contracting parties are in the same position as with the 1959 CoE Convention.
- Many states have also entered certain reservations to the 1959 CoE Convention, refusing or giving them the discretion to refuse to assist in certain situations. A state's reservations should always be checked before a request is made;
- Article 2 of the 1959 CoE Convention is supplemented by Article 5, which gives a state party the power to, for instance, apply the dual criminality rule in relation to search and seizure requests (involving, as they do, a coercive power being sought in the requested state);

– Some instruments and arrangements addressing MLA contain explicit provisions addressing those discretionary grounds for refusal long recognised (through customary law) as being legitimate reasons to refuse a request for assistance (see the discussion of those, below).

State/Public Interest

International instruments addressing MLA, whether multilateral or bilateral, will typically contain an explicit provision allowing for assistance to be refused (in relation to a request made in relation on the instrument in question) where to provide assistance would prejudice, or be detrimental to, the requested state's interests. The form of words used varies, but the 1959 CoE Convention is a good example, providing (at Article 2(b)) that assistance may be refused if:

„...the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country."

The UN Model Treaty (at Article 4.1(a)) adopts a similar approach, allowing refusal where to grant the request:

„...would prejudice sovereignty, security, public order/ordre public or other essential public interest" of the requested State.

Such a provision is found in crime instruments as well as specific MLA treaties. Thus, UNCAC (at Article 46(21)(b)), for instance, contains identical wording to that contained in the Model Treaty.

This ground is not particularly common in practice, save perhaps for national security. Practitioners will usually realise in advance the cases that may trigger this ground. When such a case arises, the requesting and requested states should consult each other to try to resolve the matter and to strike an appropriate balance between international co-operation and the protection of national interests of one state. As always with MLA, dialogue is usually the key.

Lack of Reciprocity

The principle of reciprocity provides one of the legal bases for requesting assistance, but a lack of reciprocity is also a potential ground for refusal. Some States will afford assistance even where the requesting State would not be able to comply with the request were it to be made to it, but other States will not. International instruments recognise this variation in practice and generally provide that the absence of reciprocity is a discretionary ground for refusal in respect of a request made in reliance on the instrument in question. Thus, the 1959 CoE Convention preserves the ability of a requested State to apply the principle of reciprocity and to make execution dependent on the principle being met (Article 5).

Absence of Dual Criminality

The principle of dual criminality is one that has been transposed into the framework of MLA from extradition law. For MLA purposes, the absence

of dual criminality is not an absolute bar to execution in the way it is for extradition. The applicability of the principle in MLA varies greatly from State to State. Many international instruments (and voluntary arrangements, such as the Harare Scheme) expressly provide for it as a discretionary ground of refusal. **It is particularly important, therefore, that the stance of the requested State is canvassed in discussions or consultation before a letter of request is sent.** Some States do not insist on the dual criminality requirement being satisfied, whilst others make it an essential pre-condition to giving assistance. Confusingly, a third category of States (including the UK) requires dual criminality in order for coercive measures, such as search and seizure, to be undertaken. Just to add to this uncertain picture, some of those States that insist on dual criminality as a pre-condition nevertheless consider its absence to be a discretionary ground for refusal, whilst others regard dual criminality as mandatory.

As there is such a range of approaches by States, those who are preparing a letter of request must find out from the requested State exactly what its position is. If it does require the dual criminality requirement to be satisfied, it should be borne in mind that the test is whether the conduct which gives rise to the investigation or proceedings is criminal in both states, not whether the conduct is given the same offence 'label' or criminalised as the same offence in both states. This consideration is of particular importance in relation to those offences that are generally less common; if the requested state does not have the same offence, then the requesting state will need to be thorough in ascertaining whether the conduct alleged fits into the description of an offence in the requested state, even if the title of that offence is markedly different between the two states; for instance, an abuse of function offence in a civil law state may amount to the common law offence of misconduct in public office.

Tax (Fiscal) Offences and Bank Secrecy

MLA in cases involving financial crime and related offences (including corruption) will, obviously, usually involve making bank and financial institution documents available. Some states might indeed seek to refuse to give assistance because the material sought falls under bank secrecy laws or regulations. Treaties and laws in many states may also allow refusal of MLA because the offense underlying a request is a tax offence or involves fiscal matters. In practice, though, this is a ground of refusal that is now rarely relied upon.

If a judicial authority is faced with a denial of assistance because of fiscal offences or bank secrecy, he should carefully examine the provisions of the relevant treaty, if an instrument is forming the basis of the request. Some treaties (e.g., articles 46(8) and 46(22) of UNCAC) now prohibit the refusal of assistance on those grounds. He should also look at the relevant laws of the requested state to ascertain whether the state's claim of bank secrecy is, in fact, justified. Very often, through misunderstanding or mis-application, it will not be.

As a practical, pre-emptive measure, and to attempt to prevent a rejection on the ground of bank secrecy, the requesting authority should try to obtain as much information as possible through informal means concerning a bank ac-

count before sending a request. This will be a difficult task in some investigations, but could prove worthwhile. FIU to FIU contact will, for instance, be one initial route to effect this.

Capital Punishment/human rights

Many states will refuse MLA assistance if the death penalty could be imposed by the requesting state in the case in question. The determining factor is not that a state retains the death penalty, but rather whether the offence in question is punishable by death. The principle is harder to apply to a request for MLA than to one for extradition, because the request for MLA will usually occur at an early stage in a case, when it may be difficult to say with any certainty whether the death penalty may be imposed.

A requesting authority that is faced with the issue will wish to consider whether the death penalty is, in fact, applicable to the case. It may then wish to consider whether an assurance is able to be given that, in the event of conviction, that penalty will not be imposed in that case. It follows that where, for the requested state, the death penalty is a discretionary ground for denying assistance, than the requesting and requested states should consult each other as a matter of priority in order to try to resolve the issue.

On broader human rights issues, all the authorities involved in making and executing an MLA request are public authorities and, therefore, generally bound by the provisions of relevant international and regional human rights instruments. They must therefore act compatibly with those (e.g. the ECHR) when making a request, and in giving assistance. Even if the MLA treaty in question does not contain a specific ground of refusal on human rights grounds, a request should be refused if to execute it would be to bring about an unjustified breach of a qualified right or a breach of an absolute right.

Each competent authority must keep in mind the practice of the ECtHR which has taken decisions on excluding certain evidence from proceedings for the following reasons: in the *Schenck v. Switzerland Judgment* (1988/13 EHRR 242), the court ruled that it was up to the national courts to examine whether certain evidence should be rejected due to measures which violate human rights, and what measures were used in collecting evidence and making that evidence available to the court (in this particular case there were substantive violations of the procedure resulting from the violation of the right to fair trial guaranteed by Article 6 paragraph 1 of the ECHR).

In addition, obligations under other instruments, such as the Convention Relating to the Status of Refugees and Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, should not be overlooked.

Extraterritoriality

For some states, there may be special restrictions in executing MLA requests in cases where the underlying offence occurs outside the territory of the requesting state. Of course, this is as particular issue in corruption and organised

crime cases, where many states have extraterritorial jurisdiction provided for in national law to enable them to prosecute crimes that have taken place on the territory of another state. Under some treaties and national legislation, there is an express provision that MLA may be granted only if the laws of the requested state provide, in turn, for the punishment of the same offence committed outside its territory. There is no escaping the potential difficulty that extraterritoriality can cause to some states in this regard; however, one has to say that if the principles, and any applicable treaty or law, are applied reasonably, then international co-operation through MLA should not be unduly restricted.

Non Bis in Idem (Double Jeopardy)

Most states will be minded to refuse an MLA request if the principle of non bis in idem (double jeopardy) would be offended in a given case. However, it should be noted that there are a number of variations of the principle from one instrument or treaty to another. Thus, some treaties focus on whether a person has been convicted/punished for the crime in the requesting and/or requested states, while others may also consider whether the person has been convicted/punished in a third state. Different treaties also use different formulations thus: some ask whether the person has been punished, while others look at whether the person has been tried, acquitted, or convicted. Hence, if double jeopardy might be an issue in an intended request, practitioners should closely examine the language of the relevant treaty and relevant national laws.

On a practical level, the problem of double jeopardy might be capable of being addressed by examining whether there are facts that support a different offence in circumstances where the alleged conduct is distinct from the conduct that was the subject of the earlier acquittal/conviction/punishment.

With the above in mind, the reader is referred to the observations relating to dual criminality set out above: conduct, not 'label', is the important factor common to both dual criminality and non bis in idem. For the latter, a practical effect is that if, for instance, a person has been convicted of laundering a bribe, the principle of double jeopardy arguably should not bar further proceedings against that person for accepting the same bribe, since bribe taking and money laundering are separate and distinct courses of conduct.

Political Offences, Offences of a Political Character, and Persecution

Refusal of MLA on the grounds that the offence is a political one or is of a political character will be unlikely to arise in most financial or organised crime cases, but can pose a great challenge in corruption investigations. The definition of a political offence is not always clear. Thus, some states might argue that this ground applies to the prosecution of a former public official who belongs to a political party that is no longer in power.

To address this concern, some instruments such as the UNCAC (at Article 44(4)) state that corruption offences cannot be political offences. If the relevant

instrument has no such provision, then emphasis should be placed on the facts and evidence. In other words, a claim that an offence is of a political character must be founded on sufficient evidence. As with other grounds for refusing assistance, the requesting and requested states should consult with each other on the point.

A state may also deny assistance on the grounds that the request for assistance has been made to prosecute or punish a person on account of his or her sex, race, religion, nationality, ethnic origin, or political opinions. As with the claim of political offence, an MLA request should not be denied because of a mere allegation of persecution. The claim ought to be supported by sufficient facts or evidence.

Relevance of the requested enquiries

It should not be forgotten that a request may be refused (or a supplementary letter required) if the enquiries that are sought do not appear to the requested state to be relevant. It is, therefore, important that the relevance to the overall investigation is clearly set out within the summary of facts.

In deciding whether an enquiry is relevant, a court in the requested state should adopt a wide interpretation and should have in mind that admissibility will be a matter for the trial court in the requesting state (see the principles confirmed in *Re Mutual Legal Assistance in Criminal Matters (Court of Appeal (Ontario, Canada), 13 September 1999)*., in relation to an MLA request submitted by the Russian Federation to Canada).

Other Issues of Common Difficulty

Locating suspects abroad

When an extradition request has been made, locating the suspect is obviously of the utmost importance. **However, a prosecutor cannot issue a letter of request to locate a suspect, as this is not a request to obtain evidence.** With regard to the 1959 CoE Convention, it should also be noted that Article 1(2) provides that the Convention does not apply to arrests, and not therefore to requests for assistance in locating a suspect for that purpose.

A request on behalf of the defence

The defence in a criminal case is not able to issue a letter of request itself. At the same time, the defence may have legitimate enquiries that need to be made in another state in order to ensure a fair trial or to put the defendant's case fully. In some jurisdictions the judge will be in a position to issue a letter of request setting out the enquiries that need to be made. In common law states, a defendant can usually apply to a judge after criminal proceedings have been instituted against him for the judge to issue a letter; in addition, in those states,

the prosecutor will often be in a position to issue the letter of request as part of the prosecution's duty to ensure fairness to the accused.

Generally, where a judge is unable to issue a letter or where the investigation is protracted (e.g. large scale international fraud), it is often more straightforward for the prosecutor to do so (subject to such a course of action being consistent with the prosecutor's role and duties in a given state), as the prosecution has extensive machinery for obtaining assistance, something which the defence may not have. Prosecutors should remain aware of this, and when appropriate, liaise with a suspect's legal representatives to establish whether they want any enquiries abroad made on their behalf.

There are clear advantages to the administration if the judge or the prosecutor assists the defence in this way: Doing so can place the prosecutor in a better position to resist defence applications to adjourn or delay proceedings pending their enquiries. It also ensures that a case is not dismissed against a defendant solely on the grounds that evidence that might have supported his case is no longer available. Prosecutors must have regard to these possibilities.

Distinguishing between evidence and incidental enquiries

It is good practice to itemise in the letter of request the assistance to be sought. However, this can result in some letters requesting assistance in locating the suspect when in fact the request is that a suspect be located and evidence be gathered from him, perhaps "covert DNA" (in other words, such evidence as DNA obtained from a fingerprint or lip smear on a drinking glass in circumstances without the suspect being made aware of the evidence-gathering exercise that is taking place) or video footage/surveillance. Locating the suspect is necessary but incidental to the assistance sought. To avoid confusion, in such circumstances, it may not be necessary to specify that the suspect be located as this may perhaps go without saying. If the executing authorities cannot locate the suspect, they cannot obtain evidence from him.

Requests for intelligence-gathering, etc.

It has already been highlighted in the 'Overview', above, but requests for what can only be described as intelligence gathering, or for family liaison visits and for anything else that cannot properly be described as evidence gathering, should not be made in a letter of request, unless such enquiries can fairly be said to be incidental to assistance in obtaining evidence that can properly be sought. Obtain this assistance on an administrative, prosecutor to prosecutor/police to police basis.

Participation of Authorities from the Requesting State

The participation of the authorities of the requesting state in the execution of a request is sometimes a sensitive issue that can either increase the efficiency of any investigation, or ruin it. The requesting state knows best the evidence and issues at

stake in its inquiry, but its officials cannot operate in foreign territory. **Hence, whenever possible, requested states should allow foreign investigators to:**

- **Be present when hearing witnesses, and allow them to ask questions, or indicate what questions to ask (these may be prepared in advance);**
- **Be present during searches, to help decide what to seize;**
- **Participate in sorting out of the documents seized, to indicate which ones are of use to them.**

To give an example: Switzerland has a reputation for not always allowing foreign investigators to be present. However, in fact, Swiss legislation allows those measures on the condition that foreign investigators commit themselves to not using the information that they obtain whilst in Switzerland until they receive it through the formal MLA channels.

Taking all the above into account, if it would be of assistance to have the investigating officers present when the enquiries are made, the requested state should be asked expressly in the letter to grant permission for the officers to be present. Depending upon the nature of those enquiries and the type of case, the requested state may be quite content for officers from the requesting state to travel across and to play a part. On a request that is largely documentation-driven, however, such as telecommunications service provider records, it may be that such travel would not be of any benefit.

Issues do frequently arise when officials of the requesting state conduct undercover operations in the requested state. One of the obstacles to such operations is that the requesting state loses control over the gathering of information and its use by the requested state, which contradicts the basic principles of international co-operation. Hence, experience tends to show that such undercover operations should only be carried out between states bound by an established and mutual confidence.

Challenges Arising from the Right against Self-Incrimination

Many MLA requests seek to obtain evidence or statements from individuals in the requested state. Upon receiving the request, the requested authorities must often ask the requesting state whether the witness is a suspect or a target, because national law (and sometimes the constitution) in many states protects witnesses against self-incrimination. Therefore, different rules usually apply to witnesses and suspects.

Sometimes the requested authorities will ask the requesting authorities to offer a witness immunity from prosecution. This is a potential problem in civil law states, where granting immunity to a witness is particularly rare.

Witness Protection

Another, related, issue is the existence of a witness protection programme. Witnesses under these programmes have agreed to co-operate with the prosecution in a domestic case in the requested state. Since these witnesses are often

kept in secret locations, they are not easy to reach for interviews. Early liaison and discussion between the authorities is vital. Exceptionally, a protected witness may be required to travel to the requesting state to give evidence. Close liaison between authorities must take place in such circumstances, and alternatives, such as videolinked evidence, should be considered if national laws permit (see, also, the EU Convention re videolink testimony).

There are many criminal prosecution cases that fail or even not commence due to witnesses being frightened of retribution or intimidated. Sadly, the use of fear and/or intimidation against an individual(s) are tactics that are deployed by criminals to prevent or undermine prosecutions against them. To combat these circumstances it is important to have a comprehensive and effective witness protection programme in place.

Such a programme should provide an individual effective protection and appropriate support for individuals who have given or have agreed to give information/evidence. Consideration will also have to be given for protection to relatives and associates, because of risk to the security of the person.

It is critical that the appropriate authorities providing witness protection understand that such protection can often go beyond just the time of criminal proceedings and in exceptional cases can involve an individual being given a new identity, and the requirement for relocation, perhaps even in another state.

Legality of Special Investigative Techniques[1]

What are 'special investigative techniques'?

These are means or techniques used to gather evidence and/or information in such a way that they do not alert those being investigated. Invariably, their deployment will involve a breach of the right to a private life, which will have to be justified by those carrying out/authorising the operation. Increasingly, a state will make a request of other state to have such techniques deployed in order to gather evidence for an investigation being conducted in the requesting state.

Some obvious examples of special investigative techniques include controlled delivery, surveillance (including electronic surveillance) and the deployment of undercover agents.

In that regard, the following should be noted:

Technical surveillance: Sometimes referred to as intrusive electronic surveillance, this is a formidable tool for the investigator, but, potentially, highly intrusive and, therefore, demanding of stringent safeguards against misuse. In most jurisdictions the interception of telecommunications, the use of listening devices, and the deployment of tracking devices will each fall within the definition of electronic surveillance.

---

1 See, also, Annex 3, below, on the use of such techniques and human rights considerations.

Physical surveillance and observation: Generally less intrusive than technical surveillance, and extends to placing a target under physical surveillance by following or even videoing him. It may also extend to monitoring bank accounts and sophisticated methods of monitoring computer activities.

Undercover operations and 'sting' operations: The use of undercover agents, which may or may not amount to a 'sting operation', are extremely valuable in cases where it is very difficult to gain access by conventional means to those engaged in organised criminality. The evidence of an 'insider', whether an undercover operative or even a co-conspirator, is likely to be significant in a subsequent prosecution. Furthermore, the effect of such conclusive evidence, although likely to be the subject of initial legal challenge, often brings offers of cooperation and please of guilt from defendants thereby eliminating the need for lengthy and expensive trial processes.

Overview of the legal framework for deployment

The very nature of special investigative techniques is such that their deployment is likely to give rise to later challenge before the court on the basis that fundamental rights (e.g. under the European Convention on Human Rights (ECHR)) have been breached, the activities of law enforcement have been unconstitutional, and/or the operation was un lawful under national law.

When planning any covert deployment, it must be remembered that the rights of an individual must be safeguarded and that the only breaches that occur are those that are justifiable and authorised. All decisions by those planning and authorising an operation will, almost certainly, be scrutinised and challenged.

Therefore a special investigative technique, whether for intelligence-gathering or evidential purposes, must only be used when:

- There is an express basis in national law that provides for it;
- There is a proper framework in place for authorisation and oversight;
- Its use is necessary and proportionate.

(see, below, re: human rights considerations)

When considering any sort of deployment that will involve intrusion, the question that should always be asked is: „Is it possible to gather the intelligence/evidence sought in another, less intrusive, way?"

States can jointly use these special investigative techniques when necessary where there is in place appropriate bilateral and multilateral agreements or arrangements in the context of cooperation at the international level, taking full account of human rights implications.

A potential problem is the legality of the investigative technique used to gather evidence. For example, telephone intercept, or wiretap, evidence is inadmissible in the courts of some states. As a consequence, these states will not carry out requests to wiretap. This must be clearly explained to the requesting authority to prevent further misunderstanding.

Similar questions arise when one state requests another to engage in undercover operations. While such operations are an established way to obtain evidence, they can now involve the use of new surveillance technologies. Whether such requests will be executed depends on whether those technologies are legal in the requested state.

Typically, a request for the deployment of covert techniques will involve the obtaining of an authorisation or court order in both the requesting and requested states. Those making the request should have this firmly in mind and must ensure that: they have their own state's authorisation or order in place and cited in the request, and they have provided sufficient material for the authorities in the requested state to apply before its court.

Special investigative techniques and human rights considerations

The deployment of covert, intrusive techniques is not new. However, since the early 1990s there has been ever increasing reliance on intelligence-led and proactive criminal investigations. The use of such techniques may well be the only way to investigate alleged corruption, financial crime or organised crime in any given instance, whether, for instance, it is suspected on the part of a public official with connections to organised crime, or whether it is bribery within the commercial sphere.

Turning to the human rights jurisprudence in more detail, and with investigations into alleged corruption particularly in mind, the following should be noted:

'In Accordance with the Law'

There must be a basis in law that provides for the deployment of the covert technique. Such legislation must be accessible to those liable to be affected. In addition, such legislation, including that which authorises the activity liable to interfere with the right to a private life, must have sufficient clarity so as to give a person an indication as to the circumstances and conditions in which covert methods by a public authority may be used.

The European Court of Human Rights (ECtHR) has indicated that it expects that there should be a regime of independent supervision of the use of covert, intrusive powers. As to the process of authorisation, the more independent the authorising or reviewing individual/body is, the more likely that a court will regard the authorising and reviewing regime as appropriate. Indeed, in *Klass v Germany* the ECtHR noted that judicial control of the authorisation procedure provided 'the best guarantees of independent, impartiality and a proper procedure'. The use of domestic commissioners and tribunals is also capable of satisfying the demands of the ECHR Article 8.

Necessary in a Democratic Society

The interference with an individual's qualified rights must fulfil a pressing social need, be in pursuit of one of a legitimate aims and any deployment must be only that which is necessary to achieve what is sought to be achieved (i.e. the detection of the particular crime). In addition, safeguards must be in place to prevent abuse by intrusive techniques and remedies must be available in the event of such abuse.

Proportionality

The interference must be proportionate to what is sought to be achieved by it. Thus, for example, the deployment with a listening device in a target's bedroom may require much greater justification than a deployment in a living room.

In considering whether a covert technique or deployment is indeed proportionate to the legitimate aim that is being pursued, consideration should be given to the following:

- whether relevant and sufficient reasons have been advanced in support of the measure;
- whether a less restrictive alternative measure was available;
- whether there has been some measure of procedural fairness in the decision making process;
- whether adequate safeguards against abuse exist; and
- whether the restriction in question destroys the very essence of the Convention right concerned.

The reader is also referred to the EU MLA Convention 2000 (see, 'International Instruments', below, which contains express provisions in relation to making/executing requests for the deployment of a range of covert techniques).

Transmission of an MLA Request: Competent Authorities and Central Authorities

Most states designate a central authority with the power to receive and execute mutual legal assistance requests or transmit them to the competent domestic authorities for execution,

thus providing an alternative to diplomatic channels. The judicial authorities of the requesting state can communicate with the central authority directly.

Some central authorities are also competent authorities to issue a letter of request (e.g. many small jurisdictions, including significant financial centres, have an Attorney General who performs both functions). In some states the central authority is little more than a 'post box'; in others, it is much more proactive and may, for instance, quality assure outgoing requests.

Now, to an increasing degree, even more direct channels are being used, in that an official in the requesting state can send the request directly to the ap-

propriate official in the other state. Direct transmission, as this is called, is particularly important where a request is of great urgency.

A judicial authority should always check whether the national law of the other state with whom he is dealing allows in its national law for direct transmission. If a request is made pursuant to the 1959 CoE Convention (see, below), it should be noted that Article 4 of the Second Additional Protocol amends Article 15 of the Convention to allow for direct transmission of requests in most instances.

The following EU/Schengen member states do not currently accept directly transmitted requests to their judicial or prosecuting authorities:

- The Republic of Ireland does not accept direct transmission of requests for search warrants or restraint / confiscation orders,
- Malta only accepts direct transmission from certain authorities. Do check,
- Greece.

When sending by direct transmission, there are a number of ways of identifying the correct judicial authority for your request:

- look at the European Judicial Atlas at http://www.ejncrimjust.europa.eu/atlas_advanced.aspx,
- ask the European Judicial Network (EJN) contact point for assistance,
- use the liaison magistrate scheme, where appropriate.

When sending direct, quote the relevant treaty and ensure that the request clearly indicates that evidence can also be returned directly.

Receiving Foreign Material into Evidence in the Requesting State

Since the procedural and evidence-gathering laws of states differ considerably, the requesting state may require special procedures (such as statements under oath, notarised affidavits, or audio/video recorded interviews of suspects) that are not recognised under the law of the requested state.

This has posed a difficulty for a requesting state, since the general principle has always been that the requested state will give primacy to its own procedural law.

That principle has led to practical problems, in particular when the requesting and the requested states represent different legal traditions. For instance, the evidence transmitted from the requested state may be in the form prescribed by its laws, but such evidence may be unacceptable under the procedural law of the requesting state.

The modern approach is to allow more flexibility as regards procedures. Thus, by way of example, Article 7(12) of the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, a request should be

executed in accordance with the domestic law of the requested State Party. However, the Article also provides that, to the extent not contrary to the domestic law of the requested State Party and where possible, the request should be executed in accordance with the procedures specified in the request. Thus, although not going so far as to require that the requested state comply with the procedural form required by the requesting state, it certainly encourages the requested state to do so. Such a provision may be properly cited in a letter of request in which reliance is being placed on a treaty and the treaty itself contains the provision.

It is also worth noting that the same provision appears in Article 18(17) of UNTOC and in Article 46(17) of UNCAC. A further demonstration of the current way of thinking is contained in the Model Treaty on Mutual Assistance in Criminal Matters, where Article 6 provides for the execution of the request in the manner specified by the requesting State Party to the extent consistent with the law and practice of the requested State Party. During discussions and consultation with a foreign state, practitioners might find it useful to bring this to the attention of their counterparts.

Notwithstanding the above, however, there will clearly be occasions when a piece of evidence gathered pursuant to a letter of request needs to be adduced but is not in the usual, or prescribed, form for the purposes of the requesting state. It is, therefore, important that a state has, if possible, a provision in its procedural law allowing into evidence material from a foreign state which is not in the usual form. Depending on the demands of national law, some states give their courts a discretion on whether to allow such evidence, whilst others provide that such evidence shall be treated in the same way as if it was a piece of domestically generated evidence produced in the prescribed form.

Permission to Use Evidence for Other Purposes

Evidence provided by the requested state should only be used for the investigation or proceedings stated in the request (**rule of specialty**). If a requesting state wishes to use evidence for different purposes or to share the evidence with a third state a new request must be submitted to the Central Authority that dealt with the original request. This request should explain what the requesting state wishes to use the information for and why.

Challenging a refusal by the requested state to execute the letter of request

International cooperation, whether by way of formal MLA or an informal request, depends in very large part on goodwill, a willingness to assist, and the recognition that today's requested State might be the requesting State tomorrow. What then can be done in the event of a refusal to execute a request?

If a letter of request is issued on the basis of comity, without the force of a treaty obligation, the requested State will be at liberty to refuse to execute if it is unwilling to cooperate.

However, if the request is made in reliance upon a treaty, whether bilateral or multilateral, an unjustified refusal will put the requested State in breach of its treaty obligation. Such a course may well risk embarrassment and might prompt executive or diplomatic pressure to accede to the request.

Nevertheless, if a State remains steadfast in its refusal there is, in practical terms, little that can be done. Depending on the instrument concerned, the matter may be put before the conference or assembly of the States Parties and might result in censure, or it might be referred to the organisation or body with 'ownership' of the instrument in question. Either way, rebuke and little more will be the outcome.

A further avenue that a requesting State might go down is to bring an action before the International Court of Justice (ICJ) in The Hague. Indeed, the ICJ (the principal judicial organ of the United Nations) handed down a judgment on 4 June 2008 following an action brought by Djibouti against France in respect of a refusal to execute an MLA request. The judgment itself does not assist on any substantive principle relevant for present purposes, as the Court found that France, by not giving Djibouti the reasons for its refusal to execute the letter of request, transmitted on 3 November 2004, failed to comply with its international obligation under Article 17 of the 1986 treaty between the two states and that the finding of that violation constituted appropriate satisfaction, but rejected all other claims by Djibouti. Nevertheless, the case serves to highlight that the ICJ is capable of providing a forum for redress when one state wishes to challenge a refusal by another to execute a letter of request.

Temporary Transfer of a Prisoner for Purposes of Investigation

The law of many states allows for the temporary transfer abroad of prisoners who consent to assist with foreign criminal investigations and proceedings. It is a request provided for specifically in some international instruments and arrangements (e.g. EU Convention and the Harare Scheme).

Prisoners cannot be transferred without their consent. Requests for temporary transfer of prisoners must be sent to the appropriate Central Authority. The request must usually be made formally, by a letter of request.

Before agreeing to the transfer, the relevant Central Authority must be satisfied that the presence of the prisoner is not already required in the requested state for the purposes of investigations or proceedings and that the transfer would not prolong the prisoner's period of detention.

Where the transfer is agreed with the requesting authority, the Central Authority arranges for:

- the prisoner in custody to be taken to a departure point and to be delivered into the custody of a person representing the requesting authority;

- for the prisoner to be escorted back to the requested state by the requesting authority;
- the subsequent transfer of the prisoner in custody from the arrival point in the requested state to his place of detention.

The costs of escorting and accommodating prisoners from their point of departure from the requested state to their point of return are, in these circumstances, met by the requesting authority (not the requested state, unlike costs of MLA generally).

Additional information to include in a request for temporary transfer of prisoners to the requesting state to assist in the requesting state's investigation:

1. Dates on which the presence abroad of the prisoner is required, including the dates on which the court or other proceedings for which the prisoner is required will commence and are likely to be concluded;
2. Information for the purpose of obtaining the prisoner's consent to the transfer and satisfying the requested authorities that arrangements will be made to keep the prisoner in secure custody such as:
   - whether the prisoner will have immunity from prosecution for previous offences;
   - details of proposed arrangements for collecting the prisoner from and returning the prisoner to the requested state;
   - details of the type of secure accommodation in which the prisoner will be held in the requesting state;
   - details of the type of escort available abroad to and from the secure accommodation.

Recognition of criminal judgments of foreign courts

This is a procedure through which a foreign court decision is adapted to the legal system of the state of enforcement, with the prospect of a state recognizing a foreign court decision to apply its legislation, in which case the court's judgment shall not be less favourable for a person convicted abroad. Recognition of a foreign court's decision shall not imply new criminal proceedings at a national level , since the foreign decision must be respected with certain limitations envisaged by national legislation (for example, limitations with respect to the type and severity of the criminal sanction for a particular criminal offence), but at the same time a verdict of acquittal or rejection may not be passed where there has been a foreign conviction.

Similarly, a domestic court, having heard and adjudicated upon a criminal case, may request a foreign court to enforce the domestic court's judgment provided that the convicted person is the national of that foreign country where he/she should be residing or having domicile, or he/she should be serving a sentence or another criminal sanction pursuant to an earlier judgment.

When acting upon foreign court's judgment, it should be kept in mind, though, that the purpose of enforcing the foreign court's judgment is not to transform a foreign judgment into a domestic judgment, because that judgment will always remain a foreign judgment and bearing this in mind the court should respect the judgment's factual and legal basis. The prosecutor's office has an important role in controlling the legality of court's actions in such cases.

The phase of the proceedings before the competent court (the first phase being the one before the Ministry of Justice) is envisaged within the framework of international legal assistance for the reasons of determining whether circumstances permitting or not permitting the enforcement of a foreign court's judgment exist, including whether all general rules for international legal assistance envisaged as the so called 'other' preconditions for assuming the enforcement of a foreign criminal judgment, exist.

These other preconditions do not refer to the impediments imposed by international law in the field of international legal assistance (military, political nature of the crime, non-existence of the crime in the national criminal justice legislation, the existence of circumstances providing a person with international protection against criminal prosecution, etc.), but rather to the circumstances allowing or disallowing the application of the equal treatment principle of a foreign court's judgment in each particular case. It should be checked whether the court is correctly reviewing the preconditions for the application of certain criminal and legal institutes which both states are entitled to apply in respect of the convicted person (the right to act to the benefit of the convicted person on the basis of amnesty, clemency, repeal of the judgment in the repeated proceedings, etc). The equal treatment serves to ensure that the convicted person does not suffer graver consequences than those originally imposed.

In the phase of the first-instance proceedings a proactive participation of the public prosecutor in the activities of the extrajudicial panel of the competent court ruling on enforcement of a foreign court's judgment is recommended, The session of the panel during which the legal stance of the court in that respect should be verified, is open to the public, and the public prosecutor is notified thereof.

A foreign court judgment is examined only in respect of existence or non-existence of a crime which, 'keeping in mind its nature', may be an obstacle to accepting the request for enforcement (political or military crime). At the same time, care should be taken that the court does not violate the principles of international law in respect of equal treatment of a foreign criminal judgment, or that the court does not fail to apply the envisaged criminal justice institutes for the enforcement of a final judgment, or overstep the boundaries of review of a foreign criminal judgment by venturing into the assessment of the regularity of the ascertained facts and application of substantive criminal law in a foreign state.

In the phase of the second-instance proceedings, the prosecutor, as an entity entitled to file an appeal against a decision taken in the proceedings, may contest in the appeals procedure only such decisions of the domestic court and not the judgment of a foreign court.

When reviewing the enforcement request, the court may not venture into assessing the legal qualification and identity of the crime since these are not the prerequisites considered necessary for the enforcement of the criminal sanction in that particular case. However, according to general rules applicable in proceedings pertaining to international legal assistance in criminal matters, the compatibility of the legal system is necessary, but this, too, in majority of cases is of little relevance because criminal justice norms, as a whole, in many states are essentially the same. Attention should be paid to whether the substantive and legal bases for incrimination are the same in both legal systems and whether it consists of sanctioning of the same punishable crime, as well as whether the law has set the limits of incrimination in each area (including application of the 'double incrimination' or 'double jeopardy' principle).

Requests for Criminal Record Information from EU Member States:

There is a reciprocal arrangement in place by which an EU member state will inform other EU member states of any convictions imposed on national from that other member state.

Each EU member state has a bureau or point of contact who should be directly contacted to request criminal record information regarding an EU national subject to criminal proceedings in that state.

Requests should include information on the requesting authority, the reason for the request and details on the identity of the person concerned in the request (including their name, birth name, aliases, sex, nationality, date of birth, place of birth, parent's names, residence or known address, fingerprints where available, other identification data where available).

Forms for requests can be found in the Official Journal of the European Union, 9.12.2005, L 322/36[2].

Sensitive and confidential information: Different approaches to release and 'disclosure'

It has already been explained that thought and planning is required to deal with MLA requests that contain sensitive information. However, there is a related topic which can loom large in cases that involve MLA requests: that is, the topic of the disclosure of sensitive or confidential material to parties in a criminal case.

As might be imagined, there are some differences of approach between practices in common law states and that in civil law jurisdictions. The central issue with which we are presently concerned is this: where the requesting state has

2 See at http://www.ejncrimjust.europa.eu/publications%5C2007/3/Forms/criminal_rec_en.pdf

been provided by the requested state (as a result of an MLA or administrative assistance request) with sensitive or confidential information that is not being adduced as evidence to prove a fact in the case, but has nevertheless come into the possession of the prosecution in the requesting state, how should it be dealt with and how should possible conflicting interests of (i) ensuring a fair trial and (ii) maintaining the requested state's confidentiality be managed?

For clarity, we should first look at general principles:

One of the fundamental tenets of the rule of law is the right to a fair trial. This is reflected in the various international and regional and human rights instruments which set out the basic requirements that satisfy the guarantee of the right to fair trial. These include in particular:

- The International Covenant on Civil and Political rights 1966 (Article 14),
- The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)1950 (Article 6).

The right to a fair trial in essence enshrines the need for the defendant to be fully informed of the case against him/her and permit him/her to mount a 'full and robust' defence. As part of the proceedings, therefore the defendant must be served with the evidence that the prosecution seek to adduce during the course of the trial and also be provided with relevant material that has come into existence as part of the investigation but that which the prosecution does not intend to place reliance upon.

Civil law states

The traditional civil law approach is that any material that is gathered as part of the investigative file will be disclosed to the parties to the case (prosecution, defence, and *partie civile* [where applicable]), without any distinction being drawn between evidence that the prosecution says supports its case and other material that might support either the defence's contentions or take the case as a whole no further. Such disclosure in civil law jurisdictions will usually be subject to the editing or excision of sensitive material before serving it on the defence. That determination is usually made by the investigating magistrate/judge.

In addition, there might also be material, usually intelligence or information, gathered before the investigation file was formally opened. In some civil law states, such material will remain confidential; in others, it is capable of being disclosed to the parties if it becomes relevant to an issue being decided in the case (such as the grounds for deploying a special investigative technique).

Common law states

In common law jurisdictions, evidence that the prosecution intends to rely upon as admissible evidence to prove its case is regarded as being part of its case

(so-called 'used material') and must be made available to the defense, either by inspection or service, depending on the nature and gravity of the offence alleged.

However, in addition, there will be material gathered by the investigators (both nationally and, increasingly, from abroad) that is not part of the case to be put forward by the prosecution to the court at trial. Such material is usually referred to as 'unused material' (this may include items which contain sensitive information attracting a claim of public interest immunity).

At common law such material must be disclosed to the defence if it is 'relevant'. The test of relevance is whether the material can be regarded, on a sensible appraisal by the prosecution, (1) to be relevant or possibly relevant to an issue in the case, (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use, or, (3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).

Some jurisdictions, such as Australia and the UK, now have a codified approach to such material and its disclosure. However, that codified law largely reflects the traditional common law position.

It will be seen, then, that in the circumstances of a complex economic/financial crime, corruption or organised crime case, such rules of disclosure place a huge burden on the prosecution. In conducting an investigation, the prosecutor is required to pursue all reasonable lines of inquiry and has to retain all relevant material and to record all information relevant to the investigation in durable or retrievable form. The prosecution then has to disclose to the defence all the material it proposes to use, and all unused material, that might reasonably be considered capable of undermining the prosecution's case or assisting that of the defence. A failure to meet these obligations is likely to result in the case being dismissed.

Having identified relevant unused material thus, disclosure will then take place of non-sensitive items. If, however, an item or document contains sensitive details such as an informant's true identity, then the prosecutor will go before the court to seek a ruling from the judge on whether the material in question may be withheld. However, common law courts have emphasised that:

- It is for the prosecution to put before the court only those documents which it regards as material but wishes to withhold, and the test for determining what documents are 'material' is for the prosecution to decide;
- When the court has the material before it (that is, material said to be sensitive), the judge must perform a balancing exercise by having regard to non-disclosure in the public interest on the one hand, and the potential importance of the documents to the issues of interest to the defence, present and potential, on the other. If the disputed material might go to a defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosure.

The aim should be to disclose whatever is capable of being disclosed, even if the prosecution has to edit or put in an acceptable form of words material that would otherwise (in its full form) be too sensitive to disclose. The leading common law cases on this 'balancing exercise' when addressing material said to be sensitive or confidential is the UK House of Lords case of *R v H; R v C* [2004][3];

- If disclosure should be made, but the prosecution refuses to, or is not otherwise able to, the case will not be proceeded with and will be dismissed.

A failure by the prosecutor or investigator to comply with their respective obligations at any stage of the procedure may have the following consequences:

- the accused may raise a successful abuse of process argument at the trial;
- the prosecutor may be unable to argue for an extension of a remand in custody;
- the accused may be released from the duty to make defence disclosure (in those States where such an obligation exists);
- costs may be awarded against the prosecution for any time wasted if prosecution disclosure is delayed;
- the court may decide to exclude evidence, and the accused may be acquitted as a result;
- the appellate courts may find that a conviction is unsafe;
- disciplinary proceedings may be instituted against the prosecutor or investigator.

Impact for MLA purposes

Although common law and civil law jurisdictions each have their own approach to the way in which material in the hands of the prosecution/in the investigation file is handled, both legal traditions need to be aware that the ECtHR has consistently signalled in recent times that it does expect that, for instance, underlying intelligence or material that, for instance, is said to justify a covert or undercover investigation must be made available to the defence, at least to the extent that the defence has sufficient information to be able to mount legal argument as to the legality or otherwise of the deployment. Prosecutors in every European state must, therefore, have regard to their obligations on this topic.

As crime becomes increasingly transnational and as requests for evidence, and even joint investigations between investigators in different jurisdictions, become more frequent, so the chances that unused relevant material is in existence outside the jurisdiction where the trial is being held becomes all the greater. One should be aware, then, that when executing a request from a common law state,

3 [2004] UKHL 3

the requesting authorities may need to obtain copies of background/intelligence/information material. Liaison on the point, on a case by case basis, should clarify any uncertainty. When executing requests from civil law jurisdictions, one should have in mind that the requesting authorities may require such material in order to comply with constitutional and human rights challenges at trial.

Similarly, when a civil law jurisdiction makes a request to a foreign state (whether common law or civil law), it should be recalled that, even though challenges as to the lawfulness or justification of the investigative strategy, or as to the fairness of the trial being jeopardised by the accused not having access to other material still sitting with the requested state, may not presently be frequent, there is every chance that they will become so. Accordingly, thought should be given as to the breadth of material that is requested, particularly in a case where he is asking for a covert or special investigative technique to be deployed in a foreign state.

From all the above, it will be seen that sometimes an administrative assistance request or an MLA request may result in intelligence or similar material being provided which the requested state is content to share with the competent authority of the requesting state, but which it regards as being too sensitive or damaging to a legitimate public interest to share with the defendant or his representatives.

In such an instance, care should be taken on all sides, and the following principles should be borne in mind:

- 'Ownership' of the material; particularly in relation to sensitive information, will always vest with the requested state;
- For disclosure purposes in jurisdictions where there needs to be argument before the court on whether material said to be sensitive should be disclosed to the defence, the foreign authority (i.e. law enforcement or prosecutor of the requested state) will have third party status before the court and can be separately represented (except in a joint investigation);
- There are very real difficulties for any prosecution in the requesting state if the prosecutor there does not know what the foreign (i.e. requested) state holds in relation to the case;
- As always, consultation and discussion are crucially important.

MLA AND THE INTERNATIONAL FRAMEWORK

INTERNATIONAL INSTRUMENTS: WHAT ARE THEY AND WHAT EFFECT DO THEY HAVE?

Importance of international instruments

The reader has already had attention drawn to international instruments as providing a legal basis for MLA requests. Given that the framework of international co-operation created by a number of instruments, both MLA-specific and penal, shapes the way in which requests are made and executed, it is important for judicial authorities to have a real understanding of what instruments are, what they do and the obligations they are capable of imposing on a state.

What is a 'convention' and what are the obligations of a State Party under a convention?

The 1959 CoE Convention, UNTOC and UNCAC are each an example of a multilateral treaty. The term "convention" is generally used for formal multilateral treaties where there are a broad number of parties and where participation is open to the international community.

The purpose of this section is to provide an overview of the key defining characteristics of a treaty; the different stages of adoption, signature, ratification and accession; and, how treaties are implemented under domestic law, giving them domestic legal effect.

The Vienna Convention on the Law of Treaties 1969, "the Vienna Convention"

The rules governing international treaties used to be based on customary international law, or the general principles of law. However, The Vienna Convention, which entered into force on 27 January 1980, codified these rules and sets out with greater clarity the criteria for the establishment and operation of international treaties.

For the purposes of this Manual, the following provisions of the Vienna Convention are important to note:

Article 2(1)(a) of the Vienna Convention defines 'treaty' as „an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

The terminology that surrounds the treaty-making process can be confusing. It is therefore important to note the distinction between the various procedural terms, as these can determine whether a State has consented to be bound to the terms of the treaty or not.

Adoption

'Adoption' takes place during the treaty-making process, and is the formal act in which participating States consent to the text of a proposed treaty. Article 9 of The Vienna Convention states:

Article 9(1) „The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up..."

Article 9(2) „The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule."

Signature

A State which has signed a treaty subject to ratification, acceptance or approval, does not establish the consent to be bound. Signature is a process of authentication and reflects the willingness of the State to continue in the treaty-making process by qualifying it to proceed to undertake ratification.

A signatory State to a treaty, while not yet bound to its provisions, is nevertheless obligated not to act in any way which would defeat the object and purpose of a treaty prior to its entry into force. Article 18 of The Vienna Convention states:

„A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become party to the treaty..."

Ratification

Ratification is the act whereby a State establishes its consent to be bound to a treaty. In the case of multilateral treaties, the act of ratification is normally done by the deposit of the instruments of ratification to an international organization or to the Secretary General of the United Nations, as the depositary. Article 16 of The Vienna Convention holds:

„Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) their exchange between the contracting States;

(b) their deposit with the depositary; or

(c) their notification to the contracting States or to the depositary is so agreed."

The process of ratification grants States the necessary time frame required to receive domestic approval for the treaty and to enact domestic legislation giving effect to the treaty.

Accession

Accession has the same legal effect as ratification, but applies when a State becomes party to a treaty after the treaty has already been negotiated and signed by other States. Article 15 of The Vienna Convention outlines when consent of a State to be bound by a treaty is expressed by accession:

1. *(a) the treaty provides that such consent may be expressed by that State by means of accession;*
   (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
   (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Reservations to international treaties (Articles 19 – 23 of the Vienna Convention)

Many international instruments provide for a State to make a reservation as to its provisions. A treaty can prohibit reservations entirely, or allow only specific reservations to be made. Reservations made under UNCAC must be notified to the Secretary General of the UN.

A reservation is a declaration made by a State which excludes or alters the legal effect of specified provisions of the treaty to that State. Reflecting the concept of universality, reservations provide a level of flexibility by enabling States to become parties to multilateral treaties whilst permitting the exemption or alteration of certain provisions with which the State may not wish or is unable to comply.

The integrity of the treaty remains intact by virtue of Article 19(c) of the Vienna *Convention, which holds:*

„A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: ... (c)... the reservation is incompatible with the object and purpose of the treaty."

However, it should be noted that there is considerable debate surrounding what constitutes the „object and purpose of the treaty", which renders this provision rather opaque in practice.

Giving Domestic Effect to International Treaties

There are two major approaches as to how international treaties enter into force domestically. This process depends on whether a State subscribes to a *monist* or *dualist* system governing the relationship between international and national law.

Monist systems

Monist systems reflect a unitary nature between international and domestic law, whereby both sources of law are considered to belong to the same legal family. Under this approach, when a State ratifies a treaty, the treaty is given the domestic force of law without the need to enact subsequent, implementing legislation. Democratic processes leading to the domestic approval of a treaty is attained during the treaty-making process. Under monist systems, domestic courts and other public bodies refer to the language of the treaty provisions itself as a source of law.

Monist legal systems exhibit variations in approach. These include:

- Systems where only certain treaties are considered to be directly applicable in domestic law and where the treaty provisions share the same level of hierarchy as federal laws, in line with the principle that the latest in time prevails;
- Systems where the provisions of certain treaties are superior to later legislation, but which remain lower in status to Constitutional provisions;
- Systems where the Constitution provides for the direct applicability of certain treaties and where treaty provisions are considered superior to all laws.

Examples of States with monist legal systems (or variations thereof) include Germany, the Netherlands, and the United States.

However, even in a monist legal system, the effect of the constitution may be that domestic legislation will be needed to address sanctions before any criminal proceedings can be instituted.

Dualist systems

Dualist systems of law stress that international law and domestic law exist separately, and mostly operate independently of each other. Unlike monist systems, when a dualist State expresses its consent to be bound to an international treaty, the treaty does not directly assume the domestic force of law. Rather, the enactment of domestic legislation is first required in order for the treaty to have domestic legal effect.

The process by which an international treaty is given the force of law domestically is referred to as the „act of transformation"; the treaty is expressly transformed into domestic law by the use of relevant constitutional mechanisms (i.e. an Act of Parliament). For example, the United Kingdom, which is a dualist State, ratified the European Convention on Human Rights (ECHR) in 1951, but ECHR provisions did not have the domestic force of law until the process of transformation, which resulted in the Human Rights Act 1998.

Therefore, in dualist systems, a State can express its consent to be bound by a treaty through ratification, placing the State under international legal obligations, but the same treaty provisions would have no domestic legal effect until the act of transformation. Furthermore, before the act of transformation, domestic courts are not strictly bound by the provisions of the treaty, although in practice such sources of law are considered highly persuasive.

Following the British practice, most Commonwealth countries have dualist legal systems. Some have made it their practice to pass a single Act of Parliament simply incorporating their international obligations (even if under more than one instrument) into domestic law, whilst others have chosen to give effect to the treaty by passing comprehensive domestic legislation based on the requirements of the treaty, that for e.g. establishes the necessary infrastructure or systems, and/or creates the necessary offences.

INTERNATIONAL INSTRUMENTS ADDRESSING MLA

The following is a selection of multilateral treaties that contain extensive provisions on MLA as a form of international co-operation:

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (see Article 7),
- UN Transnational Organised Crime Convention 2000 (UNTOC) (Article 18),
- UN Convention against Corruption 2003 (UNCAC) (Article 46),
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990,
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005
- Council of Europe Convention on Cybercrime,
- Council of Europe Criminal Law Convention on Corruption (see Article 26),
- Inter-American Convention against Corruption (see Article XIV),
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (see Article 9).

In addition, ad hoc mutual legal assistance instruments have been drawn up within the framework of:

- The Council of Europe (European Convention on Mutual Assistance in Criminal Matters 1959 and its two Additional Protocols of 1978 and 2001),
- European Union (MLA Convention 2000 and its Protocol of 2001),
- The Commonwealth (The Commonwealth Scheme for Mutual Assistance in Criminal Matters of 1986, as amended in 1990, 1999 and 2010),

- Organisation of American States (Inter-American Convention on the Taking of Evidence Abroad 1975 and Additional Protocol of 1984; and Inter-American Convention on Mutual Assistance in Criminal Matters of 1992 and Optional Protocol of 1993),
- Economic Community of West African States (the ECOWAS Convention on Mutual Assistance in Criminal Matters 1992),
- Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters (2002),
- Arab League (Arab League Convention on Mutual Assistance in Criminal Matters 1983).

The United Nations, in turn, has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly Resolutions 45/117, annex, and 53/112, annex I), which represents a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between states representing different legal systems.

In addition, it should be remembered that states also enter into:

- Bilateral treaties: such as the 1994 Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters
- Other, voluntary, arrangements: e.g. for Commonwealth states there is the voluntary Scheme Relating to Mutual Assistance in Criminal Matters, also known as the „Harare Scheme".
- Memoranda of Understanding (Where there is a memorandum of understanding in force, care should be taken as some may purport to offer greater assistance than is permitted by national law. Memoranda of Understanding do not have force of law and national law will take precedence.)

With the framework of international instruments in mind, practitioners should ask themselves when making a request:

- What is the legal basis used by the State for mutual legal assistance?
- Is the Convention used as a legal basis for mutual legal assistance? If not, has the State concluded bilateral or multilateral agreements or arrangements to facilitate MLA?
- Does the State participate in any practitioner or judicial network?
- Does the State have a designated central authority agency responsible for receipt, processing or execution of mutual legal assistance requests?
- Does the central authority have clear guidelines on practical aspects and issues arising in a mutual legal assistance case?
- Are there established procedures in the State for dealing with mutual legal assistance requests?

SIGNIFICANT INTERNATIONAL INSTRUMENTS FOR THOSE FIGHTING ECONOMIC/FINANCIAL CRIME, CORRUPTION AND ORGANISED CRIME:

EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS 1959 (as amended by the Second Additional Protocol [2001])

This was the first significant instrument for MLA. It was developed by the Council of Europe, and entered into force on 12 June1962. It provided recognition of the necessity for specific instruments for co-operation in evidence gathering. However, it has limitations; in particular, it was designed to operate amongst states of similar legal tradition, that of the civil law. It does not address the significant challenge to effective MLA, bridging the differences between legal systems. However, that is where the EU Convention (see below) now steps in.

Significant provisions within the 1959 CoE Convention are addressed in this manual within their relevant sections in order to give a proper context as to their practical working. However, to assist the reader, the following overview is provided:

The Convention was intended to encourage a broad permissive approach to MLA. Thus, Article. 1 specifically provides that the States Parties undertake to afford each other the widest measure of assistance in criminal proceedings. At the same time, its provisions do not apply to arrests, the enforcement of verdicts or to offences under military law which are not offences under ordinary criminal law.

In addition to stressing the widest measure of mutual assistance, Article 1 (at para 1) makes it clear that the Convention applies only to judicial, as opposed to administrative, proceedings. The effect of paragraph 1 is, *inter alia*, to make it clear that the Convention's provision's apply not just to those forms of mutual legal assistance specifically mentioned within the text, but also other forms of mutual legal assistance, including requests for assistance made in connection with:

(i) proceedings in respect of an offence which, while not classified as a criminal offence, is punishable by a fine imposed by an administrative authority (as is the case with, for instance, liability of the legal person in Germany and Italy). To make it quite clear that assistance can only be sought in the judicial stage of such proceedings, the phrase „at the time of the request for assistance" was inserted into paragraph 1;

(ii) an injured party's claim for damages in criminal proceedings;

(iii) an application for pardon or review of sentence;

(iv) proceedings for the compensation of a person acquitted.

This is reinforced by amended Article 1(3), which brings within the scope of the Convention proceedings brought by administrative authorities where the matter may give rise to proceedings before a court with jurisdiction in criminal matters.

Article 1, paragraph 2 provides that the Convention does not apply to „arrests and the enforcement of verdicts". These words make clear that arrest warrants and imprisonment for debt are generally excluded from the application of mutual legal assistance. Furthermore, paragraph 2 also excludes military offences which are not offences under ordinary law.

Amended Article 1(4) provides that assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting State.

Article 2 addresses grounds of refusal. *Sub-paragraph* (*a*) concerns political and fiscal offences. Assistance will not, however, always be refused in such cases since the text leaves the matter to the discretion of the requested State (by using the phrase, „Assistance may be refused..."). The original reason for including that discretion was to allow for assistance to be given where it might be in the interests of an accused person and might assist preparation of his defence; for instance, it might be that hearing particular witnesses might operate in favour of the accused.

Sub-paragraph (*b*) mentions other cases in which the requested State may refuse assistance and provides for a general discretion to refuse assistance where the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other of its essential interests. Note, however, that the phrase „essential interests" refers to the interests of the State (including economic interests), not of individuals.

Article 3 addresses the execution of a letter of request. *Paragraph 1* sets out that execution of a request shall take place in the manner provided for in the law of the requested State. However, this does not, of course, preclude the requested State from gathering evidence pursuant to a request in a form or manner asked for by the requesting State, so long as that form or manner is not incompatible with the law of the requested State.

Article 3(2) provides that, if the requesting State wishes to have witnesses or experts give evidence on oath, it shall expressly so request. The requested State, meanwhile, shall comply with such a request if its national law does not prohibit it. The effect, then, is that the requested State may have to gather evidence on oath even if, as a general rule, there is no provision in its judicial practice for so doing, provided that this is not contrary to its law.

Article 4 also addresses execution. Its effect is to enable the authorities of the requesting State or interested persons, if they expressly so request, to be present at the execution of a letter of request if the requested Party agrees to that course. It is understood that consent may be given only if the law of the requested State does not prohibit it. The reality is that such a request will usually be granted. However, there is always an onus on the requesting State to ensure that such a request is not simply made as a matter of course; if, for instance, the request is for a police officer or prosecutor from the requesting State to be present, it should be because he/she will bring added value (for instance, having

a detailed knowledge of the investigation, addressing further queries that might arise from officials of the requested State, or being available to transport exhibits back to the requesting State).

If a request to be present is to be made, it should be specifically included in the letter of request (with reasons).

Helpfully, amended Article 4(2) states that a request for the presence of an official or interested person should not be refused where that presence is likely to render the execution of the request more responsive to the needs of the requesting authorities and, therefore, likely to avoid the need for a supplementary letter.

It should be noted that in some States, an interested person will not be entitled, under national law, to be present at some, or even all, of the enquiries being made.

Article 5 sets out additional conditions governing the execution of requests for search or seizure. It provides that a State Party may enter into a reservation requiring that dual criminality is satisfied in order to execute a request for search and seizure, a State Party may also require the following preconditions before execution: (i) that the offence that is the subject of the request is an extraditable offence in the requested State; and (ii) that execution of the letter of request is consistent with the law of the requested State.

Article 6 concerns the handing over of property to the requesting State further to a letter of request. Paragraph 1 allows a delay in handing over if the property in question is required in the requested State in connection with pending criminal proceedings.

Paragraph 2 provides that property handed over in execution of a request shall be returned to the requested State unless such return is waived. The property referred to in *paragraph 2* means (*a*) property seized in pursuance of a letter of request, (*b*) property seized on a previous occasion in connection with other proceedings and handed over to the requesting State and (*c*) property handed over without previous seizure. The word 'property' refers back to 'evidence' mentioned in Article 3, paragraph 1.

Article 7 provides for the service of writs and records of judicial verdicts. The word 'service' is to be understood in a broad sense as referring to both simple transmission and official notification. It is not, however, necessary that the document in question be handed personally to the person to be served unless this is stipulated in the law of the requested State or is consistent with such law and is specifically requested by the requesting Party.

Article 8 applies to witnesses and experts. It provides that a witness or expert who has failed to answer a summons to appear shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he/she voluntarily enters the territory of the requesting State and is duly summoned there. The word 'penalty' refers to all forms of restraint, including fines.

Article 9 also refers to witnesses and experts and provides for the basis on which allowances and expenses are to be paid.

Article 10 supplements the implicit provision made in Article 7 (1) for the summoning of witnesses or experts for the purpose of giving evidence. Article 10(1) obliges a requesting State which attaches particular importance to the personal appearance of a witness or expert before its court to say so in its request for service of a summons against such person. In this case, the obligation of the requested State will be to invite the witness or expert to comply with the summons. Such invitation is, in truth, merely a recommendation. It follows, from the provisions of Article 8, that witnesses or experts cannot be compelled to appear before a court in the requesting State.

Article 11 (as amended) is concerned with the transfer of persons in custody who are witnesses. Such a person whose personal appearance is requested must, in principle, be transferred. Such transfer may be refused only in the cases provided for in the second sub-paragraph of Article 11(1) which contains four derogations; transfer may be refused:

a. if the person in custody does not consent;
b. if his/her presence is necessary at criminal proceedings pending in the territory of the requested State;
c. if transfer is liable to prolong his/her detention, or
d. if there are other overriding grounds for not transferring him to the territory of the requesting State.

Article 12 addresses immunity. Paragraph 1 applies to both witnesses and experts summoned to appear in the territory of the requesting State; whilst Paragraph 2, which is identical in essence, applies to a person summoned on a charge. No such person may be prosecuted or detained in respect of an offence or a former conviction that is not mentioned in the summons. Persons summoned as witnesses, experts, or accused enjoy immunity only in respect of offences or convictions preceding their departure and may be prosecuted for offences committed subsequently.

Article 13 refers to information in judicial records. It should not be confused with "exchange of information from judicial records" referred to in Article 22, below. It provides for requests from a judicial authority in connection with a 'criminal matter' and cases where a request is made by judicial authorities without jurisdiction in criminal matters (i.e. civil courts, or administrative authorities). The word "practice" has been inserted in view of the fact that in some countries such matters are not governed by law or regulation.

Articles 14 to 20 contain procedural provisions. Article 14(1) and (2) together specify what must be contained in a letter of request:

a. the authority making the request,
b. the object of and the reason for the request,

c. where possible, the identity and the nationality of the person concerned, and
d. where necessary, the name and address of the person to be served.

In addition, there must be a statement of the offence and a summary of the facts.

Article 15 specifies the channels of transmission for a letter of request. However, it is recognised that, whatever the channel adopted, the requesting State could always use the diplomatic channel if it deemed this to be necessary for special reasons. A note of caution, though, is that the usual channels now will be via the central or a competent authority.

Article 15(1), as amended, specifies the channels for a letter and for applications for the personal appearance of a person in custody; these must, in principle, be addressed between the Ministries of Justice of the two States, but a letter may be forwarded directly from one competent judicial authority to another and returned in the same way.

Article 15(2), as amended, provides that requests under Article 11 shall be addressed from the requesting Ministry of Justice to the Ministry of Justice of the requested State and returned through the same channels.

Amended 15(3) provides that requests in connection with administrative proceedings may also be transmitted and returned directly by the administrative or judicial authorities.

Requests for controlled delivery or covert investigations pursuant to the Second Additional Protocol may be transmitted directly between competent authorities (Article 15(4), as amended).

Amended Article 15(5) specifies the channels for the transmission of requests for information, including extracts, from the judicial records. Two channels are laid down, according to whether the request is made in pursuance of Article 13(1) or (2). If the request is made in accordance with paragraph 1, it may be addressed directly to the appropriate department of the requested State; that is, the competent local authority. This channel is thus not obligatory, and the requesting State is therefore also free to apply to the Ministry of Justice (for example, if it does not know the competent local authority). On the other hand, if the request is made in accordance with Article 13(2), it must be transmitted through the Ministries of Justice.

Amended Article 15(6) addresses requests for conviction details etc. and provides that direct channels may be used.

Amended Article 15(7) allows, in cases of direct transmission for urgent matters, that transmission takes place through the International Criminal Police Organisation (Interpol).

Amended Article 15(8) allows a State Party to declare that assistance by its authorities will be dependent upon one of more of the following conditions:

a) that a copy of the request be forwarded to the central authority designated in that declaration;
b) that requests, except urgent requests, be forwarded to the central authority designated in that declaration;
c) that, in case of direct transmission for reasons of urgency, a copy shall be transmitted at the same time to its Ministry of Justice;
d) that some or all requests for assistance shall be sent to it through channels other than those provided for in this article.

Amended Article 15(9) provides that requests and any other communications under the Convention or its Protocols may be forwarded through any electronic or other means of telecommunication, provided that the requesting State is prepared, upon request, to produce at any time a written record of it and the original. However, any Contracting State, may by a declaration addressed at any time to the Secretary General of the Council of Europe, establish the conditions under which it shall be willing to accept and execute requests received by electronic or other means of telecommunication.

Amended Article 15(10) makes clear that Article 15 is without prejudice to the provisions of bilateral agreements or arrangements which provide for the direct transmission of requests for assistance.

Article 16 concerns the translation of requests for mutual assistance and annexed documents. Article 16 does not apply to the exchange of information from judicial records referred to in Article 22.

Article 17 clarifies that evidence or documents transmitted pursuant to this Convention shall not require any form of authentication

Article 19 state that reasons shall be given for any refusal of assistance under the Convention.

Amended Article 20 addresses costs and states that States Parties shall not claim from each other the refund of any costs resulting from the application of the Convention or its Protocols (in other words, the costs of making and executing requests) save in respect of:

- Costs incurred by the attendance of experts in the territory of the requested State;
- Costs incurred by the transfer of a person in custody;
- Costs of a substantial or extraordinary nature;
- Costs of audio/video link and ancillary expense.

Article 22 concerns the exchange of information from judicial records. It provides that each State Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in its judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other States Parties, the information shall be given to

each of these Parties, unless the person is a national of the Party in the territory of which he/she was convicted. It should be noted that this article, which is not to be confused with Article 13, introduces the rule of automatic communication of information from judicial records and relates to nationals of other States Parties. It was inserted in order to protect any reciprocal arrangements that might exist between Ireland and the United Kingdom.

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

The Additional Protocol to the Convention was adopted at Strasbourg on 17 March 1978 by the member States of the Council of Europe.

According to Article 3 of the Additional Protocol, the Convention shall also apply to:

- The service of documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings.
- Measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement.

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

The Second Additional Protocol to the Convention was adopted at Strasbourg on 8 November 2001 by the member States of the Council of Europe. Its purpose was to improve upon and supplement certain aspects of the Convention. The changes made are set out, above, in the discussion of the Convention's Articles.

In addition to amending the existing provisions of the Convention, the Second Additional Protocol explicitly provides for requests to be made in respect of:

- Cross-border observations (Article 17);
- Controlled delivery (Article 18);
- Covert Investigations (Article 19);
- Joint investigation teams (Article 20).

It must be emphasised that, in relation to the deployment of covert or special investigative means, such activity (if agreed to by the requested State) must take place in accordance with the laws of the requested State.

EUROPEAN UNION MLA CONVENTION 2000

On 29 May 2000, the EU Council of Ministers adopted the Convention on Mutual Assistance in Criminal Matters. The Convention aims to encourage and modernise co-operation between judicial, police and customs authorities within the EU (along with Norway and Iceland) by supplementing provisions in existing legal instruments and facilitating their application.

The effect of the EU Convention is to supplement not just the 1959 CoE Convention and its 1978 Protocol on Mutual Assistance in Criminal Matters, but also the Benelux Treaty of 1962 and the 1990 Schengen Implementation Convention.

The EU Convention stipulates that such mutual assistance shall respect the basic legal principles of each Member State and the ECHR. It covers criminal offences and administrative infringements.

On 16 October 2001 a Protocol concerning mutual cooperation on banking information was also adopted, aiming at fighting against money laundering and financial crime. This Protocol forms an integral part of the 2000 Convention.

The EU Convention provides that the requesting state can ask the receiving state to comply with some formalities or procedural requirements which are essential under its national legislation. It also seeks to avoid delay by providing that requests for MLA and communications about MLA are to be made directly to the judicial authorities with territorial competence. (However, in some cases documents may be sent or returned via a central authority, and urgent requests may be made via Interpol or any other competent body.)

It also makes provision for mechanisms involving modern communication methods such as video conferencing and teleconferencing.

What kind of MLA may be requested under the EU Convention?

Mutual assistance may be requested in the following cases:

- to hand over to the competent authorities of a requesting State objects that have been stolen or obtained by other criminal means and that are found in another member state; stolen objects are to be placed at the disposal of the requesting State with a view to their return to their rightful owners. In certain cases, the requested Member State may refrain from returning the objects if that would facilitate the restitution of such articles to the rightful owner.
- to temporarily transfer to the territory of a member state where an investigation is being carried out a person held on the territory of another member state; where it is required by one of the member states, the consent of the person concerned is necessary before he/she can be transferred.

- hearing by videoconference; a witness or an expert in a member state may be heard by the judicial authorities of another member state by videoconference if this is not contrary to the fundamental principles of the requested member state and if all the parties concerned are in agreement.
- hearing by telephone conference;
- to permit controlled deliveries on the territory of a member state in the framework of criminal investigations into offences that may give rise to extradition. They are to be directed and monitored by the authorities of the requested member state;
- two or more EU Member States may set up a joint investigation team for a specific purpose and for a limited period of time; the composition of which is to be set out in a joint agreement between the member states concerned. The team would be set up for a specific purpose and for a limited period of time. An official from the member state in which the team is operating would coordinate and lead its activities in the territory of that member state.
- covert investigations may also be carried out by officers of another member state (as well as by officers of the home Member State) acting under covert or false identity, provided that the national law and procedures of the member states where the investigations take place are complied with;
- for the competent authority of a member state to request another member state to intercept telecommunications. These may either be intercepted and transmitted directly to the requesting state or recorded for subsequent transmission. Such requests must be in accordance with the national laws and procedures of the involved member states.

Personal data protection: A member state which has obtained personal data under the Convention may use them only:

- for judicial or administrative proceedings covered by Convention;
- for preventing an immediate and serious threat to public security;
- for any other purpose, with the prior consent of the communicating Member State or of the data subject.

The communicating member state may ask the member state to which the personal data have been transferred to give information on the use made of the data.

European Evidence Warrant

The European Evidence Warrant (EEW), adopted as a Council Framework Decision in December 2008, is intended to replace mutual legal assistance procedures and further improve judicial co-operation by applying the principle of mutual recognition to a judicial decision for the purpose of obtaining objects,

documents and data for use in criminal legal proceedings in different member states. Until the EEW is fully implemented, a process expected to last until late 2012, its measures will initially run in parallel with the MLA procedures under the 1959 CoE Convention and the EU Convention.

It will allow the issuing judicial authority (the definition of which includes public prosecutors) to obtain existing evidence, but not to interview witnesses, to take statements, to obtain retained communications data, to carry out interception of communications, to request covert surveillance or to monitor bank accounts. MLA requests will still be required in such circumstances.

THE UN CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME 2000 (UNTOC)

The UN Convention against Transnational Organised Crime (UNTOC or 'The Palermo Convention') was opened for signature on 12 December 2000 and came into force on 29 September 2003. It is also supplemented by three Protocols.

Ambit

Although an international instrument to counter transnational organised crime, in reality, UNTOC has a broader application. It:

- Defines and standardises certain terms (such as 'confiscation', 'organised criminal group', 'proceeds of crime', 'property', and 'serious crime') that are used with different meanings in various States or circles;
- Requires States to establish specific offences as crimes;
- Requires the introduction of specific control measures, such as the protection of victims and witnesses;
- Provides for the confiscation/forfeiture of the proceeds of crime;
- Promotes international cooperation through, in particular, extradition, legal assistance and joint investigations;
- Provides for training, research and information-sharing measures;
- Encourages States to put in place preventive policies and measures.

MLA Provisions

In Article 3, UNTOC calls for the widest measure of MLA in investigations, prosecutions and judicial proceedings, and expands the scope of application to all convention offences.

Article 18 is the principal MLA provision. It provides that assistance may be requested for taking evidence or statements, effecting service of judicial documents, executing searches and seizures, examining objects and sites, providing information, evidence and expert evaluations, documents and records, tracing

proceeds of crime, facilitating the appearance of witnesses and any other kind of assistance not barred by domestic law. Article 18 applies also to international co-operation in the identification, tracing and seizure of proceeds of crime, property and instrumentalities for the purpose of confiscation.

UNTOC allows states to refuse an MLA request under certain conditions (Article 18(21). However, it makes clear that assistance cannot be refused on the ground of bank secrecy (18(8)) or for offences considered to involve fiscal matters (18(22)). States are required to provide reasons for any refusal to assist. States must execute requests expeditiously and take into account possible deadlines facing the requesting authorities (for example expiration of a statute of limitation).

Asset Recovery Provisions

Article 12 requires a State Party to adopt measures, to the greatest extent possible within its legal system, to enable confiscation of proceeds/the equivalent value of proceeds and instrumentalities of offences covered by the Convention. The term "to the greatest extent possible within their domestic legal systems" is intended to reflect the variations in the way that different legal systems carry out the obligations imposed by this Article. Nevertheless, States are expected to have a broad ability to comply with the provisions of Article 12.

Article 12 also obligates each State Party to adopt measures to enable the identification, tracing, freezing and seizing of items for the purpose of eventual confiscation. In addition, it obligates each State Party to empower courts or other competent authorities to order production of bank records and other evidence for purposes of facilitating such identification, freezing and confiscation.

Article 13 then sets forth procedures for international co-operation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds and instrumentalities of crime abroad, as well as evidence relating thereto, in order to thwart law enforcement efforts to locate and gain control over them. A State Party that receives a request from another State Party is required by Article 13 to take particular measures to identify, trace and freeze or seize proceeds of crime for purposes of eventual confiscation.

Article 13 also describes the manner in which such requests are to be drafted, submitted and executed. It is important to note that these are special procedures aimed at obtaining the proceeds of crime, as opposed to procedures that assist in the search for such proceeds as part of the evidence of crime (for example, warrants and *in rem* procedures).

Article 14 addresses the final stage of the confiscation process: the disposal of confiscated assets. While disposal is to be carried out in accordance with domestic law, States parties are called upon to give priority to requests from other States parties for the return of such assets for use as compensation to crime victims or restoration to legitimate owners. States parties are also encouraged to consider concluding an agreement or arrangement whereby proceeds may be

contributed to the UN to fund technical assistance activities under UNTOC or shared with other States parties that have assisted in their confiscation.

Detailed provisions similar to those of UNTOC can be found in UNCAC, Article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the International Convention for the Suppression of the Financing of Terrorism, UN Security Council Resolution 1373 (2001) and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. States that have enacted legislation to implement their obligations as parties to those conventions may not need major amendments for meeting the requirements of UNTOC. In addition, the FATF Forty Recommendations set standards for countries on means of identifying, tracing, seizing and forfeiting the proceeds of crime.

THE UN CONVENTION AGAINST CORRUPTION 2003 (UNCAC)

UNCAC was opened for signature on 9 December 2003 and came into force on 14 December 2005.

UNCAC has the most detailed MLA provisions to date of any penal instrument. The offences under the Convention are wide; it is therefore likely to prove an especially useful practical tool to those investigating and prosecuting not just corruption, but a broad range of economic and financial crimes (particularly where public officials are alleged to be involved).

MLA provisions

The Convention generally seeks ways to facilitate and enhance mutual legal assistance, encouraging States Parties to engage in the conclusion of further agreements or arrangements in order to improve the efficiency of mutual legal assistance. In any case, paragraph 1 of Article 46 requires States Parties to afford one another the widest measure of mutual legal assistance as listed in Article 46 (3) in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. If a State Party's current legal framework on mutual legal assistance is not broad enough to cover all the offences covered by the Convention, amending legislation may be necessary.

States Parties have discretion in determining the extent to which they will provide assistance for judicial proceedings, but assistance should at least be available with respect to portions of the criminal process that in some States Parties may not be part of the actual trial, such as pre-trial proceedings, sentencing proceedings and bail proceedings.

The UNODC's Legislative Guide to UNCAC (at paragraphs 593-5) sets out the principal requirements of Article 46 as follows:

"State Parties are required:

(a) To ensure the widest measure of mutual legal assistance for the purposes listed in Article 46, paragraph 3, in investigations, prosecutions, judicial proceedings and asset confiscation and recovery in relation to corruption offences (art. 46, para. 1);

Article 46, paragraph 3, sets forth the following list of specific types of mutual legal assistance that a State Party must enable:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures, and freezing;

(d) Examining objects and sites;

(e) Providing information, evidentiary items and expert evaluations;

(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets in accordance with the provisions of chapter V of this Convention.

(b) To provide for mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences for which a legal entity /person may be held liable under Article 26 (art. 46, para. 2);

(c) To ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (art. 46, para. 8). In this respect, legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict;

(d) To offer assistance in the absence of dual criminality through non-coercive measures, subject to the basic concepts of its legal system (art. 46, para. 9, *(b),* on the understanding that the assistance is not related to matters of a *de minimis* nature. States parties are also invited to consider the provision of a wider scope of legal assistance in the absence of dual criminality (art. 46, para. 9 *(c)*).

(e) To apply paragraphs 9 to 29 of Article 46 to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State Party (art. 46, paras. 7 and 9-29). In this respect, legislation may be necessary if existing domestic law governing

mutual legal assistance is inconsistent with any of the terms of these paragraphs and if domestic law prevails over treaties;

(f) To notify the Secretary-General of the United Nations of their central authority designated for the purpose of Article 46, as well as of the language(s) acceptable to them in this regard (art. 46, paras. 13 and 14);

(g) To consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of Article 46 (art. 46, para. 30).

In addition, States parties may provide information on criminal matters to other State parties without prior request, where they believe that this can assist in inquiries, criminal proceedings or the formulation of a formal request from that State Party (art. 46, paras. 4 and 5). Paragraphs 4 and 5 of Article 46 provide a legal basis for the spontaneous transmission of information whereby a State Party forwards to another State Party information or evidence it believes is important to combat offences covered by the Convention at an early stage where the other State Party has not made a request for assistance and may be completely unaware of the existence of such information or evidence. The aim of these provisions is to encourage States Parties to exchange information on criminal matters voluntarily and proactively. The receiving State Party may subsequently use the information provided in order to submit a formal request for assistance. The only general obligation imposed for the receiving State Party, which is similar to the restriction applied in cases where a request for assistance has been transmitted, is to keep the information transmitted confidential and to comply with any restrictions on its use, unless the information received is exculpatory to the accused person. In this case the receiving State Party can freely disclose this information in its domestic proceedings.

Asset Recovery Provisions

In addition to Article 31 (Freezing, seizing etc,), which provides for a domestic freezing and confiscation regime in each State Party, UNCAC makes detailed provision for the recovery of property/repatriation of assets.

Article 54 (Mechanisms for recovery of property through international co-operation in confiscation) provides that:

- "Each State Party, in order to provide MLA pursuant to Article 55 of the Convention, with respect to property acquired through or involved in a commission of an offence established in accordance with the Convention shall, in accordance with its domestic law:
  - Take such measures as may be necessary to permit is competent authorities to give effect to an order of confiscation issued by a court of another State Party;

  - Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money laundering or such other offence as may be within its jurisdiction, or by other procedures authorised under its domestic law;
  - Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.
- Each State Party, in order to provide MLA upon a request made pursuant to Article 55 shall, in accordance with its domestic law:
  - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to a confiscation order (i.e. to permit its competent authorities to give effect to a confiscation order issued by a court of another State Party);
  - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested Party to believe that there are sufficient grounds for taking such action and that the property would eventually be subject to an order of confiscation for the purposes of giving effect to an order for confiscation order by a court of another State Party;
  - Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55 (International co-operation for purposes of confiscation) provides that:

- A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with the Convention for confiscation of proceeds of crime, property etc. situated in its territory shall, to the greatest extent possible within its domestic legal system:
  - Submit the request to its competent authorities for the purpose of obtaining a confiscation order and, if such an order is granted, give effect to it; or
  - Submit to its competent authorities, with a view to giving effect to it to the extent requested, a confiscation order issued by a court in the territory in the requesting State Party in accordance with Articles

31 and 54, insofar as it relates to proceeds of crime, property etc. situated in the territory of the requested State Party.

- Following a request made by another State Party, having jurisdiction over an offence established in accordance with the Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property etc for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request made under Article 55, by the requested State Party.
- A description of property to be confiscated, a statement of facts, and a legal admissible copy of the confiscation order shall be provided, as appropriate, by the requesting Party.
- Co-operation under Article 55 may be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence, or if the property is of a *de minimis* value.
- Before lifting any provisional measure taken pursuant to Article 55, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.
- Article 55 shall not be construed as prejudicing rights of bone fide third parties.

Article 57 is one of the most crucial and innovative parts of the Convention. There can be no prevention, confidence in the rule of law and criminal justice processes, proper and efficient governance, official integrity or widespread sense of justice and faith that corrupt practices never pay, unless the fruits of the crime are taken away from the perpetrators and returned to the rightful parties.

For this reason there is little discretion left to States parties about this article: States are required to implement these provisions and introduce legislation or amend their law as necessary.

Article 57 requires State Parties to:

- dispose of property confiscated under articles 33 or 55 as provided in paragraph 3 below, including by return to prior legitimate owners (para. 1);
- enable their authorities to return confiscated property upon the request of another State Party, in accordance with their fundamental legal principles and taking into account *bona fide* third party rights (para. 2);
- in accordance with the above and articles 46 and 55 of the Convention:
  - return confiscated property to a requesting State Party, in cases of public fund embezzlement or laundering of embezzled funds (see art. 17 and 23), when confiscation was properly executed (see art. 55) on the basis of final judgement in the requesting State (this

judgment may be waived by the requested State) (para. 3, subpara. a);

- return confiscated property to a requesting State Party, in cases of other corruption offences covered by the Convention, when confiscation was properly executed (see art. 55), on the basis of final judgement in the requesting State (which may be waived by the requested State) and upon reasonable establishment of prior ownership by the requesting State or recognition of damage by the requested State (para. 3, subpara. b);
- in all other cases, give priority consideration to the:
- return of confiscated property to the requesting State Party
- return such property to its prior legitimate owners
- compensation of victims (para. 3, subpara. c).

State Parties may also consider the conclusion of agreements or arrangements for the final disposition of assets on a case-by-case basis (art. 57, para. 5)"[4].

4 See UNODC's Legislative Guide to UNCAC, paragraphs 765 – 774, at http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf

USING MLA AND ADMINISTRATIVE ASSISTANCE TO TRACE AND RECOVER ASSETS

Overview

The tracing of assets may, in a given case, encompass the piecing together of an audit trail, the utilisation of a range of investigative and forensic tools (including court orders for production of documents or records), and identifying property as it passes through different manifestations (for instance, cash used to purchase antiques that are then sold and cars bought with the proceeds).

In the context of tracing assets that represent the proceeds of corruption, sophisticated financial crime or serious organised crime, it is important to remember that a legal person, for instance, a sham or shell company, is likely to be used as a conduit for the movement of assets. In that regard, the objective should always be to identify the natural person who is the beneficial owner/has a beneficial interest in the assets in question. It is not enough simply to identify the legal person beneficiary; attention should be focused on the natural person or persons behind the legal person.

When considering tracing, particularly in the context of conducting cross-border investigations and utilising the MLA process, the investigator and prosecutor will be aware that the intention of the suspect(s) will be to 'turn' illicit proceeds into apparently legal assets, or, at least, to so disguise the movement of such proceeds that they become incapable of being traced. To bring that about, the suspect(s) will, regardless of the nature of the underlying crime, have recourse to the classic money laundering three-stage process of:

- Placement;
- Layering; and
- Integration.

In essence, those stages comprise the initial placement of illicit assets into, for instance, a financial system (perhaps through a financial institution, or through conversion into financial instruments), followed by the second stage of converting into assets of a different type or moving them to another institution (perhaps involving movement across jurisdictions and/or to a shell company); and then the final stage (integration) where the assets or proceeds are then moved or mixed into the legitimate economy, perhaps through purchase of real property, investment in business opportunities or the purchase of other financial assets.

The practitioner seeking to make a request for administrative assistance or MLA in such a case must have regard to, and understand, such methods and should construct his/her request accordingly.

It is the request for assistance to another state that will be one of the principal tools available to the prosecutor or investigator when seeking to identify and/or trace assets. After all, almost any economic, financial or serious organised crime will involve transnational asset movement.

Tracing is not simply an asset recovery exercise, though. By systematically following an asset trail, a fuller picture of the extent and breadth of the underlying criminality may be obtained, along with identification of others involved, and, of course, of the victims and their loss.

A tracing investigation should ask (and seek answers to) the following, initial, questions:

- Has there been purchase of real property or high value goods?
- Are assets hidden offshore?
- Have associates / third parties been used to assist? Is there a link with other criminals?
- What 'lifestyle' evidence is there?
- Have there been, for instance, prison visits to associates?
- Have financial transfers been made?
- What do the communications patterns of those involved/suspected demonstrate? (e.g. telephone billing).

Intelligence

Before examining what is likely to be involved in a transnational tracing investigation and possible evidence to be obtained, the attention of the reader is drawn to intelligence and intelligence development.

Intelligence or information in a financial crime case or similar might relate to the underlying substantive crime itself (e.g. corruption or embezzlement), to consequent crimes (such as money laundering activity following the commission of the substantive/predicate offence), or to aspects of later asset activity that do not, in themselves, fully disclose a crime having been committed.

The importance of such intelligence or information in such circumstances will lie in it forming the basis for one or more of the following:

- Opening an investigation file;
- Making a request for administrative assistance from another state;
- Making an MLA to another state (after the opening of the investigation file);
- The requested state itself opening an investigation file.

In each of the above instances, it may be that the intelligence or information assists with identifying or tracing assets. Sometimes the initial intelligence will be sufficient for the prosecutor and investigator to move to the evidence-gathering stage; on other occasions the intelligence material will need further development before being acted upon. In addition, there will, of course, be times

when aspects of a case are still subject to intelligence development even though an investigation file has been opened and evidence is being gathered.

In financial crime and related cases, intelligence or information is likely to arise as a result of:

- Another on-going criminal investigation;
- A financial investigation following a criminal conviction;
- A suspicious activity report;
- An incoming mutual legal assistance (MLA) request;
- Human Sources;
- Product/recordings from surveillance/interception of communications;
- Financial Profiling (Land Registry, financial institutions, utilities and telephone billing);
- Account Monitoring Order or similar (will require banks etc. to provide details of specific transactions over specified period). The information can be in 'real time' e.g. ATM;
- Customer Information Order or similar.

MLA: The Investigator and Tracing

A generic plan for an asset identification/tracing exercise is unhelpful, as different cases will give rise to different demands and different avenues of enquiry. However, the techniques and approaches that should be considered for deployment are:

- Background checks on natural persons;
- Companies record/registry checks on legal persons;
- Interviews with witnesses/sources;
- Banking/financial records;
- Telephone billing/communication records and data;
- Ancillary records/evidence of 'lifestyle' spending, travelling etc.;
- Government agency records (including border entry, licensing applications etc.);
- Real property records/registers;
- Covert monitoring of accounts/transactions;
- Special investigative means and general covert methodology, including covert searches, electronic surveillance/wiretap and undercover agent deployment.

When an enquiry is required in another state, each of the above techniques are capable of being deployed through either administrative assistance or MLA (which of the two routes will depend on the nature of the request, whether

it is for intelligence or evidence, whether coercive powers are required, and on the general principles for seeking assistance set out earlier in this manual).

As for the techniques and approaches set out above, what sort of evidence might they yield?

The answer is a wide range, with each type of evidence having the potential to assist financial investigations in general, and asset tracing in particular:

- Circumstantial evidence;
- Accomplice/co-accused evidence;
- Admissions by the suspect;
- Financial and document audit trails;
- Expert evidence;
- Assets such that there is an unlikelihood of legitimate origin;
- Unusual or inexplicable business dealings (e.g. a 'bad deal' / losing money);
- Unusual business structures (including shell companies);
- Evidence of the role of agents/intermediaries whose conduct/business structure/lack of relevant expertise is itself questionable;
- Evidence of bad character;
- Physical contamination of cash;
- Corroboration by lies (sometimes and in certain legal systems);
- Inferences from silence (sometimes and in certain legal systems);
- Evidence of movement and association from covert surveillance;
- False identities, addresses and documentation.

When intending to make a request to another state in respect of asset identification/tracing, or other financial investigations, consideration should be given to seeking advice and guidance from a forensic accountant or other financial analyst in framing the nature and extent of the request and in considering material obtained following the execution of a request.

Forensic accountancy input has played a significant role in financial/asset recovery investigations in many jurisdictions, and should not be overlooked in any investigative strategy that includes cross-border activity in the context of economic or organised crime.

The forensic accountant, or financial analyst, should be asked to:

- Trace transactions back to the money/asset,
- Explain transactions to the Court,
- Analyse international money flows,
- Conduct a full analytical review,
- Aid the court's understanding of the industry/business,
- Identify unexplained turnover and consultancy fees,

- Link related parties to transactions,
- Focus on likely areas of misstatement,
- Explain accounting standards,
- Provide recognition of income,
- Review balance sheet, profit and loss account,
- Conduct sampling exercises to distinguish between, for instance, statistically possible, and likely fraudulent/dishonest, behaviour.

His/her involvement will also assist in relation to:

- Recording the full extent of financial transactions,
- Use of all the information available,
- Tracing in both directions,
- Use of IT resources,
- Use of insolvency, civil, criminal routes,
- Understanding different jurisdictions.

MLA requests for restraint and confiscation: Guiding principles

A request to a foreign state to restrain or confiscate assets will involve the exercise of a coercive power by the court in the requested state and will, therefore, invariably require the request to be made formally by a letter of request. Similarly, the supply of material needed in the tracing process will also, in the usual course of events, require such a letter to be issued.

The general principles governing MLA requests apply equally when seeking co-operation specifically to freeze or confiscate assets.

Some key points to have in mind:

- Particular care needed to ensure that the wording of the letter of request is precise.
- When the letter includes a request to trace funds, the requests made must address not only the holder/signatory of a bank account, but also any beneficial owners and anyone who has been given a 'power of attorney';
- One of the key objectives in tracing is to identify the natural person who is the beneficial owner/has the beneficial interest. Identifying the legal person with beneficial ownership is often straightforward, but will not usually be sufficient;
- In relation to account information, the specific requests contained within the letter should state concisely what is being sought, for instance: client profile, customer notes, due diligence material, correspondence or electronic records/data (there may be particular procedures/laws in the requested state to be adhered to in relation to this);

- Given the volume of material held by financial institutions in relation to information as to individual transactions, delay can be reduced by focusing the request on transactions above a certain limit, or within a particular and precise time frame (this will also help to ensure that the request is not viewed as a 'fishing expedition';
- When requesting freezing, have in mind that the requested State will want to be reassured that it is not leaving itself open to avoidable legal challenge. Therefore, where possible, consider the impact of the freezing on other persons or entities (particularly in a case where the account of a legal person with an on-going business is the subject of the request), and how such adverse effect might be addressed or minimised;
- Some States will only execute a request for freezing if criminal proceedings have already been instituted (check what the requested State understands by that, as common law States will usually regard the institution of proceedings to be charging or indicting a defendant, whereas in civil law States it will often be taken to mean the opening of the penal (investigation) file). Additionally, there are States who will only be able to provide assistance where a conviction has already been obtained;
- When making a request for the return or repatriation of assets following the making of a confiscation order, the requesting State should consider to whom the assets will be returned. For instance, the national laws of some States provide a right to a 'victim' of corruption or other economic crime to seek compensation, with the definition of who constitutes a 'victim' varying as between different jurisdictions. Consultation between the States involved should take place, particularly if the requested State is likely to seek an assurance as to whom the assets will be returned. The issue of assurances can be particularly problematic if the assets are State funds that have been stolen by, for instance, a corrupt politician or even Head of State. The requested State may be anxious to avoid repatriating assets to a State where they are going to fall back into corrupt hands, but, at the same time, Article 56 of UNCAC (addressing the return of assets) does not provide for conditional repatriation.

As we have seen in the discussion of UNCAC, above, it now provides the key international framework for restraint and confiscation in bribery, public sector embezzlement and abuse of office cases. It should therefore always be considered (and cited) when making MLA requests in such cases. UNCAC focuses heavily on cross-border recovery and envisages a range of criminal and civil mechanisms to restrain and recover the proceeds of corruption:

- Confiscation orders consequent on criminal conviction;
- Non-conviction based civil forfeiture proceedings (known in some jurisdictions as civil recovery, civil asset forfeiture or *in rem* confiscation);

- Criminal restraint orders in support of domestic or foreign criminal investigations or prosecutions, and interim receiving orders in support of domestic civil recovery proceedings;
- Enforcement of foreign criminal or civil forfeiture orders;
- Private civil proceedings brought by the claimant state (including the ability to obtain injunctions freezing assets pending outcome of the proceedings).

Post-conviction confiscation and MLA

Post-conviction asset recovery, by a confiscation or forfeiture order, is, in reality, a prerequisite for any state that wishes to address acquisitive crime (including corruption, financial crime and organised crime) effectively; it is, therefore, often necessary to make an MLA request for such an order. It should be remembered that, for all those states that are parties to such international instruments as UNTOC or UNCAC, having in place a conviction-based system of asset recovery is a requirement.

For the purposes of consultation and liaison, it is important that MLA practitioners understand that the expectation is that states will have in place a strong confiscation regime that will provide for the identification, freezing, seizure and confiscation of the proceeds of crime, including illicitly acquired funds and property. In addition, of course, a state should also be able to request freezing and confiscation from other states, and, in turn, to give effect to foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property.

Given the vital role of asset tracing and recovery in financial crime and corruption cases in particular, it should be noted that, in accordance with Article 31 of UNCAC, any state party must, to the greatest extent possible under their national system of law, have the necessary legal framework to enable post-conviction confiscation (along with the power to identify, trace, and freeze/seize the proceeds and instrumentalities of crime). This should be borne in mind as it is the key precondition to being able to make an MLA request for confiscation (and, indeed, for freezing).

The MLA practitioner must also understand how post-conviction recovery actually works.

The approaches employed by different legal systems may be broadly split into two

- A property-based system; or,
- A value-based, or benefit, system.

(It should be noted, however, that some states, such as Australia, combine the two).

A property-based system allows confiscation of property found to be proceeds or instrumentalities of crime. ‘Instrumentalities’ means any property used

for the commission of crime. The property-based is that traditionally found in civil law states and is, therefore, in operation in most European jurisdictions.

The focus of this model is 'tainted property'. It is the system in use in, for instance, Italy and Spain. To give an example, in Canada (another jurisdiction with the system in place), the sentencing judge may order confiscation of property that constitutes proceeds of crime where the offence for which the conviction was obtained was committed in relation to those proceeds. In addition, even if not satisfied that the property relates to the specific offence, the court may also order forfeiture of property if satisfied beyond reasonable doubt that the property is the proceeds of crime. The property basis for recovery is, by its very nature, specific to property; therefore, if the property cannot be located, has been transferred to a third party, is outside the state, has been substantially diminished in value or has been mixed with other property, the court may usually order a financial penalty (as a fine) instead.

In contrast, the value-based or benefit system allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value.

This approach is the one that has usually been favoured by common law states; although, it should be noted that both The Netherlands and Austria, although civil law states, have also adopted value-based confiscation.

Value– based confiscation has its origins in the United Kingdom. Under this system, the court calculates the 'benefit' to the convicted offender of a particular crime. Having determined the accrued benefit, the court will then assess the defendant's ability to pay (i.e. the value of the amount that might be realisable from the defendant's assets). On the basis of those calculations, the court then goes on to make a 'confiscation order', in the amount of the benefit or the realisable assets, whichever is the lower. An additional period of imprisonment will, typically, also be determined, but will only be served by the defendant if he/she fails to pay the amount of the order.

In addition to the above approaches, many states now have a split system in place. Such an approach allows both for the confiscation of specific items of property which are found to be the proceeds or instrumentalities of a crime, and for the making of an order based on the value of the proceeds of crime received. In some of those states, the principal method of confiscation remains property-based, but the law allows for a value order to be made if a piece of property is not available for confiscation for certain, defined, reasons; for instance, where the defendant has removed the property from the territory and it cannot be located. In other jurisdictions, systems are in place that realy equally on property and value confiscation.

Although all of the above methods require a criminal conviction as a prerequisite, the proceedings following conviction are generally, but not always, of a civil nature; the effect of that is that in a common law jurisdiction, the procedure will explicitly employ the so-called civil standard of proof (proof on the balance

of probabilities). It should be noted, though, that in some states (such as Hong Kong SAR), the burden of proof is reversed, and falls on the defence, at the post-conviction confiscation hearing stage.

In the context of MLA, it should be remembered that international co-operation takes into account the fact that different states have different ways of complying with requests. Thus, routinely, states with a value-based system will request a state with a property-based system to obtain (or enforce) a confiscation order and, in such a circumstance, if one is obtained in a court of the requested state it will be on a property-based approach. The same principle will, of course, be applied if the roles are reversed and it is a state with a property-based system making the request to a value-based state. In either case, providing that the requesting state's authorities liaise with their counterparts, ascertain what evidence and material needs to be produced, and understand the basis and effect of the order sought, there should be no practical difficulty.

Advantages and disadvantages of criminal and civil proceedings (international cases)

Some states have civil forfeiture (or 'confiscation *in rem*') available in their procedure law or code. Although a civil action, it may arise from a criminal investigation. Consequently, MLA practitioners will sometimes be asked to make or to execute an MLA request for such a case. Some states will provide MLA for civil forfeiture cases, others will not. It is therefore important to liaise if the issue arises.

For clarity, civil forfeiture is an action against the property (hence, '*in rem*') not the person and is the mechanism by which, in the absence of criminal proceedings, the proceeds of criminal activity can be confiscated so as to deprive a person of ill-gotten gains. Many practitioners will be more familiar with the established mechanisms for asset forfeiture through criminal proceedings, as described above. Post-conviction confiscation is the usual course of events and should be the preferred option where the accused is found in the territory of a state and there is sufficient evidence to support a criminal prosecution.

However, there are instances when such a course of events may not be available to the prosecuting agencies of a state, as the suspect may have fled following the dissipation of his assets, may be able to rely upon a jurisdictional privilege (sometimes referred to as 'domestic immunity') or may have died. In such circumstances, civil forfeiture is able to be used to prevent the proceeds of the criminal activity to be enjoyed by the suspect (and his associates) abroad and to prevent 'inheritance' of such proceeds by successors.

There may be occasions, particularly in relation to corruption cases, where in a state where there is a prosecutorial discretion, a decision has to be made whether to proceed down a criminal post-conviction confiscation route or via the civil process. Practitioners should be aware of this because it is possible

to receive an MLA request from a state where such a prosecutorial decision has been made. The following considerations should be borne in mind:

- The different mechanisms (of confiscation) each have advantages and disadvantages;
- Package of criminal and civil measures is often required to recover assets laundered internationally;
- Chosen mechanism often fact-dependant;
- Various issues will be weighed when deciding what is the most suitable mechanism:
- How efficient and speedy are civil and criminal mechanisms in the jurisdiction in which assets are located?
- How easy and costly is it to freeze assets in the jurisdiction in which they are located using criminal or civil powers?
- Can an enforceable confiscation order be obtained (e.g. against dead or absconding defendants, or foreign companies/trusts)?
- Can a confiscation order be enforced against the entity holding the assets?
- What opportunity will a defendant have to challenge a foreign confiscation order?
- What is the standard of proof? „Beyond reasonable doubt" v „Balance of probabilities";
- What are the rules on admissibility of evidence?
- What are the rules on jurisdiction?
- What individuals and entities can be defendants?

Specific legal procedural tools capable of being utilised in respect of the recovery of certain assets: Initiating the procedure for handing over objects

This is a special type of co-operation in criminal matters tool which is particularly important in fighting organised crime and corruption. At the request of a foreign state for the handing over objects which were subject of a crime, or objects by means of which a crime has been committed (i.e. instrumentalities), including objects which represent a reward for the committed crime, the judicial authorities are able to act upon such request in the same manner as if the request had been made within their judicial system. This type of international legal co-operation in criminal matters may be related to the extradition of a foreigner, but may also be initiated independently from this procedure, or it may proceed in parallel with the extradition process of the person in question.

It should be underlined that in certain cases which have been precisely defined, the request of the foreign state will not be acted upon: those cases include political and military criminal offences, crimes punishable by mild sentences, and cases where the accused or defendant has asylum rights or is a national of the State.

Asset Recovery Agencies: Variations from state to state

Given the importance of liaison and the building of networks, those making or receiving MLA requests in relation to asset recovery cases and financial investigations should remember that there are essentially four models of asset recovery agency competence:

- A dedicated assets recovery body/agency (ARB) established and has the competence to address asset recovery (criminal and confiscation *in rem*) in relation to all acquisitive crime/unlawful activity;
- A dedicated ARB established and has the competence to address only confiscation *in rem*; with individual prosecutorial/law enforcement entities having the conduct of post-conviction confiscation proceedings;
- A dedicated ARB established, but its competence is confined to managing assets that have been restrained/frozen; with individual prosecutorial/law enforcement entities having the conduct of both post-conviction and *in rem* confiscation proceedings;
- Powers of asset recovery (including asset management) are given to each existing entity to be used in accordance with present areas of competence.

When liaising with such an agency from another state, do ascertain (in accordance with the above) what competence it exercises.

Practical Steps to Effective Asset Recovery Co-Operation

Requests for the restraint and confiscation of assets generally require dual criminality and a full justification as to why it is necessary. Without this information, a court will be unable to give an order to freeze assets effectively or register an order to confiscate assets to allow it to be enforced.

The requested authority dealing with the request will make the appropriate applications before the court for the assets to be restrained and should inform the requesting authority as soon as this has been done.

The requesting state must then serve a copy of the restraint order upon the suspect and any other person known to be affected by it once it receives it from the requested state. It must be remembered that the requested state's courts will usually require an acknowledgement that this has been completed otherwise the court may discharge the order.

In most, but not all states, the order to freeze assets can be obtained by a court on behalf of a foreign jurisdiction at the investigative stage of criminal proceedings.

Important additional information to include in an MLA request for freezing/restraint of property in the requested state:

1. The name, address, nationality, date and place of birth and present location of the suspect(s) or defendants whose criminal conduct has given rise to anticipated confiscation or forfeiture proceedings.
2. Details of the criminal investigation.
3. Details of the law applicable to the investigation and current evidence against the suspects.
4. Particulars of the property which it is intended to restrain in the requested state, the persons holding it and details of the link between the suspect and the property (this is important if the property to be restrained is held in the name of a third party such as a company or another person).
5. State clearly whether prior assistance in the case (including asset tracing assistance) has been provided and, if so, give particulars of the requested state's enforcement or other authority involved and details of the assistance already received.
6. Where applicable, details of any court orders already made in the requesting state against the suspect in respect of his or her property. If any court order has been made, a duly authenticated copy should be included with the request; that is, a true copy of that order certified by a person in his/ her capacity as a judge, magistrate or officer of the relevant court of the requesting state, or by an official of the Central Authority in the requesting state.
7. If possible, brief details of all known property held by the suspect outside the requested state.
8. A certificate or statement issued by or on behalf of the requesting state's Central Authority, stating:
   - that an investigation has been instituted in that state and has not concluded, or that proceedings have been instituted and are on-going in the requesting state;
   - that the order which it is expected the court of the requesting state will make;
   - will have the purpose of recovering property or has the purpose of ordering
   - the forfeiture of instrumentalities of crime;
   - that any future order that is made can be enforced outside the jurisdiction of the requesting state;
   - an undertaking or agreement to serve a copy of the order once it has been made upon the suspect and other persons known to be affected by the order.

Important additional information to include in a request for confiscation/ forfeiture of property in the requested state:

1. The information as outlined above for freezing/restraint applications.
2. If direct enforcement is sought, an original confiscation or forfeiture order, or a duly authenticated copy of the order; and
3. A certificate or statement issued by or on behalf of the requesting state's Central Authority stating:

- that the order was made consequent on the conviction of the person named in the order;
- that the order is in force, and that neither the order nor any conviction to which it may relate is subject to appeal;
- that all or a certain amount of the sum payable under the order remains unpaid in the territory of the requesting state or that other property recoverable under the order remains un-recovered there;
- that the confiscation order has the purpose of recovering property, or the value of property received in connection with the commission of crime, or, in the case of a forfeiture order, has the purpose of ordering the forfeiture of instrumentalities of crime;
- that the order made can be enforced outside the jurisdiction of the requesting state.

The court has to be satisfied that granting a freezing/restraint order or a confiscation/forfeiture order, or giving effect in the requested state to a confiscation order made in the requesting state would not be incompatible with any rights under the ECHR (or other regional human rights instrument as may be applicable if a state from another region). The requesting state, in particular, must consider its request against the provisions of applicable human rights instruments.

Obstacles to be Overcome When Seeking International Forfeiture/Confiscation Co-operation

Among the procedural, evidentiary and political obstacles to recovery efforts are:

- Anonymity of transactions impeding the tracing of funds and the prevention of further transfer;
- Lack of technical expertise and resources;
- Lack of harmonisation and co-operation;
- Problems in the prosecution and conviction of offenders as a preliminary step to recovery;
- Absence of institutional/legal avenues through which to pursue claims successfully, certain types of conduct not criminalised, immunities, third party rights;
- Questions of evidence admissibility, type and strength of evidence required, differences regarding *in rem* forfeiture, time-consuming, cum-

bersome and ineffective mutual legal assistance treaties when the identification and freezing of assets must be done fast and efficiently;

- Limited expertise to prepare and take timely action, lack of resources, training or other capacity constraints;
- Lack of political will to take action or co-operate effectively; lack of interest on the part of victim states in building institutional and legal frameworks against corruption;
- Corruption offenders are often well connected, skilled and bright. They can afford powerful protections and can seek shelter in several jurisdictions. They have been able to move their assets and criminal proceeds discretely and to invest them in ways that render discovery and recovery difficult.

SHOULD MLA BE SOUGHT OR SHOULD PROCEEDINGS BE BROUGHT IN ANOTHER JURISDICTION?

It may sometimes be the case that consultation between states should focus on where the case should be heard, rather than the provision of MLA. It might be that it would be better for the (would-be) requesting state to provide its evidence to the requested state for proceedings to be initiated there. There might even be existing, related, proceedings in the requested state. There has always been a great deal of uncertainty once the issue becomes one of determining which is the best or most effective jurisdiction within which to undertake proceedings against criminal offences with transnational dimensions.

In doing so, a list of priorities may need to be established. The starting point is likely to be that the state in which the act was committed should have priority to prosecute the offender. Other criteria, it might be argued, should be subordinate to this principle. However, this assumption is often overturned in transnational cases once other considerations are taken into account.

States should try to make decisions at an early stage and may wish to ask when and how the issue of jurisdiction should be considered, as well as which authorities will be responsible for consultations and agreement. The issue of timing may also be relevant, as the question is raised whether the decision should be made at the beginning of investigation or after the nature of the case has been ascertained.

To facilitate decisions on case transfer, states should formulate a practical set of criteria which may assist in resolving such complex jurisdictional issues. For instance, the types of questions that states will be likely to ask will include:

- Where was the offence committed and where was the offender arrested?
- Where are the most witnesses or most important evidence or victims of the crime concerned located?
- Which jurisdiction has the best/most effective laws?
- Which jurisdiction has the best confiscation laws?
- In which jurisdiction will there be less delay?
- Which jurisdiction provides the best security and custody assurances?
- Which jurisdiction can best deal with sensitive disclosure issues?
- Which jurisdiction can bear the costs of the proceedings?
- In which jurisdiction had the crime substantial effects?
- Where is the largest part of potentially recoverable assets located?
- Which state has the most developed asset-recovery mechanisms?

- Has the state concluded agreements or arrangements on transfer of criminal proceedings?
- Has the state developed policy and practical criteria for decisions on transferring or accepting criminal proceedings?
- Does that policy paper lay out the judicial, operational and sentencing implications of decision-making on these issues?
- Does that policy paper address the implications of decision-making in relation to the proceeds of crime?
- Has the state identified and mandated an authority to take lead responsibility for consultations and decision-making on related issues?

ANNEX 1

JUDICIAL AND LAW ENFORCEMENT NETWORKS[5]

The Committee of experts on the operation of European Conventions on co-operation in criminal matters (PC-OC)

The PC-OC is a Council of Europe committee of experts in the field of international cooperation in criminal matters working under the authority of the European Committee on Crime Problems (CDPC). The PC-OC plays an important role in international co-operation in criminal matters. The committee is composed of representatives of the central authorities of the 47 member states of the Council of Europe and observers.

The PC-OC monitors the application of the Council of Europe conventions related to international co-operation in criminal matters (in particular extradition, mutual legal assistance and transfer of sentenced persons) and proposes new instruments in this field. It also produces helpful tools, such as country information, model forms, practical guidelines, etc. for practitioners who deal with these instruments. National practitioners can take advantage of the expertise of the PC-OC Secretariat and its national experts. Questions about the application or interpretation of the Council of Europe instruments in the field of international co-operation in criminal matters can be addressed to the PC-OC, helping the PC-OC in continuing the development of these instruments[6].

A website (www.coe.int/tcj) has been set up containing useful information and documentation regarding this co-operation:

- legal standards and useful background material for practitioners (country information, tools for implementation) in the key areas of work of the PC-OC);
- relevant case law of the European Court of Human Rights;
- useful links to other websites of interest to the activities of the PC-OC;
- archives of past activities, studies, papers and publications of interest;
- information on the activities of the PC-OC including its upcoming and past meetings and events.

Eurojust

Eurojust is a judicial cooperation body created to help provide safety within an area of freedom, security and justice. It was set up by the Council of the

5 Data and text from the relevant official websites. List of web addresses in Annex 2.

6 Questions can be submitted to the national PC-OC representative or directly to the PC-OC Secretariat at the following e-mail address: Dg1.tcj@coe.int.

European Union in February 2002 to improve the fight against serious crime by facilitating the co-ordination of action for investigations and prosecutions covering the territory of more than one member State with full respect for fundamental rights and freedoms.

Eurojust is composed of 27 National Members, one from each EU member state. National Members are seconded in accordance with their respective legal systems and are judges, prosecutors or police officers of equivalent competence, who together form the College of Eurojust.

In order to carry out its tasks, Eurojust maintains privileged relationships with the European Judicial Network, the European Police Office (Europol), the European Anti-Fraud Office and liaison magistrates. It is also able, through the Council, to conclude cooperation agreements with non-member states and international organizations or bodies, such as UNODC, for the exchange of information or the secondment of officers.

At the request of a member State, Eurojust may assist investigations and prosecutions concerning that particular member state and a non-member state, if a co-operation agreement has been concluded or if there is an essential interest in providing such assistance.

In addition to cooperation agreements, Eurojust also maintains a network of contact points worldwide. Eurojust aims to improve the co-ordination of investigations and prosecutions between the competent authorities in the member states and improves the cooperation between the competent authorities of the member states, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests.

What practical input can Eurojust give to an MLA or administrative request?

Members know the legal systems and practical arrangements of their state, have rapid access to their state agencies and will be entitled to engage in direct dialogue with the national authorities. They can immediately consult, and advice can be given collectively from the whole Eurojust team and not only from any one individual. They have the further advantage of having an overall view of what is happening across Europe. They can put any cases referred to them into an EU context and more easily spot any patterns or trends in EU crime.

Eurojust can give immediate legal advice and assistance in cross-border cases to investigators, prosecutors and judges in different EU states. It advises judges and prosecutors where to look for information that they need from another EU state and on how to proceed in cross-border cases.

Although Eurojust can recommend to national authorities to take certain steps, such as to initiate and/or co-ordinate investigations or to set up investigation teams, it has no authority to launch or carry out investigations itself. It works alongside the European Judicial Network (EJN).

The European Judicial Network

The European Judicial Network (EJN) is a network of national contact points for the facilitation of judicial cooperation in criminal matters between the members States of the European Union.

National contact points are designated by each member State among central authorities in charge of international judicial cooperation, judicial authorities and other competent authorities with specific responsibilities in the field of international judicial cooperation, both in general and for certain forms of serious crime, such as organized crime, corruption, drug trafficking or terrorism.

The Network is composed of more than 300 national contact points throughout the 27 member States, the European Commission and a Secretariat based in The Hague.

The contact points promote judicial cooperation between the competent local authorities for the purpose of, for example, the dispatch and implementation of requests for judicial assistance as well as the establishment of the most appropriate direct contacts. In addition, the contact points can help in resolving difficulties arising from the implementation of such requests. The contact points meet three times a year to gather knowledge on the different legal systems of European Union countries, to discuss difficulties in the provision of judicial assistance, and to make proposals for the resolution of conflicts.

The EJN is made up of:

- the central authorities in each member state responsible for international judicial cooperation;
- one or more contact points in each member state, each having an adequate knowledge of a language of the EU other than its own national language;
- the European Commission is also a contact point for those areas falling within its sphere of competence.

How does the EJN function?

The contact points:

- are active intermediaries with the tasks of facilitating judicial cooperation between the member states, particularly in actions to combat serious crime and establishing the appropriate direct contacts for mutual assistance requests;
- provide the necessary legal and practical information to the local judicial authorities in their own countries, to the contact points in other countries and to the local judicial authorities in the other countries to enable them to prepare an effective request for judicial cooperation or to improve judicial cooperation in general;
- improve coordination of judicial cooperation in cases where a series of requests from the local judicial authorities in a Member State necessitates coordinated action in another Member State.

The contact points must have permanent access to the following four types of information:

- full details of the contact points in each Member States;
- a simplified list of the judicial authorities and a directory of the local authorities in each Member State;
- concise legal and practical information concerning the judicial and procedural systems in the Member States;
- the texts of the relevant legal instruments.

The EJNs Secretariat forms part of Eurojust but functions as a separate unit and enjoys autonomy.

Members

Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

Information about the laws and requirements of EU Member States, the types of evidence that can be obtained, and details of contact points can be found at the European Judicial Network website: (*www.ejn-crimjust.europa.eu).* Some states also have their own websites.)

The relationship between Eurojust, the EJN and Liaison Magistrates

The relationship between the EJN, Eurojust and the liaison magistrates set up in the Joint Action of 22 April 1996 is natural and complementary as regards facilitating judicial cooperation in cross-border cases. The EJN is a decentralised network of contact points which advise and assist judicial authorities in Member States when judicial cooperation is necessary. Eurojust is a central unit with wide possibilities for coordination in cross-border cases. Their relations are based on consultation and complementarity to avoid duplication of efforts. Seconded liaison magistrates in Member States also encourage judicial cooperation by exchanging legal information to promote mutual understanding. Eurojust may, on a case-by-case basis cooperate with liaison magistrates that, at the same time, can be appointed as contact points of the EJN.

European Judicial Network in Civil and Commercial Matters

There is a European Judicial Network (EJN) for Civil and Commercial Matters website where a large quantity of information about the Member States, Community law, European law and various aspects of civil and commercial law can be found.

Website: http://ec.europa.eu/civiljustice/.

Interpol

Interpol is the world's largest international police organisation, with 188 member states. It facilitates cross-border police co-operation, and supports and assists all organisations, authorities and services whose role is to prevent or combat international crime. Interpol aims to facilitate international police co-operation even where diplomatic relations do not exist between particular countries.

Interpol acts as a central repository for professional and technical expertise on transnational organised crime and as a clearinghouse for the collection, collation, analysis and dissemination of information relating to organised crime and criminal organisations:

- It enables different police forces from across the globe to exchange crucial data quickly and securely;
- Provides support to member countries in on-going international investigations on a case by case basis;
- Identifies, establishes and maintains contacts with experts in the field;
- Initiates, prepares and participates in programmes to improve the international sharing of information;
- Traditionally, Interpol has not been a transmission route for letters of requests (although it has always been able to receive a copy of a letter in order to facilitate the process); however, it now has a formal role in transmission in certain circumstances in relation to requests made under the EU Convention (see section on that convention, above;
- Monitors and analyses information related to specific areas of activity and criminal organisations.

Europol

Europol is the European Union law enforcement organisation that handles criminal intelligence. Its aim is to improve the effectiveness and co-operation between the competent authorities of the member states in preventing and combating serious international organised crime and terrorism.

The objective of Europol is to make a significant contribution to the EU's law enforcement action against organised crime and terrorism, with an emphasis on targeting criminal organisations. Europol's role (like that of Interpol) is to improve the sharing of intelligence between law enforcement agencies across the EU and globally

The Competent National Authorities (CNAs) on-line Directory

Two of the existing UNODC Directories are relevant here; both are designed to allow easy access to the contact information of competent national authorities (CNA):

(a) The on line Directory of Competent National Authorities designated under the 1988 Drugs Convention and the United Nations Convention against Transnational Organised Crime and the Protocols thereto.

The Directory contains the contact information of over 600 CNA's authorised to receive, respond to and process requests for:

- Extradition,
- Transfer of Sentenced Persons,
- Mutual Legal Assistance in Criminal Matters,
- Illegal Traffic of Narcotics by Sea,
- Smuggling of Migrants by Sea,
- Trafficking of Firearms.

With the view to facilitate communication and problem solving among competent authorities at the inter-regional level, the Directory contains essential information on:

- State membership in existing regional networks,
- Legal and procedural requirements for granting of requests,
- Use of the Organised Crime Convention as the legal basis for requests,
- Links to national laws and websites,
- Indication of requests that can be made through Interpol.

The on line directory is available to competent authorities and government agencies with a user account. Account members also receive the latest publication of the Directory twice a year and can download the directory in .pdf and .rtf formats.

(b) The online Directory of Competent National Authorities designated under the United Nations Convention against Corruption.

The directory contains the contact information of authorities authorized to receive, respond to and process requests for:

- Mutual Legal Assistance in Criminal Matters (Central Authority),
- Asset Recovery (Asset Recovery Focal Point),
- Prevention of Corruption (Prevention Authority).

With a view to facilitate communication and enhance trust and cooperation among competent authorities at the interregional level, the directory contains essential information on:

- Areas of assistance provided by prevention authorities,
- Legal and procedural requirements to be observed in requests,
- Use of the United Nations Convention against Corruption as the legal basis for requests,
- Links to national laws and websites,
- Indication of requests that can be made through Interpol,
- State membership in existing asset recovery networks.

The online directory is available to competent authorities and government agencies with a user account.

Members

All State parties to the above mentioned Conventions can access the Directory, which is password protected.

Commonwealth Network of Contact Persons (CNCP)

The purpose of the Commonwealth Network of Contact Persons is to facilitate international cooperation in criminal cases between Commonwealth member states and between those sates and non-Commonwealth countries, including on mutual legal assistance and extradition, and to provide relevant legal and practical information.

The Network comprises at least one contact person from each of the jurisdictions of the Commonwealth.

Members

Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu and Zambia.

Financial Action Task Force (FATF)

The anti-money laundering global response is focused on FATF, an intergovernmental policy-making body established by the G7 in 1989 and based in Paris. In 2001, the FATF mandate was expanded to include combating the financing of terrorism (CFT) and then subsequently in 2013 to prevent the financing of weapons of mass destruction proliferation activities.

FATF's purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. It works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

Since its creation, FATF has spearheaded the effort to adopt and implement measures designed to counter the use of the financial system by criminals. It established a series of Recommendations in 1990 (revised in 1996, 2003 and 2012 to ensure that they remain up to date and relevant to the evolving threat of

money laundering) that set out the basic framework for anti-money laundering efforts and are intended to be of universal application.

FATF currently comprises 34 states, although some 180 countries have joined the FATF or a FATF-Style Regional Body (FSRB) and are committed to having their systems of AML/CFT assessed against a set of international standards, which includes the FATF 40 Recommendations themselves, as well as a range of UN instruments (relevant provisions of UN Conventions and UN Security Council Resolutions). See *www.fatf-gafi.org*.

CARIN

The Camden Asset Recovery Inter-Agency Network (CARIN) is an informal grouping of contacts dedicated to improving cooperation in all aspects of tackling the proceeds of crime and increasing the effectiveness of members' efforts through cooperative inter-agency cooperation and information sharing. The CARIN permanent secretariat is based in Europol headquarters at The Hague. CARIN members meet regularly at an Annual General Meeting (AGM). Access to the CARIN network and its website is restricted to members of the network. The organisation is governed by a Steering Committee of nine members and a rotating Presidency.

Full Membership of the CARIN network is open to EU Member States and to those states, jurisdictions and third parties who were invited to the CARIN launch congress in 2004. Each Member may nominate two representatives, one from a Law Enforcement Agency and one from a Judicial Authority to be their CARIN contacts. Assets Recovery Offices may represent either law enforcement or the judiciary. In principle, CARIN should be a key entity in facilitating MLA.

The Egmont Group

In 1995, a group of Financial Intelligence Units (FIUs) met at the Egmont Arenberg Palace in Brussels and decided to establish an informal group for the enhancement of international co-operation. It is now known as the Egmont Group of Financial Intelligence Units. The member FIUs meet regularly to find ways to co-operate, especially in the areas of information exchange, training and the sharing of expertise.

The aim of the Egmont Group is to provide a forum for FIUs around the world to improve co-operation in the fight against money laundering and financing of terrorism and to foster the implementation of national programmes. The Group provides support with a view to:

- expanding and systematizing international cooperation in the reciprocal exchange of information between FIUs;
- increasing the effectiveness of FIUs by offering training and promoting personnel exchanges to improve the expertise and capabilities of personnel employed by FIUs;

- fostering better and secure communication among FIUs through the application of technology, such as the Egmont Secure Web (ESW);
- fostering increased co-ordination and support among the operational divisions of member FIUs;
- promoting the operational autonomy of FIUs; and
- promoting the establishment of FIUs in conjunction with jurisdictions with an AML/CFT programme in place, or in areas with a programme in the early stages of development.

The Egmont Group presently has over 100 FIU members. The Group's "Best Practices for the Exchange of Information Between FIUs" is set out at Annex 4.

See www.egmontgroup.org; enquiries to mail@egmontsecretariat.org.

StAR Initiative (World Bank/UNODC)

In September 2007, the World Bank and the United Nations Office on Drugs and Crime (UNODC) launched the Stolen Assets Recovery (StAR) initiative, which is intended to help developing nations recover stolen, embezzled or corruptly obtained state funds. The World Bank estimates that between US$1 trillion and US$1.6 trillion are lost each year to various illegal activities including corruption, drug trafficking, counterfeit goods and money, the illegal arms trade, and tax evasion. More specifically, the StAR Initiative, which is supported by a number of bilateral development agencies, assists in:

- Enhancing capacity in developing states to respond to, and make, MLA reque– Adopting and implementing effective confiscation measures, including non-conviction based confiscation legislation;
- Promoting transparency and accountability of public financial management systems;
- Creating and strengthening national anti-corruption agencies; and
- Monitor recovered state funds if requested by states.
- However, neither the World Bank nor UNODC would get directly involved in the investigation, tracing, law enforcement, prosecution, confiscation and repatriation of stolen assets; in short, every practical step necessary for the successful application of the initiative to specific cases. See *http://www1.worldbank.org/publicsector/star_site/*.

StAR and Interpol – Focal Point Contact List

To assist developed and developing states in their efforts to recover stolen assets, the StAR Initiative and INTERPOL are working together and have established a 24/7 Focal Point Contact List of national officials who could respond to emergency requests for international assistance. This is the first of its kind,

worldwide list of national officials who are available 24 hours a day, seven days a week, to help states with stolen asset cases, especially those involving politically exposed persons, and bribery of public officials.

For contacts, see *http://www1.worldbank.org/publicsector/star_site/*.

The Judicial Regional Platforms of Sahel and Indian Ocean Commission Countries

Judicial Regional Platforms have been established by UNODC's Terrorism Prevention Branch and Organised Crime and Illicit Trafficking Branch to strengthen international cooperation in criminal matters in the regions of the Sahel and the Indian Ocean. Their main focus is to prevent and combat forms of serious crime, such as organized crime, corruption, drug trafficking or terrorism.

The Platforms are international cooperation networks of focal points, who facilitate extradition and mutual legal assistance in criminal matters procedures with the Member States of their Platforms. They also identify technical assistance needs for strengthening the judicial cooperation among them and sensitize the national stakeholders of the penal chain on the role and mechanisms of the Platforms. The national focal points meet, a least, once a year.

Judicial Regional Platform of the Indian Ocean Commission (IOC) states: Comoros, France (Réunion), Madagascar, Mauritius and Seychelles

Judicial Regional Platform of Sahel states: Burkina Faso, Mali, Mauritania, and Niger,

Further details at: http://www.unodc.org/documents/treaties/organized_crime/internationalcooperation/Focal_points_IOC.pdf.

Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States

The Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition has been under development since 2000, when the Third Meeting of the Ministers of Justice or of Ministers or Attorney Generals of the Americas decided to increase and improve the exchange of information among member States of the Organization of American States in the area of mutual assistance in criminal matters.

The Network has three components: a public website, a private website and a secure electronic communication system.

The public component of the Network provides legal information related to mutual assistance and extradition for the 34 States members of the Organization of American States. The private component of the Network contains infor-

mation for individuals who are directly involved in legal cooperation in criminal matters. The private site includes information on meetings, contact points in other countries, a glossary of terms and training on the secure electronic communication system.

The secure electronic communication system facilitates the exchange of information between central authorities who deal with issues of mutual assistance in criminal matters and extradition. The system provides secure instant e-mail service to central authorities and a space for virtual meetings and the exchange of pertinent documents.

Members

Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia (Plurinational State of), Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela (Bolivarian Republic of).

Ibero-American Legal Assistance Network (IberRed)

The Ibero-American Legal Assistance Network (IberRed) is a structure formed by contact points from the Ministries of Justice and Central Authorities, Prosecutors and Public Prosecutors, and judicial branches of the 23 states comprising the Latin American Community of Nations, aimed at optimizing instruments for civil and criminal judicial assistance and strengthening cooperation between countries.

Members

Argentina, Bolivia (Plurinational State of), Brazil, Colombia, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Puerto Rico, Spain, Uruguay and Venezuela (Bolivarian Republic of).

The International Centre for Asset Recovery (Basel Institute on Governance) (ICAR)

ICAR specialises in the development and implementation of capacity building, training and mentoring programmes that enable law enforcement agencies and prosecutors in developing states to investigate and prosecute complex corruption, economic crime and money laundering cases. The Centre also provides policy advice to both requesting and requested states for MLA purposes. It also assists with legal and institutional reform processes, and offers strategic advice to requesting states in international bribery cases with an asset recovery

angle. The ICAR team of experts consists of investigators and prosecutors with a wide range of experience in international cases, MLA and asset recovery.

ICAR also has an extensive online 'knowledge' database.

For ICAR, see *http://www.baselgovernance.org/icar/* and for online 'knowledge centre' see *http://www.assetrecovery.org*.

ANNEX 2

USEFUL WEB LINKS
(Listed alphabetically)

CAERT

http://www.caert.org.dz

CARIN (Camden Asset Recovery)

http://www.europol.europa.eu/publications/Camden_Assets_Recovery_Inter-Agency_Network/CARIN_Europol.pdf

The Committee of experts on the operation of European Conventions on co-operation in criminal matters (PC-OC)

http://www.coe.int/t/DGHL/STANDARDSETTING/PC-OC/default_en.asp

Commonwealth Harare Scheme on International Co-operation in Criminal Matters:

http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_HARARESCHEMERELATINGTOMUTUALASSISTANCE2005.pdf

Commonwealth Network of Contact Persons:

http://www.thecommonwealth.org/subhomepage/165671/

The Council of Europe Treaty Office

http://www.conventions.coe.int/

The Egmont Group

http://www.egmontgroup.org

Eurojust

http://eurojust.europa.eu/Pages/home.aspx

European Convention on Mutual Assistance in Criminal Matters (the Council of Europe, 1959)

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=030andCM=8andDF=15/04/2011andCL=ENG

European Court of Human Rights (ECtHR)

http://www.echr.coe.int/Pages/home.aspx?p=home

http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c

European Judicial Network (EJN)

http://www.ejn-crimjust.europa.eu/ejn/

EU MLA Convention (2000)

http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdocandlg=ENandnumdoc=42000A0712(01)andmodel=guichett

Europol

https://www.europol.europa.eu/

Financial Action Task Force (FATF)

http://www.fatf-gafi.org/

Ibero-American Legal Assistance Network (IberRed)

http://www.iberred.org/

ICAR (International Centre for asset Recovery, Basel)

See http://www.baselgovernance.org/icar/ and for online 'knowledge centre' see http://www.assetrecovery.org

IGAD Network of Judicial Experts:

http://www.issafrica.org/cdterro/index.htm

Interpol:

http://www.interpol.int/Public/Icpo/intliaison/default.asp

Online Directories of Competent National Autorities

http://www.unodc.org/unodc/en/legal-tools/directories-of-competent-national-authorities.html

StAR Initiative (World Bank/UNODC)

See http://www1.worldbank.org/publicsector/star_site/

StAR Interpol Focal Point Contact List

For contacts, see http://www1.worldbank.org/publicsector/star_site/

UNODC

http://www.unodc.org/unodc/index.html?ref=menutop

UNODC MLA Tool Writer (password required):

http://www.unodc.org/mla/index.html

UNODC: UN Convention Against Corruption (UNCAC):

http://www.unodc.org/unodc/en/treaties/CAC/index.html

UNODC: UN Convention Against Organised Crime (UNTOC):

http://www.unodc.org/unodc/en/treaties/CTOC/index.html

UNODC: UN Counter-Terrorism Conventions:

http://www.unodc.org/unodc/en/terrorism/conventions.html

Vienna Convention on the Law on Treaties

http://untreaty.un.org/cod/avl/ha/vclt/vclt.html

ANNEX 3

PROACTIVE AND COVERT INVESTIGATIONS (INCLUDING SURVEILLANCE AND UNDERCOVER DEPLOYMENT): RIGHT TO A PRIVATE LIFE, 'PROVOCATION' AND UNLAWFUL ENTRAPMENT: THE ECHR JURISPRUDENCE

(to be used as reference when requesting to implement covert measures through MLA)

It is essential that any regulatory regime for covert law enforcement satisfies the requirements of the European Convention on Human Rights.

Article 6.1 of the Convention provides that:

„*In the determination of.....any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

Article 8 provides:

„*1. Everyone has the right to respect for his private and family life, his home and correspondence.*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The European Court of Human Rights has analysed Article 8 issues by considering the following questions:

- does the subject matter fall within the scope of Article 8?
- if so, has there been an interference by a public authority?
- if so, was it 'in accordance with the law'?
- if so, did it pursue a legitimate aim i.e. one of those set out in Article 8(2)?
- if so, was it necessary, i.e. did the interference correspond to a pressing social need and was it proportionate to that need?

Most covert law enforcement operations will involve an interference with an individual's Article 8(1) rights (but not always, see **Ludi v Switzerland**, below).

The right to privacy enshrined in Article 8 is not absolute, it is a qualified right. Interference with the rights protected by Article 8(1) will give rise to a violation of Article 8 unless the interference was:

1. in accordance with the law;
2. in pursuit of one or more of the legitimate aims referred to in Article 8(2):

- the interests of national security;
- the interests of public safety;
- the interests of the economic well-being of the country;
- the prevention of disorder or crime;
- the protection of health or morals;
- the protection of the rights and freedoms of others, and

3. was necessary in a democratic society.

In accordance with the law

The impugned measure, i.e. the deployment of the covert technique, must have proper basis in domestic law. There must be some specific legal rule or regime authorising the act which interferes with the Article 8(1) right. The law must be accessible to the person(s) affected – see **Silver v United Kingdom** (1983) 5 EHRR 347.

The law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, public authorities are empowered to resort to covert methods – see **Kopp v Switzerland** (1998) 27 EHRR 91 and **Taylor-Sabori v United Kingdom** (2002) 36 EHRR 17.

The law must indicate the scope of any discretion conferred on the authorities, and the manner of its exercise, with sufficient clarity to give the individual(s) affected protection against arbitrary action. There should be independent supervision of the use of covert methods: **Malone v United Kingdom** (1984) 7 EHRR 14.

In **Huvig v France** (1990) 12 EHRR 528, the European Court of Human Rights held that the term 'law' should be understood in its substantive rather than formal sense. Common law could therefore be relied upon, but it too must be sufficiently clear to enable an individual to know the precise extent of his legal entitlements and obligations. In relation to covert activity, common law rules must define with clarity the categories of individuals liable to be targeted, the type of offences which might give rise to covert operations, the permitted duration of such operations and the circumstances in which records of such operations are to be destroyed.

The Court is reluctant to hold that administrative guidelines provide an adequate basis in law for the purposes of Article 8(2); see **Malone v United Kingdom** (above). Codes of Practice issued under a delegated rule making authority have, however, been held to comply with the Convention: **Barthold v Germany** (1985) 7 EHRR 383.

The regulatory regime must provide a guarantee against the arbitrary use of the powers it confers. In **Kruslin v France** (1990) 12 EHRR 547, a telephone tapping case, the Court identified the following legal deficiencies in the French procedures:

- there was no definition of the categories of persons whose telephones were liable to be tapped;
- there was no definition of the categories of offence which would justify tapping;
- there was no limit on the duration of a tap;
- there were no procedures laid down for the reporting of intercepted conversations;
- there was no judicial scrutiny;
- there was no provision for scrutiny by the defence;
- there was no provision for the destruction of tapes in the event of acquittal.

The European Court considered the cases of **Kruslin v France** and **Huvig v France** in **Valenzuela Contreras v Spain** (1998) 28 EHRR 483. At para 46(iv), in the context of interception, the ECtHR set out the following minimum safeguards which must be set out in the statute regulating the covert activity:

- a definition of the categories of people liable to have their telephones tapped by judicial order;
- the nature of the offences which may give rise to such an order;
- a limit on the duration of telephone tapping;
- a procedure for drawing up summary reports containing intercepted communications;
- the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and defence;
- the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court.

The greater the independence of the bodies that authorise and review the use of covert methods, the greater the likelihood that the regulatory regime will be considered to satisfy the requirements of Article 8(2). In **Klass v Germany** (1978) 2 EHRR 214, the European Court held that parliamentary supervision and independent review by a person qualified to hold judicial office were sufficient to satisfy Article 8(2) but commented that judicial control afforded *„the best guarantees of independence, impartiality and a proper procedure."*

In **Funke v France** (1993) 16 EHRR 297, the Court held that the powers afforded to the French customs by their regulatory regime left them with exclusive competence to determine the expediency, length and scale of searches and so infringed Article 8. The absence of prior judicial authorisation for searches was said to be the most serious deficiency. It may well therefore be that self-authorisation by the police of intrusive forms of covert activity, in the absence of any independent scrutiny, will be found to offend against Article 8.

Necessary in a democratic society

This means that the restriction on the exercise of an individual's Article 8(1) rights must:

(a) fulfil a pressing social need;
(b) be in pursuit a legitimate aim [set out in Article 8(2)] and
(c) there must be a reasonable relationship of proportionality between the [covert] means deployed and the [legitimate] aim pursued. Put another way, covert activity should be restricted to what is strictly necessary to achieve the required objective. There must also be adequate and effective safeguards and remedies against the abuse of such methods.

Further, any qualification to an individual's Article 8 rights must be applied in a non-discriminatory manner.

Proportionality

The impugned measure must be proportionate to what is sought to be achieved by it. There are certain areas of an individual's private life that are more private than others so that more substantial justification may be demanded.

Proportionality was explained in **B v SSHD** (unreported) as:

„.....a measure which interferes with a human right must not only be authorised by law but must correspond to a pressing social need and go no further than is strictly necessary in a pluralistic society to achieve its permitted purpose; or, more shortly, must be appropriate and necessary to its legitimate aim."

Proportionality is sometimes described as the principle which brings human rights standards to life. The principle is concerned with striking a fair balance between the protection of individual rights and the interests of the community at large. This balance can only be achieved if the restrictions on an individual's [Article 8(1)] rights are strictly proportionate to the legitimate aim they pursue e.g. the prevention of crime. In short, the assessment of proportionality requires a balancing exercise between the extent of the intrusiveness of the interference with an individual's right to privacy and the specific benefit to the investigation or operation being undertaken.

Factors to consider in determining whether a covert measure is proportionate to the aim pursued include:

- whether relevant and sufficient reasons have been advanced in support of the measure;
- whether a less restrictive alternative measure was available;
- whether there has been some measure of procedural fairness in the decision making process;
- whether adequate safeguards against abuse exist; and
- whether the restriction in question destroys the very essence of the Convention right concerned.

The UK case of **R v Khan** [1997] AC 558 is a good example of the application of the principle of proportionality. In that case, Khan and his cousin were searched on their arrival at Manchester Airport from Pakistan. The cousin was found to be in possession of heroin worth £100,000. No drugs were found on Khan who said nothing incriminating in interview and was released without charge. The police subsequently placed a covert audio surveillance device on the outside of a property known to be visited by the defendant. The placing of the device involved elements of trespass and minor criminal damage but was authorised by the Chief Constable for the force area in which it was deployed in accordance with 1984 Home Office Guidelines. The device recorded details of a conversation in the course of which the defendant incriminated himself in the importation of a substantial quantity of heroin. The trial judge allowed the admission of the evidence so obtained on the basis that authorisation for the use of the surveillance device had been obtained in accordance with the 1984 Guidelines and the case involved a serious criminal investigation where normal methods of surveillance were impracticable and the use of the device would lead to arrest and conviction. The defendant changed his plea to guilty following this ruling but subsequently appealed against conviction.

The Court of Appeal upheld the conviction. The test for admissibility was relevance and if the evidence was relevant it could be admitted even if it was illegally obtained. The invasion of privacy aspect of the case was outweighed by other considerations (such as the fact that the police had acted in accordance with the 1984 Guidelines and the criminal conduct under investigation was of a serious nature) and plainly could not be regarded as having such an adverse effect on the fairness of the proceedings that the court should have exercised its discretion under section 78 of the UK's Police and Criminal Evidence and excluded the evidence.

The Court of Appeal's conclusions were ratified by the House of Lords. On the facts, the discretion to admit the evidence was correctly exercised although the provisions of the Convention could be relevant to the exercise of the section 78 discretion. Lord Nolan emphasised that the significance of any breach of relevant law or a Convention right will normally be determined by its effect on the fairness of the proceedings rather than its unlawful use or any irregularity.

Khan appealed to the European Court of Human Rights. The Court ruled that the deployment of the covert device offended against Article 8(1). The interference with the defendant's right to privacy could not be justified under Article 8(2) as the absence of a statutory framework for such surveillance meant that the deployment of the device could not be 'in accordance with the law'. Significantly, however, the Court ruled that the admission of evidence obtained in breach of a Convention right did not automatically render the trial unfair and so in breach of Article 6 even where, as here, it was effectively the only evidence against the defendant.

Following **Khan**, in **Armstrong v United Kingdom** (2002) 36 EHRR 30, the Court unanimously held that the use of a covert audio surveillance device

purportedly authorised in accordance with the 1984 Guidelines offended against Article 8 as not in accordance with the law as there was no statutory regime to regulate the use of such devices.

Accountability

In **Klass v Germany** (ante), the Court observed that there must be adequate and effective safeguards against the abuse of covert powers. Although it was not a requirement of Article 8, it was desirable that the machinery of supervision should be in the hands of a judge.

The effect of Article 8 breaches – the case law

The Court has made it clear that it is not necessarily a requirement of a fair trial that evidence obtained through an unlawful covert operation should be excluded. In **Schenck v Switzerland** (1988) 13 EHRR 242, the prosecution relied on evidence of tape recordings of telephone conversations which had been illegally obtained. The ECtHR declared that rules on the admissibility of evidence were *„primarily a matter for regulation under national law"* and that the court's task was to determine whether the trial as a whole was fair. The defendant had the opportunity to challenge the authenticity of the recordings which was not the only evidence on which the conviction was based.

The Court appears to have gone one step further in **Khan v United Kingdom** (see above) where the unlawfully obtained evidence was the only evidence upon which the prosecution sought to rely.

In **Allan v United Kingdom**, the prosecution had relied at Allan's (A) trial for murder on covertly recorded cell conversations between A and his co-accused in relation to other offences, and conversations between A and his girlfriend covertly recorded in a prison visiting room. It was accepted that this amounted to a breach of A's Article 8 rights as the (then) absence of a statutory framework for such covert activity rendered it not 'in accordance with the law'. Nevertheless, the Court found that the use of the covertly recorded material at trial had not violated A's right to a fair trial under Article 6. At both trial and on appeal, A had been given the opportunity to challenge the reliability and significance of the evidence. [The Court did, however, rule that A's right to a fair trial had been violated by the use in evidence of an alleged confession elicited from A by a police informer acting on the instructions of the police.]

In **Perry v United Kingdom** [2003] CLR 281, defendant was charged with a series of armed robberies. Police attempts to conduct identity parades had been frustrated and so they covertly recorded him in the public area of a police station. They then got 11 volunteers to imitate his actions and showed the footage so obtained to witnesses, two of whom positively identified defendant. Neither defendant nor his solicitor were aware of the covert recording and they did not see it before it was used. The trial judge admitted the evidence on the basis that the manner in which the film was used was not unfair notwithstanding that certain guidelines had not been followed. The Court of Appeal upheld the conviction and the ECtHR ruled defendant application inadmissible since the use of

evidence obtained without a proper legal basis or through unlawful means will not generally contravene Article 6(1) provided that proper procedural safeguards are in place and the source of the material is not tainted.

The surreptitious gathering of information about an individual by a law enforcement agency will not always amount to a breach of Article 8(1) so that there is no need to engage Article 8(2). In **Ludi v Switzerland** (1992) 15 EHRR 173, the ECtHR refused to find that the use of an undercover agent infringed the applicant's Article 8 rights as he was a suspected member of a large group of drug traffickers in possession of 5 kilos of cocaine and *„must therefore have been aware from then on that he was engaged in a criminal act.....and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him.*" The drug trafficking was already underway when the undercover officer came on the scene and so the admission of evidence gathered in the course of the operation did not violate Article 6.

'Provocation' or 'Entrapment'

The law on entrapment has been considered extensively in ECHR case law, and in this regard, three cases are worthy of note:

- **Schenk v Switzerland***(1988) 13 E.H.R.R. 242*
- **Ludi v Switzerland** *(1992) 15 E.H.R.R. 173*
- **Teixeira De Castro v Portugal** *(1998) 28 E.H.R.R. 101*

The two Swiss cases state that the principal consideration for the court is whether the evidence is put forward in such a way that the proceedings are fair as a whole. This means that the defence should be given an adequate opportunity to challenge the evidence before the court. In the **Ludi** case, the prosecution had relied on a report from the undercover operative and he was not called to give live evidence during the proceedings. This meant that the defence could not challenge his evidence; the ECtHR found that to be unfair and, therefore, in violation of Article 6(1).

In **Teixeira**, the Court held that the Portuguese authorities had violated Article 6(1), and took into account the following matters:

- The police investigators were not supervised by a judicial authority (in Portugal such investigations are supervised by a magistrate).
- The police investigators had exerted "very great insistence" on the defendant to commit the offence, and
- The defendant had not exhibited any behaviour which may have led to the conclusion that he was ready to commit the offence had the police investigators not intervened.

The factors listed in the European cases are consistent with the position in common law jurisdictions. In 2001 the House of Lords extensively reviewed the current state of law on entrapment, and the limits of acceptable police conduct when they delivered a judgment on 25 October 2001 on two related appeals (***Attorney General's Reference Number 3 of 2000, R v Loosley***). Both cases involved

the supply of drugs to undercover police operatives following circumstances where the operatives had been proactive in the course of their dealings with the defendants.

This appeal addressed two issues:

- The extent to which the powers to stay proceedings or exclude evidence have been modified by Article 6 of the European Convention on Human Rights, and
- What conduct by agents of the state would constitute entrapment of such a nature that either a prosecution based on that evidence should be stayed as an abuse of process, or the evidence should be excluded under S.78 of the Police and Criminal Evidence Act.

The following principals were confirmed:

- Entrapment is not a defence at common law;
- The court has a jurisdiction to stay proceedings and a discretion to exclude evidence;
- A stay of proceedings will usually be the most appropriate remedy in response to entrapment. The court took the view that if there had been "an affront to the public conscience" then it would be unfair to try the defendant at all;
- The Court set down a number of factors to be taken into account, namely:
  - Have the police caused the commission of the offence, or simply given the defendant the opportunity to commit it?
  - Is the offence one which would be difficult to detect by overt means?
  - The police must act in good faith, i.e. they must show that they had reasonable grounds for suspicion;
  - The operation must be properly supervised;
- The reasonable grounds for suspicion need not relate to a specific individual;
- It is not essential that the agent of the state acts in an entirely passive manner;
- The greater the inducements or overtures made the more likely the court would conclude that the unacceptable boundary had been crossed;
- Regard should be had to the defendant's circumstances/vulnerability;
- The court is more concerned with the conduct of the police, not the background of the defendant.

The above principals will be seen to accord with one of the recent judgments of the ECtHR in ***Constantin and Stoian v. Romania*** (application nos. 23782/06 and 46629/06).

In that case, the Court confirmed that entrapment was distinct from the use of legitimate undercover techniques. It also reaffirmed the domestic courts' obligation to carry out a careful examination of the material in the file where an accused was arguing police incitement (the Court's role being only to ensure that the domestic courts had adequately secured the rights of the defence).

The Court, stating that it was mindful of the importance and difficulties of the investigating agents' task, held that the actions of the undercover police agent and his collaborator, beyond mere passive criminal investigation, had incited the applicants to commit the offence of which they were convicted. Notwithstanding both its subsidiary role in assessing the evidence and the disputed evidence, it considered that the facts indicated that if it had not been for the police officer's express request to buy drugs, none of the events in question would have occurred.

Furthermore, the domestic courts had not sufficiently investigated the allegations of incitement. In particular, the Court of Appeal had reversed the County Court decision without having taken any evidence, let alone having interviewed directly the applicants on the merits of the accusations. The Court also noted, among other things, that the Court of Appeal's doubts concerning the lack of honesty of the witnesses had not been supported by the findings of the investigation.

The Court therefore concluded that the applicants' trial had been unfair, in violation of Article 6.

ANNEX 4

EGMONT GROUP: Best Practices for the Exchange of Information Between Financial Intelligence Units[7] (original text)

Introduction

1. According to the **Statement of Purpose** of the Egmont Group, the Financial Intelligence Units (FIUs) participating in the Egmont Group resolve to encourage co-operation among and between them in the interest of combating money laundering and terrorism financing.

   The members showed an awareness of the need to maximise information exchange and effective co-operation among FIUs and expressed their conviction that there exists both significant potential for broad-based international co-operation among the FIUs and a critical need to enhance such co-operation.

   The Egmont Members agreed to pursue as a priority the further enhancement of information exchange on the basis of reciprocity or mutual agreement and the development of appropriate modalities to that end.

2. Consequently, a document on **"Principles of Information Exchange Between Financial Intelligence Units"** was agreed on and incorporated into the Statement of Purpose.

   These principles reflect the intention of the Egmont Group to make their pursuit of the enhancement of information exchange a priority and to overcome the obstacles preventing cross-border information sharing. FIUs are therefore invited to do everything possible to ensure that national legal standards and privacy laws are not conceived so as to inhibit the exchange of information between or among FIUs. The principles relate to the conditions for the exchange of information, the permitted uses of information, as well as the confidentiality issue.

3. In some countries there might be restrictions that limit the free exchange of information with other FIUs or the access to information relevant to a requesting FIU. This document firstly describes practices that maximize cooperation between FIUs and can be used as inspiration for government authorities and officials when considering money laundering legislation.

---

7 See together with other pertinent Egmont documents at http://www.egmontgroup.org/library/egmont-documents

Furthermore to address the practical issues that have been identified as impeding the efficiency of mutual assistance, this document aims to provide guidelines in terms of best practices for the exchange of information between FIUs. When dealing with international requests for information, FIUs should endeavour to take these best practices into account to the greatest possible extent.

A. LEGAL

1. The Egmont principle of free exchange of information at FIU-level should be possible on the basis of reciprocity, including spontaneous exchange.
2. The exchange of information between FIUs should not be affected by their status, be it of an administrative, law enforcement, judicial or other nature.
3. Differences in the definition of the offences governing the competence of FIUs should not be an obstacle to free exchange of information at FIU-level. To this end, the FIU's competence should extend to all predicate offences for money laundering as well as terrorism financing.
4. The exchange of information between FIUs should take place as informally and as rapidly as possible and with no excessive formal prerequisites, while guaranteeing protection of privacy and confidentiality of the shared data.
5. Should an FIU still need MOUs to exchange information, these should be negotiated and signed by the FIU without undue delay. To that end the FIU should have the authority to sign MOUs independently.
6. It should be possible for communication between FIUs to take place directly, without intermediary body.
7. Requests from a counterpart FIU should be dealt with in the same way as a domestic disclosure so that the receiving FIU can exchange all information available to the FIU under its own authority. To this end FIUs should have speedy access to complementary information. FIUs should in particular have access to:
   - all relevant tools and registers existing in their respective jurisdiction, including law enforcement information;
   - information held by financial institutions and other reporting entities;
   - information on beneficial ownership and control of legal persons, such as corporate entities, trusts and IBCs.
8. The providing FIU's prior consent to disseminate the information for further law enforcement or judicial purposes should be granted promptly and to the largest extent possible. The providing FIU should not refuse its consent to such dissemination unless this would fall beyond the scope of application of its AML/CFT provisions, could lead to impairment of a criminal investigation, would be clearly disproportionate to the legitimate interests of a natural or legal person or the State of the provi-

ding FIU, or would otherwise not be in accordance with fundamental principles of its national law. Any such refusal to grant consent shall be appropriately explained.

B. PRACTICAL

1) Request

The following practices should be observed by the FIU intending to submit a request for information:

1. All FIUs should submit requests for information in compliance with the Principles for Information Exchange that have been set out by the Egmont Group. Where applicable the provisions of information sharing arrangements between FIUs should also be observed.
2. Requests for information should be submitted as soon as the precise assistance required is identified.
3. When an FIU has information that might be useful to another FIU, it should consider supplying it spontaneously as soon as the relevance of sharing this information is identified.
4. The exchange of information between Egmont FIUs should take place in a secure way. To this end the Egmont FIUs should use the Egmont Secure Web (ESW) where appropriate.
5. If necessary the requesting FIU should indicate the time by which it needs to receive an answer. Where a request is marked "urgent" or a deadline is indicated, the reasons for the urgency or deadline should be explained. All FIUs should refrain from arbitrary use of this terminology. When the requested information is only partially urgent, the request for information should use the 'urgent' mark only for the relevant sections. The requesting FIU should indicate if it desires an acknowledgment of receipt of the request. The requesting FIU may not require an acknowledgment (orally or in writing) unless the request is marked "urgent" by that FIU or, in its view, an acknowledgment is necessary in the light of the circumstances of the case. An urgent request should include the contact information for the individual responsible for sending the request.
6. Where appropriate, especially in the case of urgent requests, and in order to speed up proceedings, the requesting FIU may ask for prior consent for further use of the information to be granted directly together with the reply itself.
7. The Egmont Group has developed a request for information form. The use of this form should be encouraged, when exchanging information.
8. Requests should contain sufficient background information to enable the requested FIU to conduct proper analysis/investigation. Requests shall be accompanied by a brief statement of the relevant facts known to the requesting FIU. Particular attention should be paid to:

- the information identifying the persons or companies involved (at least name and date of birth for individuals and name and registered office for companies);
- the reported suspicious or unusual transactions or activities, including the involved accounts;
- the *modus operandi* or circumstances in which the transactions or activities took place;
- whether the request for information is based on one or more disclosures or whether it has another base, such as a request from a national police authority, a list of suspected terrorists...;
- the link with the country of the requested FIU.

9. Requests for information that are not related to a specific country and that are being sent to several FIUs at the same time should be justified as much as possible, providing an overview of the underlying facts. Also the request should be targeted as precisely as possible. The FIU should therefore refrain from using group mailings unnecessarily and should consider carrying out preliminary research into the transactions in order to identify a possible target cluster of FIUs that are more likely to have the relevant information at their disposal.

2) Processing the request

1. Except if indicated otherwise, all incoming requests for information originating from a counterpart FIU should be answered, also in case of a negative reply.
2. The request should be dealt with as soon as possible upon receipt.
3. FIUs should assign unique case reference numbers on both outgoing and incoming case requests to facilitate tracking of a particular case request or response.
4. Where a request is acknowledged, the requested FIU concerned should provide the requesting unit with the name and contact details, including telephone and fax numbers, of the contact person and the case or reference number assigned to the case by the responding FIU.
5. FIUs should give priority to urgent requests. If the receiving FIU has concerns about the classification of a request as urgent, it should contact the requesting FIU immediately in order to resolve the issue. Moreover each request, whether or not marked as "urgent", should be processed in the same timely manner as domestic requests for information.
6. (a) As a general principle, the requested FIU should strive to reply to a request for information, including an interim response, within 1 week from receipt in the following circumstances:
   - if it can provide a positive/negative answer to a request regarding information it has direct access to;
   - if it is unable to provide an answer due to legal impediments.

(b) Whenever the requested FIU needs to have external databases searched or query third parties (such as financial institutions), an answer should be provided within 1 month after receipt of the request. The requested FIU may consider contacting the requesting unit within 1 week from receipt to state that it has no information directly available and that external sources are being consulted or that it is experiencing particular difficulties in answering the request. The latter may be done orally.

(c) If the results of the enquiries are still not all available after 1 month, the requested FIU should provide the information it already has in its possession or at least give an indication of when it will be in a position to provide a complete answer. This may be done orally.

7. FIUs should consider establishing mechanisms in order to monitor request-related information, enabling them to detect new information they receive regarding transactions, STRs, etc. that are involved in previously received requests. Such a monitoring system would enable FIUs to inform former requestors of new and relevant material related to their prior request. 15/11/04 5

3) Reply

1. Where the requested FIU desires feedback on how the information it provided was used, it should request this explicitly. When the requesting FIU is not able to obtain this information, it should reply stating the reasons why the requested feedback cannot be provided.
2. If appropriate, especially in case of urgent requests, and in order to speed up proceedings, prior consent for further use of the information can be granted with the reply itself.
3. The exchange of information between FIUs should take place in a secure way. To this end the Egmont FIUs should use the Egmont Secure Web (ESW) where appropriate.

4) Confidentiality

All FIUs should use the greatest caution when dealing with supplied information in order to prevent any unauthorised use resulting in a breach of confidentiality.

ISBN 978-86-84437-57-2