

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 15/12/2016
[PC-OC/DOCS2016/PC-OC(2016)07E]
<http://www.coe.int/tcj>

PC-OC(2016)07

EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMMITTEE OF EXPERTS

ON THE OPERATION OF EUROPEAN CONVENTIONS

ON CO-OPERATION IN CRIMINAL MATTERS

(PC-OC)

16 November 2016

**Special session on new opportunities for mutual assistance offered by the Second
Additional Protocol to the Convention on mutual assistance in criminal matters**

(part of the implementation of the Action Plan against Transnational Organised Crime)

Contents

Programme of the Special Session.....	3
Introduction by Mr Eugenio Selvaggi (Italy)	4
Presentation by Mr Vincent Jamin, Eurojust JIT Secretariat.....	7
Workshop 1: Exchange of Information	
Discussion paper prepared by Ms Eleni Loizidou (Cyprus)	8
Workshop 1: Exchange of information	
Summary of discussions by Ms Barbara Goeth-Flemmich (Austria)	11
Workshop 2: Gathering of evidence	
Discussion paper prepared by Mr Erik Verbert (Belgium).....	13
Workshop 2: Gathering of evidence	
Summary of discussions by Mr Juhan Korhonen (Finland)	17

Programme of the Special Session

- 2 pm.: **General introduction** by Mr Eugenio Selvaggi (Italy), Rapporteur on MLA
- Presentation** by Mr Vincent Jamin, Eurojust JIT Secretariat
- 2.30 pm : **Workshop 1: Exchange of information** (Agora Room 6)
(Scope of information and channels of communication; e.g. Art. 1.3; 4; 11; 15; 16; 25; 26)
- Exchange of views based upon discussion paper prepared by the moderator
- Moderator: Ms Eleni Loizidou (Cyprus)
 Rapporteur: Ms Barbara Goeth-Flemmich (Austria)
- Workshop 2: Gathering of evidence** (Agora Room 3)
(Methods of gathering and admissibility of evidence in the requesting state; e.g. Art 9; 10; 12; 13; 14; 17; 18; 19; 20; 23)
- Exchange of views based upon discussion paper prepared by the moderator
- Moderator: Mr Erik Verbert (Belgium)
 Rapporteur: Mr Juhani Korhonen (Finland)
- 4 pm.: Break
- 4.30 pm.: **Presentation of the discussions of the workshops by the Rapporteurs**
- 5 pm.: **Conclusion by Ms Joana Ferreira (Portugal), Vice-Chair of the PC-OC**

Introduction

by Mr Eugenio Selvaggi (Italy)

This paper tends to offer participants to Special Session on MLA some possible ideas for discussions. However, discussions should not be limited to the points mentioned below.

Preliminary remark. A Jewish saying says: If you do not know where are you going to, at least be aware where do you come from.

So: where does the Second Protocol come from?

Changes in judicial co-operation, in particular in the last 20 years or so, due to:

1. Individuals, goods and capitals do move very quickly and freely, much more than they did before. Also criminals move more frequently and freely than ever (prosecutors and law enforcement agencies have to stop at the borders); That is to be considered one of the many effects of globalization.
2. Many forms of criminality are transnational in character, and these are the most dangerous forms of criminality. Either criminal activities (drug, arms, trafficking in human beings, terrorism) have an impact over more than one country, or proceeds of crime is placed in countries that do not have effective measures related to judicial co-operation (including off shore countries).
3. Modus operandi of criminals has also changed due to new technologies (e.g. frauds via internet); that gives rise to the problem where the crime is committed, i.e. which jurisdiction is competent.

The present Special Session is a part of the Action Plan against TOC as approved. That is to say that both discussions and summaries of said discussions should be oriented as to give possible inputs for further action. To that extent it is of a particular significance that the present Session is dedicated to experts of international judicial co-operation who may bring their experience and on that basis check whether problems encountered may be solved by means of best practices or whether other type of action is needed, such as operating on drafting exercises, both on soft law or on binding instruments.

Where does the Second Protocol come from? It reads from the website that “The Protocol is intended to improve States' ability to react to cross-border crime in the light of political and social developments in Europe and technological developments throughout the world. It will therefore serve to improve and supplement the 1959 Convention and the 1978 Additional Protocol to it, in particular by broadening the range of situations in which mutual assistance may be requested and making the provision of assistance easier, quicker and more flexible. It also takes account of the need to protect individual rights in the processing of personal data”.

It should be recalled that the drafting of such Protocol is to be seen in combination with the 2000 EU Convention on MLA; as a matter of fact they are almost similar. But the setting was (still is) quite different: in the EU the common space and mutual recognition make the difference.

But it is also true that the underlining perspective was (and still is) that international judicial co-operation could more effectively (or even should) be a matter of relations among judicial authorities rather than a matter among Governments: that would make co-operation more effective, streamlined and fast.

Past and ongoing initiatives carried out by PC-OC tend to simplify mechanisms of judicial co-operation, including channels of communications and gathering of evidence.

The present Session is devoted and focused on the issues which appear under the two workshops.

That, of course, does not exclude that also other issues be examined in the Session, including, *inter alia* MLA in relation to proceedings related to responsibility of legal entities or the problem of proportionality in (requesting and) granting co-operation. Also relations between judicial co-operation and police to police co-operation might be of interest for PC-OC, in particular in reference to the special investigation techniques (controlled deliveries, cross-border observation etc.).

As to Workshop 1, Eleni Loizidou has pointed out the main items under examination. I believe that issues related to spontaneous information and confidentiality will be discussed in depth; I also could envisage that it might also amount to the main issue of transfer of criminal proceedings.

As I said above, the legal setting in the CoE and the EU is not the same. However, because of the globalization and transnational character of crimes mentioned above, it is not unusual to have different jurisdictions acting at the same time and on same cases; it should therefore be borne in mind that some “mixt co-operation” might be envisaged (e.g. using JIT’s results even in jurisdictions that do not have yet that possibility provided for in their legal system).

In general: I see that both good will and imagination could play a role.

When requested for assistance, competent authorities should look how to better cope with the needs of the requesting State.

On the other side, what was gathered, either as evidence or as performance requested (e.g. service of documents in a particular form or way) is to be used in the requesting State; hence, a certain grade of flexibility in the execution of a request is necessary from the side of the requested State; and even the concept of “execution” should be a matter for reflection. To that extent I will pick up the provocative phrase by Erik Verbert: the line between assisting and actually cooperating in the execution is very thin.

That is the issue (which I very much welcome) that is proposed in the paper by Erik Verbert for Workshop 2, where also special measures of investigation and co-operation provided for by the Second Protocol will be examined.

Article 8 of Second Protocol is crucial, in my view. It could be looked at as the precedent for mutual recognition and finally for the European Investigation Order (EIO) in EU.

In the context of the Action Plan on TOC, examination of issues related to special investigation techniques and new or special measures for international co-operation is crucial too.

Videoconference.

Cross-border observations/proceedings.

Controlled deliveries and undercover operations.

Spontaneous information. This point should be expanded as to include the transfer of proceedings issue.

Of course the wide range of issues to be considered would ask for a Special Session of more than one day. That means that what we are called for is to start an exercise which is supposed to continue as an ordinary action of PC-OC.

Presentation by Mr Vincent Jamin, Eurojust JIT Secretariat

The Network of National Experts on Joint Investigation Teams (JITs Network): [Powerpoint presentation](#)

Workshop 1: Exchange of Information

Discussion paper prepared by Ms Eleni Loizidou (Cyprus)

(Scope of information and channels of communication; Art. 1.3; 4; 11; 15; 16; 25 and 26 of the 2nd Additional Protocol to the CoE Convention on Mutual Legal Assistance in Criminal Matters)

The 2nd Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS N°182) which entered into force in 2004, is intended to improve states' ability to react to cross-border crime in the light of political and social developments in Europe and technological developments throughout the world. It serves to improve and supplement the 1959 Convention and the 1978 Additional Protocol, in particular by broadening the range of situations in which mutual legal assistance may be requested and making the provision of assistance easier, quicker and more flexible. It also takes account of the need to protect individual rights in the processing of personal data.

PC-OC has decided to organise a special session on the Second Additional Protocol to examine whether the opportunities it provides for better cooperation are being exploited by member states and to discuss any problematic issues and solutions that could be found.

I propose that in this Workshop 1, entitled "Exchange of Information - New Opportunities for co-operation" we discuss:

- (a) whether and to what extent each relevant provision, as set out in summary below, has indeed provided new opportunities for better co-operation in exchanging information both as regards procedures and content**
- (b) any difficulties encountered in the application of these provisions and**
- (c) ways of solving any problems encountered**

Art. 1(3) – Scope

This article extends the scope of the Convention to cover the whole field of "administrative criminal law".

The purpose of para 3 is to bring under the same treaty, provisions on mutual assistance applicable to two types of national proceedings, namely (a) proceedings in respect of criminal offences and (b) proceedings in respect of infringements (sometimes called regulatory offences) punishable under criminal/administrative law. The rationale is that the same facts (eg severe pollution due to negligence, or traffic offences) are often the subject of criminal proceedings in one state and the subject of criminal/administrative proceedings in another State. A prerequisite is that in the end it is legally possible to bring such proceedings before a court having jurisdiction in particular, but not necessarily exclusively, in criminal matters.

Art. 4 – Channels of Communication

This article rewords Art 15 of the Convention. It establishes that as a general rule requests are in writing, channelled via the Ministries of Justice (always via Ministries of Justice in applications for temporary transfer of detained persons to the requesting state). As a general rule requests may always be forwarded directly between judicial authorities whereas requests concerning "administrative/criminal offences" may be forwarded directly between administrative authorities or between administrative and judicial authorities. It should be

stressed that para 9 of this article opens the way to the use of telecommunications in the transmission of requests and other communication. The Interpol channel is left open for urgent cases only.

Art. 11 – Spontaneous information

This article extends to mutual assistance in general what was until now only recognized in the limited field of money laundering, namely the possibility (but not an obligation) for Parties, without prior request, to forward to each other information about investigations or proceedings which might contribute to the common aim of responding to crime.

In accordance with paragraph 2, conditions may be attached to the use of information provided under this article, and paragraph 3 provides that, if that should be the case, the receiving Party is bound by those conditions. In reality, the sending Party only binds the receiving Party to the extent that the receiving Party accepts the unsolicited information. By accepting the information, it also accepts to be bound by the conditions attached to the transmission of the information.

Because some States might have difficulties in not accepting the information once it has been transmitted, for example where their national law puts a positive duty upon authorities who have access to such information, paragraph 4 opens the possibility for states to declare that information must not be transmitted without their prior consent should the sending State attach conditions on the use of such information.

Article 15 – Language of the procedural documents and judicial decisions to be served

Article 16 – Service by post

These articles replace the terms “writs and records” in the Convention, articles 7 and following, with the term “procedural documents” and “judicial decisions” without intending to depart from the scope of article 7 but only to reflect the language used today in a large number of countries. Article 15 provides that procedural documents and judicial decisions shall in all cases be transmitted in the language they were issued. But if the issuing authority has reason to believe that the addressee understands only some other language, the most important passages of those papers should be accompanied by a translation into that language. This provision conforms to the requirement of article 6(3)(a) of ECHR that everyone charged with a criminal offence has the minimum right inter alia “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”. Furthermore for the benefit of the authorities of the requested Party the papers shall be accompanied by a short summary of their contents into the language of that Party.

The objective of article 16 in enabling the service of procedural documents and judicial decisions by post to persons who are in the territory of the other Party is to ensure that they can be sent and served as speedily as possible.

Art. 25 Confidentially

This article aims at recognizing that the requesting State is entitled to impose a duty of confidentiality on the requested State as to the fact and substance of the request except to the extent necessary to execute the request.

Art. 26 Data protection

This article applies only to personal data “transferred”. Personal data is used within the meaning of article 2(a) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 1981. Personal data transferred may be used only for the purpose of proceedings to which the Convention or its Protocols apply or for preventing an immediate and serious threat to public security, unless prior consent is given by the other Party or the data subject. A Party may refuse to transfer personal data if it is protected under its national legislation and the other Party is not bound by the 1981 Convention. Parties may by Declaration to the Secretary General of the Council of Europe require that personal data transmitted may not be used unless their prior consent is granted.

Workshop 1: Exchange of information

Summary of discussions by Ms Barbara Goeth-Flemmich (Austria)

(Scope of information and channels of communication; Art. 1.3; 4; 11; 15; 16; 25 and 26 of the 2nd Additional Protocol to the CoE Convention on Mutual Legal Assistance in Criminal Matters)

Moderator: Ms Eleni Loizidou (Cyprus)

Rapporteur: Ms Barbara Goeth-Flemmich (Austria)

Participants from Croatia, Estonia, France, Israel, Japan, Latvia, Liechtenstein, Lithuania, Moldova, Montenegro, Norway, Portugal, Romania, Estonia, Sweden, Ukraine, Interpol.

Eleni Loizidou introduced the topic and invited MS to share their experience when applying Art. 1 para 3; 4; 11; 15; 16; 25 and 26 of the 2nd Additional Protocol (ETS 182), to report any difficulties encountered and possible ways of solving these problems.

Art 1 para 3 (Scope) and 4 (Channels of communication):

Though ETS 182 provides for direct channels between judicial authorities (Art. 4 para 1) and also between administrative authorities or between judicial and administrative authorities (Art. 4 para 3) these direct channels are not used on a regular basis. Also States in favour of direct channels mentioned cumbersome proceedings in order to identify the competent authority. The information necessary for using direct channels is not (easily) accessible (no list of competent authorities, no atlas, etc.).

Some delegations raised concerns that direct communications without involving the Central Authorities would risk that requests are not (properly) executed. According to their view judicial and administrative authorities are not prepared to receive requests by direct channels. Other delegations held the view that the involvement of Central Authorities seems only to be justified in cases, where the Central Authority has a role to play (quality check, etc). Where the role of the Central Authority is reduced to forwarding the received documents to the competent authority, direct channels should be used.

The possibility to use electronic or any other means of telecommunication (Art 4 para 9) provides a clear added value in view of quick transmission of information though many judicial/administrative authorities still need the original documents in order to be able to execute the request.

There was experience reported with regard to the use of the Interpol channel in urgent cases (Art 4 para 7). Obviously some NCBs do not forward received documents on to the competent authority, but involve the Central Authority.

Art. 11 (Spontaneous information):

With regard to the somehow similar provision of Art. 21 of the Convention ETS 30 (Laying of information) the question was raised in which situations either Art. 11 of the Second Additional Protocol or Art. 21 of the Convention is used. It was pointed out that Art. 21 can only be used when the State laying information has jurisdiction. In cases where this State does not have jurisdiction information can only be forwarded on the basis of Art 11 of the Second Additional Protocol. The view was expressed that Art. 11 is used in a more informal

context in order to share important information with another Party in parallel proceedings in view of coordinating these proceedings, setting up a JIT, etc. Information provided according to Art. 11 may also be necessary in order to enable the receiving State to send a formal request for specific assistance (search, seizure, etc.).

Art. 15 (Language of procedural documents and judicial decisions to be served), Art. 16 (Service by post):

One delegation provided information about the practice of administrative authorities to send by post to the person concerned decisions/documents without translated information and papers (s. Art. 16 para 2 and Art. 15 para 3). One delegation highlighted the situation where the person to be served does not speak the official language of the requested States. If documents are forwarded in such situations via the Central Authorities (and not by post) translations in two languages will have to be provided creating double costs and work. One delegation voiced reluctance concerning service by post. Often service by post cannot be effected due to the absence of the person concerned at the address available to the Requesting Party.

Art. 25 (Confidentiality):

Though the possibility to require the Requested State to keep confidential the fact and substance of the request is used no problems were reported.

Art. 26 (Data Protection):

In the discussion no clear common understanding of Article 25 para 5 could be reached. No problems in the application of Art. 26 were reported.

Workshop 2: Gathering of evidence

Discussion paper prepared by Mr Erik Verbert (Belgium)

(Methods of gathering and admissibility of evidence in the requesting state; e.g. Art 9; 10; 12; 13; 14; 17; 18; 19; 20; 23)

The indicated articles of CETS n° 182 concern: Articles 9 (Hearing by video conference) ; 10 (Hearing by telephone conference) ; 12 (Restitution) ; 13 (Temporary transfer of detained persons to the requested Party) ; 14 (Personal appearance of transferred sentenced persons) ; 17 (Cross-border observations) ; 18 (Controlled delivery) ; 19 (Covert investigations) ; 20 (Joint Investigation Teams) and 23 (Protection of witnesses).

Since it will not be possible to discuss the legal issues, practises and problems that regard *all* of the listed articles, I would like to focus on one key article – which is actually not in the indicative list, but is essential in the light of the central issue of (in)admissibility of evidence obtained abroad. This central matter can be combined with each and one of the specific types of MLA (cross border observation for example) under articles 12-23 or more advanced ways to execute MLA-requests (via a video conference for example) under articles 9-12.

I would focus on the application of CETS n° 182 as a “traditional” instrument for MLA, thus excluding discussions on the application of Joint Investigation Teams (JITs) (articles 20-22). A JIT is an alternative for MLA, rather than a - new(er) - form or type of MLA. The preparation of a JIT and its follow-up, insofar a JIT-contract was indeed concluded, is always or at least nearly always a EUROJUST-matter anyway.

Perhaps the most striking feature of the Second Additional Protocol to the 1959 European Mutual Legal Assistance Convention (CETS n° 030) is contained in its **article 8**¹.

“Article 8 – Procedure

Notwithstanding the provisions of Article 3 of the Convention, where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law, unless otherwise provided for in this Protocol.”

First of all, the article’s title is simply “Procedure”. While all the instruments, and I mean not just those of the Council of Europe, hardly ever or rather essentially *never* regulate the procedures by which the assistance, whether it is extradition, mutual legal assistance or any other form of international cooperation in criminal matters, article 8 CETS n° 182 explicitly refers to the domestic proceedings that may or even should apply when MLA is being provided by the requested State.

¹ See also §58-69 of the Explanatory Report.

As a “standing” rule of international cooperation law, the procedures or the less regulated *proceedings* applied by and *mutatis mutandis* in the requested State are those ‘of’ the requested State. The requesting State has no say and even less influence over the ways ‘its’ request is being executed by / in the requested State. ‘Locus regit actus’ is the common rule in international cooperation in criminal matters. For that reason, the conventions and treaties remain at arm’s length from any sort of regulation of the procedures and proceedings that are followed in order to execute a request, even when those procedures and proceedings have a direct impact on the way a requested State applies the convention or treaty, i.e. respects its basic obligation to cooperate.

Article 8, mirroring article 4.1. of the 29 May 2000 EU MLA-Convention², is somewhat of a Copernican Revolution, since it enables the requesting State to have *its own procedural requirements been taking into account by / in the requested State*, even if those requirements are incompatible with – the term ‘unfamiliar (to)’ is used - the law of the requested State. The limit of this, perhaps in practice somewhat *soft obligation* to accommodate foreign procedural rules when executing a foreign MLA-request, is that they may not be “contrary to the fundamental principles” of the criminal procedure law of the requested State.

At face value, the article states the obvious, by that I mean that it – finally, 44 years after the MLA Mother Convention – provides for a conventional legal basis for probably the key element that should assure that MLA-requests are not just executed, but that they are executed *in a way that avoids admissibility issues in the (former) requesting State*. A simple solution to a complicated matter, plain and simple. Or not?

The question arises if article 8 indeed manages to avoid admissibility issues in the requesting state. A central question regards the parties’ experiences, good or bad, applying article 8, and esp. eventual outcomes as regards (in)admissibility issues. Perhaps the central question can be reformulated as follows: to what extent are the parties to CETS n° 182 prepared to accept and apply ‘unfamiliar’ procedural requirements from the requesting Party? The question can be supplemented by the question whether the first question would be answered differently if the MLA-request may or will have an impact on an ongoing investigation in the requested Party ?

In order to provide some further and concrete guidance: a classic admissibility matter is the questioning of suspects or potential suspects *under oath* (or affirmation). A concrete case³:

² Compare with: article 6.1 b. of the *European Convention on the Service Abroad of Documents relating to Administrative Matters*, Strasbourg, 24.XI.1977 (CETS n° 094): “Article 6 – Manner of service

1 The central authority of the requested State shall effect service under this Convention:

a. by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b. *by a particular method requested by the requesting authority, unless such a method is incompatible with the law of the requested State.*”

³ To some extent the example is drawn from ECtHR, *Stojkovic v. France et Belgique*, n° 25303/08 judgment 27 October 2011. France requested Belgium to interview the Serbian national Stojkovic who was remanded in Belgium and a suspect for France. The interview was to be conducted by the Belgian police, assisted by French police officers and a French investigating judge. Stojkovic was qualified as a “temoin assisté” which is a suspect who is willing to collaborate, i.e. also a witness regarding the offences committed by himself and others. Stojkovic was thus willing to provide testimony about the other suspects. Despite being informed of his status and the legal consequences in accordance with French criminal procedure law (which included to be interrogated in the presence of a defence lawyer), the

- State A requests State B to interview Mr. T. Mr. T. is suspected to have played a role in a murder case. At the time the interview is requested, the 'evidence' against Mr. T. is to say the least rather weak, yet there are indications – esp. coming from trustworthy informants – that merit further investigation, hence the request. State B., not informed about specific procedural requirements in State A, executes the request like any other foreign request, i.e. in accordance with its own law. The law of state B. prescribes that (potential) suspects have to be interviewed – for judicial purposes – under oath. Some time, perhaps even years later, the report of the interview must be kept out of the case file since under State A's procedural law, a suspect cannot be interviewed under oath, on the contrary: a suspect is free to lie, the oath would deprive the suspect of his / her right not to self-incriminate.
- Let's suppose for a moment that State A did indicate from the onset, relying on article 8, to interview Mr. T. not under oath. Would state B. refuse to do so, considering that such an interview is contrary to the fundamental principles of its own law? Would such a refusal be valid even if the matter has no ties whatsoever with a domestic case in State B ?
- It is usual practice that the assisting police officers of the requesting State make a report of their assistance offered in the requested State. If this report contains the admissions made by the suspect that are made contrary either the law of the requesting State or the law of the requested State (for example during hearings), introduced as evidence in the case: what is the status of such a police report ?

In more complex scenario, equally complex admissibility issues may rise. State A requests State B to allow a 'Bill C.' to operate as an undercover agent in State B. The investigation is about international drug trafficking.

The request implies that the undercover agent is actually a cooperating suspect and not a professional undercover agent. Supposing that State B only allows undercover operations to be performed by police officers and not by (be it criminal) civilians, should the request be blatantly refused? What is the matter is of such importance that it may lead to significant results in State B, results that cannot be obtained without executing the request - in one way or the other?

Article 8 cannot be seen as a stand-alone article: a long established practice is that in many cases, police officers and / or prosecutors and / or investigating judges assist in the execution of an MLA-request – cf. article 2 CETS n° 182, amending article 4 CETS n° 030. The reason for such assistance is fairly self-evident: the requested State is normally not familiar at all with the foreign investigation. The timely, full and effective execution of the request can sometimes only be assured if police officers and / or magistrates from the

interview proceeded without the presence of a lawyer. Stojkovic admitted his role in different offences committed in France. The requesting State (France) was ultimately found in violation of article 6§1 *juncto* 6§3 c) of the Convention. As Belgium executed the request as indicated by France, the application was deemed inadmissible as regards Belgium. The case is a perfect illustration of the fact that despite the assistance of officers of the requesting State and even taking into account the legal requirements of the requesting State, mistakes can be made if there are no clear arrangements made prior to the execution of an MLA-request.

requesting state are present during the execution. This assistance is sometimes even essential in order to assure that the requested State's officers apply the necessary procedures and / or formalities per article 8 properly. The question is, to what extent requested States would allow such assistance given that in practice, the line between assisting and actually cooperating in the execution is very thin?

Workshop 2: Gathering of evidence

Summary of discussions by Mr Juhan Korhonen (Finland)

(Methods of gathering and admissibility of evidence in the requesting state; e.g. Art. 9; 10; 12; 13; 14; 17; 18; 19; 20 and 23 of the 2nd Additional Protocol to the CoE Convention on Mutual Legal Assistance in Criminal Matters)

Moderator: Mr Erik Verbert (Belgium)

Rapporteur: Mr Juhan Korhonen (Finland)

The moderator introduced the topic by stating that the Second Additional Protocol represents an important modernization of the Mother Convention as to gathering evidence. Especially Article 8 presents a complete turnaround from the principle *locus regit actum* according to which the law of the requested state is determinant in the execution of a request. Under Article 8 the law of the requesting state shall prevail unless the formalities or procedures sought are contrary to the fundamental principles of the requested state. And that might entail admissibility issues coming up in the requesting state.

The group limited itself to discuss the implications of applying Article 8 in the execution of MLA requests.

Admissibility may be illustrated by a situation where state A requests state B to interview person X who resides in state B while being a suspect in state A. State B, not informed about specific procedural requirements in state A, executes the request in accordance with its own law, in this case under oath. The evidence so gathered might be ruled inadmissible in state A should its procedural rules prohibit interviewing suspects under oath. On the other hand, if such interview were requested in conformity with Article 8 to be carried out free of oath, what would happen if state B considered that to be contrary to the fundamental principles of its law?

In the ensuing discussion interrogation of suspects in the presence/absence of counsel came up as a likely source of admissibility problems. The general feeling was that states were willing as a requested state to take into account foreign requirements in the spirit of Article 8.

As a requesting state the states try to secure admissibility by formulating the requests accordingly. Nevertheless, admissibility issues sometimes come up. It was reported that requested states do not always take into account requesting states' wishes in the execution of requests. On the other hand, some states invariably execute requests in a manner indicated by the requesting state. However, particularly procedures required for the admissibility in the requesting state of business-related documents and certification of documents have caused problems.

As to Joint Investigation Teams, there was a sentiment that although JIT's may avoid admissibility problems they can also create them. On the other hand, it was pointed out that problems are caused by different national legislations rather than JIT's. Also a certain amount of reluctance to enter into JIT's was reported because of possible admissibility problems.

The general feeling of the discussion seemed to be that the farther you get from direct participation in the execution of a request, the more likely you are to have admissibility problems.

It was noted that although the Second Additional Protocol offers a wide variety of new methods of gathering evidence, there are surprisingly few ratifications and surprisingly many reservations and declarations, which might already be outdated.

The group concluded that

- it is of utmost importance to prepare a request properly, especially if a suspect is to be interrogated in the presence of counsel, it might sometimes also be beneficial to draw up a draft request for comment on how to execute a request and engage in consultations, where appropriate

- admissibility problems may be minimized by allowing representatives from the requesting state to participate in the execution of a request, thereby also alleviating the burden imposed on the requested state,

- flexibility in overcoming problems caused by different procedural rules is to be encouraged, keeping in mind that JIT's are an example of flexibility,

- states should not delay any longer in ratifying the Second Additional Protocol and if they need to reserve themselves or declare, they should do so wisely.