



Strasbourg, 29 April 2010

DG-HL (2010) 6

PROJECT VC 2248
ON EFFECTIVE PRACTICAL TOOLS TO FACILITATE
JUDICIAL COOPERATION IN CRIMINAL MATTERS

FINAL REPORT

Report prepared by the Criminal Law Division
Directorate General of Human Rights and Legal Affairs (DG-HL)

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Appendix I Project proposal

EXECUTIVE SUMMARY

Results achieved

1. A standard model request form for mutual legal assistance was drafted

A structure for a standard model request form for mutual legal assistance containing all the necessary elements required for such assistance to be executed successfully and speedily was developed.

The standard model request form can now be individualised to the legal requirements and procedural or practical needs of each Council of Europe member state.

2. Mutual legal assistance practice in the United Kingdom and the Russian Federation was reviewed

The two country visits - to the United Kingdom and to the Russian Federation - served to "test" the structure for a standard model request form for mutual legal assistance. The particularities of the common law legal tradition in the United Kingdom and mutual legal assistance with the Russian Federation were examined with a view to completing and refining the standard model request form with all the necessary elements relating to the legislative, procedural and practical requirements for a mutual legal assistance request to be duly executed.

3. Guidelines were drawn up

Two sets of guidelines assisting practitioners with the drafting of a mutual legal assistance request were drawn up. One set of guidelines defines the convention basis for the various types of mutual legal assistance request. The other set of guidelines provides general practical information and tips to practitioners on how best to fill in the form in order for the request to be successfully and speedily executed by the requested state.

Introductory Report

I. Purpose and scope of the project

A. Purpose

Judicial cooperation in criminal matters between European states is governed by a legal framework comprising multilateral agreements, especially Council of Europe (CoE) Conventions, bilateral agreements, European Union (EU) law and national legislation. The CoE Conventions, such as the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 30; MLA, herein after MLA Convention), are important legal acts especially in the area of cooperation between non-EU member states. However, many member States have made reservations to certain provisions contained therein, e.g. the reservation to apply the condition of double criminality in case a search of seizure. In addition, the CoE legal acts, in principle, do not govern the manner of execution of requests for judicial assistance (see art. 3 para. 1 MLA providing for the requested state to determine the manner of execution; see, however, art. 8 MLA-II).

The aim of the project is to create standard model request forms for requests for judicial cooperation in criminal matters for each CoE member state. The forms shall reflect the requirements deriving from the CoE legal framework on judicial assistance, the reservations made by the member state to be requested and the national legislation and practice of the respective member state. Such models are in no way mandatory but they should provide assistance and practical guidance assisting the relevant judicial authorities of a member State to ensure effective requests which should contain all the necessary and relevant information. The implementation of this project would increase the chances of executing the request properly and within reasonable time and thereby improving the application of CoE legal acts in the area of judicial cooperation in criminal matters. It would also reduce delays in criminal proceedings, thus fostering compliance of member States with their obligations under the European Convention on Human Rights.

It is important to note that forms shall be hosted by a database on the website of the CoE accessible to the competent judicial authorities of the member states.

B. Scope

The project shall cover relationships between CoE member states that are not covered by EU legal instruments on judicial cooperation.

Experts and the Secretariat agreed that the model request forms should be limited to mutual assistance in criminal matters at the first stage (see for the definition of mutual assistance below). The cooperation mechanisms regarding the transfer of sentenced persons and of proceedings are excluded. It was further decided that a second and separate standard model request form for the laying of information should be developed on the basis of the relevant conventions for mutual legal assistance. This second form is based on a separate logic since it does not focus on obtaining evidence from the requested State. Instead, the aim here is to "incite" the relevant authority of the requested State to prosecute the alleged suspects by sending the collected evidence.

Within the frame of mutual assistance, the project shall also take into account legal standards covering specific types of economic crimes, in particular the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (ETS No. 141) and the Convention on Cybercrime of 23 November 2001 (ETS No. 185).

It was agreed that only a limited number of the new possibilities provided by the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8

November 2001 (ETS No. 182; MLA-II) shall be reflected in the forms, since some very specific types of mutual assistance, e.g. controlled delivery (art. 18 MLA-II), covert investigations (art. 19 MLA-II) require bilateral agreements.

In addition to the forms, guidelines – referred to as information sheets in the project proposal (appendix I) – describe each section of the forms, e.g. containing indications on the relevant provisions or the practice of the requested state. The guidelines shall be integrated into the database hosting the forms in order to ensure easy access by the competent judicial authorities.

II. Definitions of used terms:

A) Judicial cooperation

Judicial cooperation in criminal matters can be defined as assistance for pending criminal proceedings. It must be distinguished from cooperation between administrative authorities, such as police or tax authorities (see Explanatory Report re. art. 1 MLA). The following types of cooperation are covered:

- Extradition: this type of judicial assistance is governed by specific conventions (see Convention on Extradition of 1957) and subject to particular conditions which, in principle, do not govern mutual legal assistance, such as the condition for double criminality and the condition for an extraditable offence (see art. 2);
- Mutual assistance in criminal matters: this type of cooperation aims at granting assistance to another State concerning pending criminal proceedings either through the procurement and transmission of evidence and/or the service of writs, e.g. summons to appear as a witness and of judicial verdicts;
- Transfer of sentenced persons;
- Transfer of proceedings.

B) Conditions and exceptions:

Extradition and mutual assistance in criminal matters are subject to conditions and exceptions. Conditions qualify as minimum prerequisites which must be met by a request in order to be admissible. In principle, any member State which has joined the CoE Conventions on judicial assistance is obliged to comply with an admissible request (see art. 1 para. 1 MLA). Exceptions give grounds on the basis of which the requesting State may refuse to cooperate even if all conditions are fulfilled (see Explanatory Report MLA re. art. 2). The CoE legal acts on judicial cooperation contain a variety of exceptions. Such standards enable a requested State to refuse to execute a request especially in case (1) it considers its national *ordre public* to be at risk, i.e. its national interests (art. 2 letter b MLA) or (2) it considers the request to be motivated by a fiscal offence (art. 2 letter a MLA; art. 5 EA) It considers the offence at stake a political offence or an offence connected with a political offence (art. 2 letter a MLA).

MEANS DEPLOYED - SUMMARY REPORT OF ACTIVITIES

Activity 1 – First consultation meeting, Brussels, 9 September 2009

This first activity brought together the Secretariat members of the Council of Europe, representatives of the European Commission, the European Judicial Network, and one of the experts selected to take part in the project.

The objective of the one-day meeting was to discuss how best to proceed with the preparatory stages of the project, from September to December 2009, financed by the voluntary contribution from Germany. The scope of the project was discussed and agreed, in particular the Council of Europe instruments and the types of request to be covered, and the general framework of the mutual legal assistance request forms.

The organisation of on-site visits to member states was discussed, with the aim of collecting information related to mutual legal assistance requests and having as representative a sample as possible of different legal systems and requirements. It was agreed that the country visits should take place in November and December 2009.

Both the European Commission and the European Judicial Network representatives expressed strong support for the project.

Activity 2 - Second consultation meeting, Strasbourg, 20-21 October 2009

The objective of the meeting was to define the activities to be completed in the preparatory phase of the project until the end of 2009 and to prepare the country-visits.

During the meeting a draft model request form was developed for mutual legal assistance. It was agreed that the structure of the form would, in principle, be preserved while particular elements might still be subject to modification following the consultations with practitioners in member states.

It was also agreed that guidelines for practitioners on how to fill in the forms were required.

The organisation of country-visits to the United Kingdom, the Russian Federation and possibly also a Balkan country, such as Serbia, was discussed. The purpose would be to meet with the key actors involved in mutual legal assistance and present and “test” the draft model request form. With the input and assistance of the states visited, the draft model request form could be completed.

At a later stage of the project, the model request form, once endorsed by member states at a launching conference, would be individualised to the domestic requirements of each state.

Activity 3 - Consultants' contracts

The three experts in the project were offered fees for their work to develop the project on effective practical tools to facilitate judicial cooperation in criminal matters by participating in visits to member states for the purpose of collecting information and drafting a comprehensive report related to the elaboration of model request forms for mutual legal assistance.

Activity 4 - Country-visit to United Kingdom, 7-8 December 2009

The aim of the country-visit to the UK was to “test” the draft structure for a standard model request form for mutual legal assistance with a view to refining and completing it with all the

necessary elements relating to the legislative, procedural and practical requirements for a mutual legal assistance request to be executed speedily and successfully. Meetings were held with officials of the Home Office (UK Central Authority), HM Revenue and Customs, the Serious Fraud Office and the Crown Prosecution Service.

During the discussions with the different UK authorities dealing with incoming and outgoing mutual legal assistance requests the suggestions for improvements to the form were noted. In addition, a number of important aspects particular to the common law adversarial legal system (such as the very specific rules of evidence) were highlighted for further explanation in the draft standard model request form (or in the accompanying guidelines).

The United Kingdom authorities supported the general objective of the project and found the Council of Europe's standard model request form to be a very useful checklist for preparing a mutual legal assistance request.

Activity 5 - Country-visit to the Russian Federation, 10-11 December 2009

The country-visit to the Russian Federation involved meetings with officials of the Prosecutor General's Office and of the Ministry of Justice.

During the discussions with the Prosecutor General's Office, which is responsible for the vast majority of incoming and outgoing mutual legal assistance requests, a number of suggestions for improvements to the form were noted.

The Russian authorities also expressed their support for the project and found the Council of Europe's standard model request form to be a very useful tool.

**DRAFT MODEL STANDARD REQUEST FORM FOR MUTUAL ASSISTANCE IN
CRIMINAL MATTERS¹**

<p>TITLE OF THE REQUEST WITH MOST IMPORTANT ELEMENTS <i>Indication of Urgency</i></p>
<p>1. Requesting authority</p> <ul style="list-style-type: none"> - Official Title - Address - Contact details: telephone numbers, e-mail addresses
<p>2. Requested authority</p> <ul style="list-style-type: none"> - Official Title - Address - Contact details
<p>3. Object and reason</p> <ul style="list-style-type: none"> - Type and purpose of request - Legal basis of the request - Brief description of the facts related to the offence and legal qualification of the offence - Description of the stage of criminal proceedings, including if possible the expected time-frame <p><i>Where applicable:</i></p> <ul style="list-style-type: none"> - <i>justification of urgency</i> - <i>indication of a requirement to be notified about the date/place of the execution of the request as well as on the presence of particular persons with their contact details</i> - <i>information on previous communications</i>
<p>4. Persons concerned</p> <ul style="list-style-type: none"> - Name - Nationality - Address - Position in Legal Proceedings <p><i>Where applicable:</i></p> <ul style="list-style-type: none"> - <i>ID Number</i> - <i>Alias (excluding experts)</i> - <i>Date of birth (excluding experts)</i> <p>Information on a Legal person</p> <ul style="list-style-type: none"> - Name - Registration number - Address of the seat - Contact details of the person authorised to act on behalf of the company <p><i>Where applicable</i></p> <ul style="list-style-type: none"> - <i>Address of different headquarters</i>

¹ This model request form is intended as a guide and a reference only. The requirements may be modified as necessary to meet the requirements of domestic law and practice of Member States

5. Measures requested

A. Extracts from judicial records

- Type of information requested

Where applicable:

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

B. Service of judicial documents (writs and records; summons to appear as a witness/expert/accused person):

i. Information common to all requests of service

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

Where applicable:

- *Information on witness protection*
- *Safe passage issues*
- *Requirements for confirmation of service*
- *Requirements if service fails*

ii. Specific modalities for summons to appear

- Date of appearance
- Time and place of hearing

Where applicable:

- *alternative date of appearance, time and place of hearing*
- *approximate allowances payable and the travelling and subsistence expenses refundable*

C. Temporary transfer of a person in custody

- Date and time-line of transfer
- Place of transfer
- Purpose of transfer (e.g. witness/confrontation)
- Confirmation of custody and return by the date specified

Where applicable:

- *Indication whether transit is required*
- *Contact person(s)*

D. Letters rogatory

i. Facts and legal information about the offence

- Time and place of commission of offence
- Legal qualification of the offence with relevant provisions
- Clear description of the links between the offence and the person and between the offence and the evidence sought
- Provisions regarding the maximum penalty applicable

Where applicable

- *Damage caused by the offence*
- *Information on victims*
- *Where necessary, provisions on lapse of time*

ii. Types of measures

a. Hearing of witnesses, experts or accused persons and expertise: specific modalities

Hearing performed by the requested authority

- Indication of the competent authority which should perform the hearing
- Information on rights and obligations to be notified to the person to be heard
- List of questions to be asked

Where applicable

- Express request for hearing under oath
- Indication whether the witness to be heard requires protection (including details on possible existing agreements between both Parties on this issue)

Alternative modalities for a hearing by the requesting authority

Hearing by video conference

- Indication of reasons why it is not desirable or possible to attend in person
- Name of the judicial authority or of the persons conducting the hearing
- Details concerning practical arrangements (technical information on available means, proposals concerning payment of costs, etc.)
- Notification of rights and obligations of the person to be heard

Where applicable

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

Hearing by telephone conference

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

b. Search and seizure, restitution

b1. Information for generally requested MLA measures:

- Clear indication of the applicable law and/or of the text of the relevant provisions justifying such measures
- Type of search: body searches/ house searches/ other premises
- As far as possible, precise identification of the person, or premises to be searched (location, interest for property, bank accounts) while giving details on the links between the person and place to be searched
- Identification of documents, records, data, property to be seized

Where applicable

- Information on the decision/order of a court or other competent authority of the requesting State
- Restitution: indication of articles obtained by criminal means which should be at the disposal of the requesting State to be returned to their rightful owners

b2. Information for specific measures provided by Conventions on Economic Crime:

- **Convention on Cybercrime**

- **Stage 1: Request for provisional measures regarding expedited preservation of data**
 - Adequate information to identify the relevant data to be preserved including its location (custodian of the stored computer data; location of a computer system)
 - Grounds to believe that risks of loss or modification
 - Indication that MLA request will follow

- **Stage 2: Request for MLA on investigative powers: search or similar access, seizure or similar securing, or disclosure of data**
 - Specific purpose
 - Identification and location of data: time and place of communication in case of real time collection or interception, technical data necessary to perform such action
 - As far as possible, precise identification of the person, or premises to be searched while giving details on the links between the person, data and place to be searched
 - Contact point

- *Where applicable, information on a request for the preservation of data*

- **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime**
 - Reasons to believe that a property is located in the requested State
 - Indication of the procedures the requesting State wishes to follow
 - Indication that the measure sought or any other similar measures can be taken in the territory of the requesting State under its national law
 - Attachments: true copy of confiscation order and statement of grounds for order ; attestation that confiscation is enforceable;,

Where applicable

 - *Information on similar requests sent to other States*
 - *Where confiscation takes the form of a requirement to pay a sum of money corresponding to the value of the property, inform on the maximum value of the property to be seized*
 - *Attachment of documents proving that third parties had the opportunity to claim rights*

- c. Banking evidence**
 - banking details,
 - account number,
 - indication of the period for which the information is requested

- d. Telephone/IP data**
 - Information concerning telephone data**
 - Indication of the telephone number
 - Information concerning the holder of the telephone number
 - Information on the period the telephone was used

 - Information concerning IP data** (computer, website, IP addresses)
 - Indication of website address/ e-mail address/ any relevant information including the provider

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

- e. Expertise**

Any relevant information in accordance with national requirements

- f. Wire-tapping**

Any relevant information in accordance with national requirements

g. Special techniques

Any relevant information in accordance with national requirements

iii. General modalities of execution

- Necessary formalities and procedures under the law of the requesting State and guidance
- Presence of officials and interested persons from the requesting State
- Timeframe for execution
- Coordination between relevant and competent authorities (contact persons)
- Costs
- Language to be used

Where applicable

- *indication of requirements to keep confidential the fact and substance of the request*
- *indication of rules to ensure data protection*

iv. Modalities for the transmission of evidence

- *Indication whether originals are needed*
- *Indicate means of transmission used by requested State (courier, liaison officer, diplomatic representative)*

6. Final information

- *Any other information which the requesting State considers important*
- *Seal, name, function of the official and signature*

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GUIDELINES

Title of the request comprising the most important elements

a. Content

The title should be short and clear (e.g. “request for hearing of a witness” including the name of the , “request for service of documents”, “request for hearing and service of documents”, “request for hearing by videoconference” etc.). The right title will facilitate the execution of the request. It is very important to indicate clearly and precisely the purpose of the request at the beginning of the form to ensure that competent authorities within the requested State will know immediately what is expected from them. For this purpose, the title should indicate the nature and range of activities. If the operation name is used in a system of a requesting state, such name should be indicated in the title (e.g. Operation Rose – request for house search).

b. Reference numbers

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

c. Where applicable, indicate the urgency

This specific indication at the beginning of the request will underline the expectation of the requesting authority regarding rapid procedures in the requested State and its prompt response. The urgency of the request should be justified in "3. Object and reason".

* * *

1. Requesting authority (Article 14 para. 1.a)

The official title of the requesting authority, its address and contact details (telephone, fax numbers, e-mail address) should be indicated. On the basis of the 2nd Additional Protocol which enables direct contacts, it is also crucial to provide contact details of the prosecutor or other officials making the request without restricting this type of information to heads of offices. There might be technical issues requiring clarification or further information before the execution of the request. This may be directly performed through e-mail, fax, or phone without formulating formal requests for additional information. Indicating a contact person may also be useful in this context, in particular in cases of missing information or documents

This information may be provided as such: name of case worker: ..., telephone number, e-mail.²

It is important to note that following internal conflicts regarding competence, UK authorities raised the question of the possibility of indicating that the targeted requesting authority is the authority which has competence in making such request. It should be noted, however, that authorities considered as judicial authorities are officially defined in declarations of Contracting Parties regarding the European Convention on MLA. In practice, issues related to competence are only raised and further clarified in cases of doubt. In most cases, such doubts do not occur since it is presumed automatically that the authority requesting assistance is authorised to do so under its national law.

2. Requested authority

The title, official address and contact details of the requested authority should be indicated in the request. Various practical examples show that it is also possible to simply state: "to the competent authority of the district of ..." including with its address. In the European Union, an Atlas for the identification of the requested authority exists and may be useful for the application of the 2nd Additional Protocol and in particular to identify direct contacts.

3. Object and reason (Article 14 para. 1.b)

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

² This idea has been mentioned during the visits and its acceptance may help to facilitate the execution of a request

- Legal basis of the request

Although this information is not a decisive factor for the execution of the request and as a general rule based on the MLA this information is not considered as being necessary and will depend on the decision of the requested State to decide which legal acts apply, many countries, however, have established the regular practice of indicating the legal basis at the beginning of the request. Such practice was also further encouraged during the country visits. It may take the following form: "Referring to Article of the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)....". In addition to the Convention, an explicit reference of any relevant cooperation treaties based on reciprocity should be made, including relevant UN Conventions and/or bilateral treaties which were adopted to facilitate the application of the European Convention on MLA.

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

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

- Brief information on the offence

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

- Describe criminal proceedings including pending proceedings in the requesting State

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

Where applicable:

- In urgent cases, indicate the justification of such urgency

The current practice shows that while many requests are marked as urgent, the urgency is not always justified. This leads to important delays based on the lack of attention by requested authorities to urgent or very urgent, but unmotivated requests. To respond adequately to the urgent nature of the demand, it seems fundamental to provide clear grounds for the urgency.

Furthermore, including this information may facilitate the system of assistance as a whole, since it could ensure that requests are effectively prioritised by preventing the automatic

classification of requests as urgent without justification by requesting States which tend to use such method to ensure that requested authorities address their demand as quickly as possible even in cases where there is no reason for such urgency. In other words, a system requiring the motivation of the urgency may help the requested authority prioritise urgent requests on the basis of the facts justifying the urgency.

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

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

As mentioned during the country visits, it is important to note that in cases where no measures were taken for a long period of time in the requesting State (for example 5-10 years), the latter may decide accelerate procedures by marking the request as urgent, for example to programme the search or seizure of a property. In such cases, it will be necessary for the requested authorities to understand why it should suddenly take immediate and urgent measures. The simple notification of the 'urgency' in this context cannot be regarded as sufficient, since there is a strong risk that the requested State will not take immediate action otherwise.

- Indicate if there is a requirement to be notified about the date and place of the execution of the request as well as on the presence of particular persons with their contact details

The current practice reveals the increase of requests which contain a requirement made by the requesting authority to be notified of the date and place of the execution of the request or to accept the presence of some persons on the basis of the conditions set by the Convention on MLA and its 2nd Additional Protocol.

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

- Any information about previous communications

It is important to include at the beginning of the request any relevant and useful information which could facilitate the execution of the request. For example, it may be important to mention any available information on previous police cooperation within the case, communications with Eurojust (it is mostly applicable for the EU states, however, there are cooperation agreements also between Eurojust and non-EU member states), communications with the European Judicial Network's contact points or PC-OC contact points.

4. Persons concerned (art. 14 para. 1 letter c MLA)

The persons concerned may be: suspect(s), the person accused, witnesses, experts, victims.

It is important to indicate clearly and precisely any personal information on the person concerned mentioned above in particular: the name, alias, date of birth, nationality, address, last known address, if differs, ID number, and where appropriate, the position in legal

proceedings which is particularly crucial. For experts, however, it is not required to indicate any alias and date of birth.

Where a request concerns a legal person, the following relevant information should be included: – **name, registration number, address of the seat and contact details of the person authorised to act on behalf of the company.**

In a number of countries, it is difficult to provide surnames since they are used in electronic registers as a key search word. A date of birth may be substituted by the birth number if it is used in the requesting country. Concerning the address, the requesting State should provide any known addresses, including those differing from the official place of residence. Indications of any restrictions to the personal liberty of the person to be heard should also be highlighted in the request. Where applicable, it should be explicitly mentioned when the name of the legal person was registered and its registration number should be indicated. The address of the seat means the address commercially registered which is frequently a postal box and does not correspond to the place where the person carries out its business activities. The address of such place, including of headquarters and different branches should also be provided. Finally, although contact details of persons authorised to act on behalf of a company may be found in a commercial register by a requested authority, it is still helpful to indicate such details in the request. In addition, it is important to note that such persons may change over time. Therefore, relevant documents or information concerning the company may be made available by either the former or current representative of the company which should be clearly identified in the request.

5. Measures requested

A. Extracts from judicial records (Article 13 MLA)

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

It is important to take into account the existence of the differing practical approaches between Member States concerning the information contained in judicial records, in particular between civil and common law systems, when drafting and filling in the request form which should be as precise as possible.

B. Service of judicial documents (Articles 7 – 12 MLA)

i) Common information requested and specific information for summons to appear.

Information mentioned above and appearing at the beginning of the form to identify persons concerned is very important in requests for the service of documents, in particular for summons to appear. It is particularly important to note that many countries restrict the service of documents when the person concerned is the accused. Time limits between the service

and date for appearance are frequently set. Requirements concerning the content of summons to be served are also usually established, in particular regarding the clear identification of the position in the on-going case in the requesting State of a person invited to participate in proceedings. The authority which issued the summons should be clearly named and the summons should be duly signed by an official of the competent authority. For the purpose of establishing the authenticity of the request, it is important to identify precisely the competent judge or prosecutor or any other competent official, as well as the seal of a particular office.

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

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

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

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

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

ii) Requirements regarding the execution of the request for the service of documents

It is important to indicate the required means to organise the service of documents which can be executed through simple service or personal service (excluding service by post). It should also be indicated, whether any follow-up is required if the service fails, or whether any specific requirements exist to confirm service. It was mentioned during the visit, that request for service of document could also, where applicable, contain a requirement to forbid the disclosure of the address of the victim. It is important to note that personal service is not common to all States. It could be useful therefore, to indicate what is meant by “personal service” in accordance with the law of the requesting State.

C. Temporary transfer (Articles 11-12 MLA, Article 3 of the 2nd Additional Protocol)

Before, and sometimes after, the request is sent to the requested State, the different competent authorities generally discuss issues regarding temporary transfer. The application of a temporary transfer requires a high level of coordination between police, prison and

judicial authorities. In many cases, decisions on temporary transfer are made by judicial authorities and modalities are agreed between police authorities. Some countries, however, expect information on the chosen types of escort, as well as of secured accommodation or even details of proposed arrangements for collecting and returning the prisoner. Differences between countries on their levels of expected information may create practical difficulties. It is recommended, therefore, to establish minimum standards concerning information which should apply to all cases.

Concerning the content of the request form, the requesting State should indicate clearly the purpose of the transfer in part 3. In this specific part, however, it is important to specify the place of transfer and the period of time during which the person concerned should be present in the requesting State which should take into account the time needed for the transfer of the persons depending on his geographical situation. The requesting State should also expressly guarantee that the person concerned will be kept in custody in the requesting state while specifying the date of his return. In addition, it is important to indicate if transit through the territory of a third State would be required and to give information on the progress of the pending request for transit.

D. Letters rogatory (Chapter II MLA)

i. Facts and legal information (Article 14 para. 2 MLA)

Information found in this part of the request completes the given information in part 3.

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

It is important to clearly and briefly describe any available and relevant information concerning the offence including the facts, its legal qualification, damages caused where applicable including the number of victims. In addition, it is crucial to describe clearly and precisely the facts of the case in connection with the person concerned and the measures requested.

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

ii. Types of measures

This part of the form contains measures to obtain evidence. It is related to certain types of measures stemming from various Council of Europe Conventions. The first chapter focuses on the different types of hearings depending on the status of the person concerned in criminal proceedings, the means used for the execution of a hearing and the legal conditions for such a hearing. The issue of restitution is covered as well. The second chapter concentrates on traditional types of coercive measures, namely search and seizure, based on different legal basis. Finally the third chapter refers to newer forms of cooperation.

a. Hearing of witnesses, experts or accused persons and expertise

General observations on the modalities of a hearing:

This chapter concerns a very important and common way of obtaining evidence from another State. Information on the legal position or status of the person to be heard is crucial since it will determine the rights and obligations of the latter as well as the use of the gathered evidence before a court of the requesting State.

Organising hearings on the basis of procedural rules of the requested State is the simplest modality for this specific type of assistance. A person will be notified of his or her rights and obligations in accordance with the law of the requested state and the hearing will organised by its competent authority.

However, it is important to note that the current trend reveals that hearings are more complex since the requesting State demands generally that the requested State follows specific formalities and procedures for the hearing under the law of the requesting State. If under the MLA Convention, requesting States may demand to follow their own procedures, the requested State may refuse.

It is important to note that legislation of certain States, such as the Russian Federation, prohibit the hearing of their nationals as suspects/accused and only allow their hearing as witnesses or victims. This may create serious difficulties for a requesting state, where the witness statement of a person cannot be used in proceedings against the same person, who is in a position of a suspect/accused. This issue should be further discussed during the conference.

In addition, differences were observed leading to practical problems between States which allow the taking of statements in particular at the pre-trial stage and countries which do not and will refuse therefore to execute the request. In some legal systems which allow the taking of statements, such statements are not accepted as evidence before the court.

However, such problematic situations of procedural conflicts between both States can be overcome for Parties to the Second Additional Protocol. Article 8 of the 2nd Additional Protocol responds notably to such possible problematic cases since requested States who are Parties are compelled to follow the requirements of the requesting State unless the action sought is contrary to its fundamental principles. In this context, to ensure that the requested State executes fully and effectively the request, it will be very important that the requesting

State provides a requested State not only with extract of its procedural rules, but also with the necessary guidance on their application.

Hearings may be performed by the requesting State itself using specific technical means such as telephone and video conference. Such requests may sometimes lead to complicated issues, in particular where telephone hearings are not admitted by requested States which perceive this method as affecting the principle of fair trial. Furthermore, if the 2nd Additional Protocol provides a legal basis for this type of cooperation, it is however restricted to conditions provided in the national law of the requested state.

Regarding hearings by video conference a number of States recognised this type of modality for hearings even before the 2nd Additional Protocol was adopted. However, the added value of the 2nd AP relates to the fact that it provides a treaty basis for such hearings and therefore sets clear and explicit minimum requirements for hearings by video conference. It is evident from its wording that a hearing by video conference includes technical, legal, financial, as well as language/interpretation issues.

Hearings performed by the requested State

- Indication of the competent authority which should perform the hearing

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

- Information on the rights and obligations to be notified to the person to be heard

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

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

It is very common, to see requests for both the service of documents and for a hearing. Procedures impose that documents should be firstly served, the person concerned should then be notified of his rights and obligations and finally the hearing should take place.

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

- List of questions to be asked

Practical examples show that a hearing executed by competent authorities of a requested state is facilitated when the requesting authority provides a list of questions to be asked since the latter possesses the necessary knowledge and can make immediate connection between the collected pieces of evidence to ensure the success of the case. It is clear that this list should not be exhaustive and restrictive but should only be indicative. A person heard may provide information, which requires further questions or clarifications. The competent authority of the requested State usually has sufficient skills to initiate further questions which prevent additional hearings and the extension of proceedings in the requesting State. A list of questions assists to a competent authority of a requested state in a preparation of hearing. During the country visits, representatives of the UK and the Russian Federation have repeatedly highlighted the importance of providing this list in a request.

Where applicable

- *Express request for hearing under oath (art. 3 para. 2 MLA)*

The procedure to give evidence under oath is followed in many but not all States. It should be noted that the Convention on MLA provides for hearing under oath if the law of the requested party does not prohibit it. Therefore this type of assistance should be made available on the basis of the EC on MLA. In addition, Article 8 of the 2nd Additional Protocol establishes flexibility since it will help its Parties solve possible conflicts where the requesting State makes this type of request which is not recognised in the requested State. If a requesting State wishes to hear a person under oath, it should be clearly indicated in the form itself. Where such measure is not recognised and used in the requested State but is not contrary to fundamental principles of the requested State (in particular if Article 3 para 2 MLA is applied) a requesting State should indicate the procedure to follow. It is also advisable to provide the wording of the oath where the requesting State is aware that the requested State does not regulate this issue.

It is important to take into account information provided by the UK authorities concerning the used terminology. For many countries words such as “to hear” or “to examine” have an important meaning, however these words do not have a precise meaning under the UK law. Therefore where evidence is required to be taken under oath, it should be expressly provided in the request.

- Temporary transfer to the requested state (art. 13 and 14 of 2nd Add. Prot.)

Guidance provided by Articles 13 and 14 of the 2nd Additional Protocol should be applied, including the fact that Articles 11 and 12 of the Convention apply mutadis mutandis. It is also important to note that Article 14 does not apply to extradition cases.

- Indication whether the witness to be heard requires protection (art. 23 2nd Add. Prot.)

If the person concerned is a witness who requires protection, the requesting authority should indicate it in the request. Such measure is usually agreed between competent police authorities of both the requesting and requested Parties in accordance with their national law. It may also happen that an additional agreement of other competent authorities will be needed after the reception of the requested State. If an agreement already exists to protect the witness, the reference of relevant documents or arrangements should be included in the request.

Alternative modalities for a hearing by the requesting authority

- Hearing by video conference (art. 9 of the 2nd Add. Prot.)

Hearings by video conference are provided in many States even those which are not Parties to the 2nd Additional Protocol to the extent that such measure is provided in the national law of the requested State. However, Article 9 is very helpful to ensure an effective and successful hearing through this method. Before a hearing by video conference is requested it is possible for requesting and requested States to initiate mutual discussions which may be carried out throughout the whole procedure.

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

- a) If a hearing by video conference is requested, a requesting State should provide information on reasons why it is not desirable or possible for the witness or expert to attend in person and the name of persons who will be conducting the hearing (in case 2nd AP applies).
- b) Technical information on the means available for video conference (such information may also be provided at a later stage), a proposed date and time for trial connection (it is advisable to check whether the connection works in advance),
- c) Information on any particular measures which are necessary to protect the person to be heard,
- d) Information whether any interpreter will be used by a requesting State (or a person to be heard) if available at the time of the request
- e) If needed, the notification of rights and obligations of a person to be heard, including the right not to testify (according to the national law of the requesting state),
- f) Time and date of hearing (a person is summoned on the basis of procedural rules of a requested state)
- g) List of questions to be asked (it is recommended to indicate questions in advance – a competent authority of a requested state will be mainly active at the beginning of the hearing, but it also checks whether a hearing is arranged in compliance with its fundamental principles – if questions are indicated in advance, the requested state

may for instance indicate that certain questions (or the way how questions are formulated) could raise some difficulties)

- h) Proposals concerning the payment of costs of hearing by video conference,
- i) If any personal appearance from a requesting state is requested, it should be stated in the request,
- j) In case of a hearing of a suspect/accused a requesting state is encouraged first to consider declarations of a potential requested state concerning acceptance of such hearing.

As addressed in the 2nd Additional Protocol, it is also possible to request a hearing under oath by video conference.

It may be also underlined that due to practical reasons, certain countries demand a billing address in the requested State together with a confirmation that it accepts payment. Although a request to pay for the video conference may be justified, as a matter of principle, such requirement should not be included in the form.

Hearing by telephone conference (Article 10 of the 2nd AP)

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

b. Search and seizure (Article 5 of EC on MLA) + restitution

b1. Information for generally requested measures:

The most common legal basis for search and seizure may be found in Article 5 of the MLA Convention. It should be underlined that search and seizure are subject to stricter conditions than for other mutual assistance measures because they have a direct impact on individual fundamental rights. Therefore, in many countries a specific authorisation/order from a judge or, where applicable, a prosecutor is needed.

Article 5 of the MLA Convention sets conditions under which a Party may, by a declaration, reserve its rights to execute a letter rogatory for search or seizure if one or more of the following conditions are not satisfied:

1. the offence motivating the letters rogatory is punishable under both the law of the requesting and requested states (and it may even be more complicated if dual criminality is applied in concreto);
2. the offence motivating the letters rogatory is an extraditable offence in the requested State;
3. the execution of the letters rogatory is consistent with the law of the requested state.

The following information for search and seizure requests should be clearly and precisely included in the form:

- Justification of such measures

These coercive measures should be applied only in exceptional circumstances. For instance, to obtain banking information of the person concerned, some States may request the search of the person's bank in accordance with their national law which may differ with the means of execution of such request used by the requested State. In this case, taking into account the interests and needs of the requesting State, the requested State will decide on the procedures to be followed to obtain the requested information. It is therefore crucial to describe precisely and clearly the reason and purpose of the requested measure.

- Type of search

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

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

Although body searches are not very common, a person to be searched should be duly identified. As regards searches of premises, it is very important to know whether premises to be search are used for housing, business or for other purposes. Car searches are also possible. Therefore it is very important to provide relevant, clear and precise information to allow a requested authority to perform a search (and to obtain an order/authorization from a competent authority). For houses/other premises the exact address will be required, as well as the name of the owner of such premises (a company may have rented certain premises). For car searches, the car should be identified by its known features (type, colour, name plate, registered number and any other relevant information).

- identification of documents, records, data, property to be seized

What should be seized should be clearly and, as far as possible, precisely described in the form. If a request is too general, it may prevent the requested authority to take any action, due to restrictions imposed by its national law. If seizure concerns computer data, it is important to indicate the type of data (e.g. accountancy documents of a firm X for a period from year A to year B). It is further important to note that if the offence is computer-related, the Convention on Cybercrime may apply, as well as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime if the offence relates to money laundering.

Where applicable:

- A decision/order of a court or other competent authority, if provided under the law of a requesting State

A requesting authority should take into account that a requested State may require that it attaches the relevant decision/order. For other States, a production order may be sufficient or it may not require any decision. Therefore, as a minimum requirement a requesting State

should indicate if a decision/order has been issued in that State or if there are no specific requirements on that matter within its national law..

- Restitution (art. 12 2nd Add. Prot.)

This part of the form concerns the return of articles obtained by criminal means to their rightful owners without prejudice to the rights of bona fide third parties. Although there is no obligation imposed on a requesting State to make such request, it is useful to indicate which articles should be returned by the requested States. If the seized article will be used as evidence in a requested state, there is no obligation for this latter to execute this type of request.

Information for specific measures provided by Conventions on Economic Crime:

- Convention on Cybercrime

Although the Convention itself does not contain specific provisions on international cooperation, it does provide for specific measures to search and seize computer data which may be used by Parties for purposes of investigations or proceedings, in particular in the absence of applicable international agreements. As mentioned above, a competent authority can seek this type of assistance on the basis of a traditional request for MLA but the requested State may refuse to execute it.

In addition, it is important to note that for cases which concern computer data, the speed of procedures is crucial. Time is the enemy for investigating and prosecuting authorities. Therefore, the Convention provides a two fold/steps mechanism which is not mandatory but is more likely to be applied.

The Convention offers the possibility of requesting mutual assistance regarding provisional measures such as the expedited preservation of stored computer data which Parties are compelled to apply at national level. This measure aims at preventing any alteration, removal or deletion of data during the period of time of the preparation, transmission and execution of an MLA request to obtain such data. It should be noted that it is a limited provisional measure because it is less intrusive than traditional MLA on search and seizure. Requested States generally prefer procedures which ensure that the custodian (generally the service provider) preserve the targeted data, which should be transmitted at a later stage to the competent authorities executing the request for MLA.

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

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

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

Concerning stage 1 requests, in principle, dual criminality requirements will not be considered. Article 29 para 4 is the only provision which offers the possibility of making a limited reservation concerning dual criminality – if a Party demands the establishment of dual criminality as a condition for responding to any MLA request for the production of data, and if it has reason to believe that, at the time of disclosure, dual criminality will not be satisfied, it may reserve the right to require that dual criminality is set as a precondition for the execution of measures for the preservation of data. This may only be applied to offences which are not covered by the Convention.

Furthermore, the Convention requires that the executed preservation should last more than 60 days and shall be continued pending the decision on the request for MLA for the search or similar access, seizure or similar securing, or disclosure of the preserved data.

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

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

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

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

- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990

The scope of this Convention provides a broad legal basis for cooperation. Indications on the required information which should be in sections 1-3 of a request can be found in Article 27 of the Convention. In principle, the assistance sought on the basis of this Convention will be for evidentiary purposes and in view of confiscation. It means that assistance (reference here is

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

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

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

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

It should be noted that this Convention provides a separate chapter on the notification and protection of third parties' rights which, in the absence of specific provisions, provides a legal basis for international cooperation in the fulfilment of notification requirements, if states do not have other legal basis. Such notifications may contain court orders to seize property, the execution of the order, the seizure of property in which third party rights are vested, seizure of registered property etc. (for further details see explanatory report to the Convention). Direct service may be authorised on the basis of the law of the notifying State, in cases where it is important to act quickly or in respect of notification of judicial documents which are of a less important nature.

c. Banking evidence (bank details, account number, indication of a period for which the information is requested)

Information to be provided here can be found in the chapter on search and seizure. It is important to ensure that the request indicates all available bank details in order to allow the requested State to identify the accounts in question (sort code, account numbers, etc.) and specify the period for which the information is requested.

d. Telephone/IP data (indication of period for which documents are required)

In addition to the general information described above, it is important to note that information concerning the holder of a telephone number is generally requested.

In such case, a requesting State should transmit to the requested State the telephone number and information on the period when the telephone was used.

Concerning computer data, on the basis of the MLA Convention, a request may concern data in a computer, on a website, IP addresses etc. In such cases the website address, e-mail and other relevant information (such as provider data) should be contained in the request where such data is available to the requesting state. If traffic data is needed, information on the period for which the IP address was used, should be indicated.

It would be interesting to know whether the MLA Convention is considered as a sufficient legal basis for all Parties to cooperate.

e. Expertise

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

f. Wire-tapping

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

g. Special techniques

Articles 17-20 of the 2nd Additional Protocol concern special techniques for judicial cooperation, including to obtain evidence to be used before a court but they do not refer to police cooperation.

In addition Article 20 of Joint Investigation Teams is very accurate and detailed. There are different authorities empowered under national laws to set up such teams. This issue may be further studied by the PC-OC.

Article 4 of the Money Laundering Convention covers special investigation powers and techniques, such as order to seize or make available bank, financial or commercial records to carry out actions referred to in Articles 2 and 3. It also covers monitoring orders, observations, interception of telecommunications, access to computer systems and orders to produce specific documents.

iii. General modalities of execution

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

It should be specifically stated in the form if a requesting State wishes that the requested State follows specific procedures and requirements to execute the request. In addition, in accordance with the 2nd Additional Protocol, the wording of applicable provisions should be included as well as guidance on their application which may be restricted if such procedures and requirements are contrary to the fundamental principles of the legal system of the requested State This is one of the most important achievements of the 2nd Add. Prot. It allows for the application of procedures and requirements of a requesting state and it thus enhances the chances of acceptance of obtained evidence before courts of a requesting State.

- Presence of officials and interested persons (art. 4 MLA)

While Article 4 of the MLA Convention enables the requested State to refuse the presence of officials and interested persons if such presence is prohibited by its law, the 2nd Add. Prot. limits this possibility.

Presence of officials of a requesting state during the execution of its request becomes more and more frequent. Restrictions are being removed and this has a very positive impact on proceedings in a requesting state. However there are still States, which, for instance do not allow the presence of a defence lawyer.

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

- Time-frame for execution

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

- Coordination

The execution of complex requests for MLA frequently requires the coordination of the different competent authorities involved which will be made possible if contact details of the relevant persons are included appropriately in part 3 of the form. In some cases, it is also recommended to send the particular request informally to have it checked by representatives of the requested state before it is sent officially. During the visit to London, UK representatives stressed that this practice is seen as very useful.

On the ground that representatives of the UK Crown Prosecution Service mentioned that there is no sufficient knowledge about the PC-OC points of contact, a leaflet could be distributed among judicial authorities as well.

- Costs (see art. 20 MLA Convention and art. 5 2nd Add. Prot.)

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

In addition to costs mentioned above, Parties to the 2nd AP may request the reimbursement of costs of a substantial or extraordinary nature. In addition, the costs incurred by the requested State shall be reimbursed by the requesting State for the use of video or telephone conference, including interpretation, allowances to witnesses and their travelling expenses, unless the Parties agree otherwise.

- Languages to be used

Article 16 of the MLA Convention and Article 15 of the 2nd Additional Protocol, as well as bilateral treaties regulate issues related to the translation of the request and its annexed documents, including procedural and judicial documents to be served. It is always advisable to check also bilateral agreements before a translation of a request is made. Where translation is required and/or where the services of an interpreter will or will not be arranged by the requesting authority, all relevant details should be included, in particular, the language required.

MLA templates may be helpful, but the relationship between the draft form, guidelines, templates, PC-OC contact points and possible MLA atlas should be discussed.

Where applicable

- Confidentiality and data protection (see art. 25 and 26 2nd Add. Prot.)

The requesting State should specifically indicate if the requested State should keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

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

iv. Transmission of evidence

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

A requesting state may prefer to have the evidence transmitted through a particular channel (courier, liaison officers, and diplomatic representative). This information should also be included in the form.

6. Final information

This part of the form should contain the seal of the competent authority with its contact person' name, position/function and his or her signature. This information should be mandatory. International cooperation is based on the presumption that a request is made by the competent authority of the requesting state, unless any doubts occur. The indication of the competent judge or prosecutor or any other official and the seal of a particular office helps the requested authority to establish the authenticity of the request. As indicated above, the same applies to any documents attached.

Moreover, any other useful information may be provided in this part of the form, if the requesting State considers that it will contribute to the effective execution of its request by the requested authority.

DRAFT STANDARD REQUEST FORM FOR THE LAYING OF INFORMATION

Title – Request for the laying of information
1. Requesting authority
2. Requested authority
3. Person(s) and offence(s) concerned - Personal information on the person concerned (identity, nationality, etc.) - Offence(s)
4. Indication of attachments (copies of documents/files)
5. Offence - Legal qualification must be indicated - Legal provisions and maximum penalty applicable should be indicated
6. Summary of facts
7. Evidence - Indication of the evidence to prove the offence (i.e. witness statements, documents)
8. Reason for the request - Existence of proceedings pending in the requesting state - Motivation for the request shall be indicated (i.e. suspect is national of and living in the requested state) - The legal basis for the request
10. Measure requested - Initiation of proceedings in the requested state and feedback.
11. Additional information - Contact person of the requesting authority - Request for information on initiation of proceedings and result of proceedings - Seal and signature

* * *

GUIDELINES

1. Introduction: purpose and reasons for the laying of information

The laying of information is a type of mutual legal assistance as found in Article 21 of the MLA Convention.

Contrary to the 'classic' form of MLA, the purpose of the laying of information is not to obtain evidence from the requested State. In fact, by laying information to the requested State, the requesting State actually sends the gathered evidence to request the prosecution of the suspect(s) in the requested State. In essence, it is one party which transmits a case file (dossier) to another party in order to *allow* the prosecution of a suspect in the latter party.

The laying of information can be compared to a pre-emptive and totally *voluntary* form of transfer of proceedings under the 1972 Convention on the Transfer of Proceedings. It is essential to underline that the laying of information does not create any obligation on the requested party to prosecute. Where the 1972 Convention creates reciprocal obligations to transmit a proper request for the transfer of proceedings and the actual 'acceptance' to proceed if all conventional conditions are met, the laying of information relies merely on the 'goodwill' of the requested party. Its voluntary nature means that the laying of information does not even require a treaty basis. Article 21 of the MLA Convention just mentions this possibility, without regulating this type of MLA to any further extent. From the context of the 1959 MLA Convention it can be devised that all other general principles for MLA apply *mutatis mutandis* to a request for the laying of information. In that respect the model request aims at sending a request for the laying of information that contains a maximum of information and thus enhances the chances to obtain proper prosecution in the requested party. The latter will receive a file that is as complete as possible.

The lack of (extra-)territorial jurisdiction over the offence is the most important reason to lay information in order to – if possible – 'incite' the prosecution in the requested State to prosecute. Another reason which may be more political concerns the fact that the requesting State has no interest in prosecuting rather minor offences. In the interest of the suspect and / or the victims, such prosecution will be better conducted in the requested party.

A crucial motive to lay information to the requested State is the location of the suspect and / or the victim(s) on its territory. In that respect, the laying of information is the logical follow up to the application of the 'aut dedere, aut judicare' principle as laid down in article 6, para. 2 of the 1957 Extradition Convention.

Most parties to the 1957 Extradition Convention have declared that they would not extradite their nationals. As a general rule, only Common Law countries extradite their

nationals without any condition. The Netherlands is one exception amongst Civil Law countries which extradite their nationals, albeit solely for prosecution purposes and under the condition that the extradited national will be returned upon eventual final conviction to a prison sentence in order to serve that prison term in the Netherlands. Since the nationality exception to extradition applies in most CoE member States, to compensate the non-extradition clause, the requested party should assess the possibility of prosecuting itself the person sought.

The laying of information is indeed the most appropriate tool to implement the ‘aut judicare’ principle since it enables the transmission of evidence which is normally only partially included in the extradition request. Physical evidence such as expert reports, police reports, and others are not normally attached to the extradition request. Where the requested party is able (competent – has jurisdiction) to prosecute the person sought, additional evidence is highly important to ensure a successful case.

The requested State requires (extra-)territorial jurisdiction to be able to prosecute the suspect on the basis of layed information. Not just *in abstracto*, but *in concreto* which means that the case would have been prosecuted if its facts had been committed on the territory or within the jurisdiction of the requested state. Mitigating circumstances should be taken into account or this may well lead to a decision not to prosecute in the requested State. Applying the double criminality principle in *concreto* to the facts of the case may lead to the re-qualification of the offence as of lesser nature which would thus become barred from prosecution because of the application of a much shorter period of time related to “lapse of time”.

2. Specific guidance relating to items of the request form for the laying of information

As a general rule, practical examples of requests for the laying of information confirm that filling such requests as precisely and completely as possible, will enhance the chances of obtaining its effective and adequate execution. The term ‘executed’ is relatively appropriate for laying of information requests since the requested party is not obliged to follow suit. However, a request for the laying of information that contains a proper identification and localisation of the suspects and the victims (if any), a clear outline of the facts of the matter, the applicable legal qualifications (the offences) and a good evidentiary basis, will more likely lead to the prosecution of the suspect.

One major difficulty with such requests concerns translation. If the case file in the requesting State concerns complex issues (e.g. elaborated or organised fraud / money laundering cases) and has reached an advanced state, it will take a considerable amount of effort, means and time to translate the collected evidence into the official language of the requested state.

When set goals are high and the ‘information’ to be laid is very substantial, it is of the utmost importance to prepare the request together with to-be-requested State. In such cases, the laying of information should never be done before consulting the-to-be

requested state. Only when the latter is legally competent and willing to prosecute the suspect(s), the actual request should be sent. In those cases, a formal request to transfer the proceedings is actually much more effective. The above mentioned advice is thus addressed to member States which have not (yet) ratified or acceded to the 1972 Transfer of Proceedings Convention.

Title – Request for laying of information

The name of the request is important in order to qualify the request at first sight. It is important to apply a correct 'label' to the request.

1. Requesting authority

The requesting judicial authority should be fully identified. The official title of the requesting authority, its address and contact details (telephone, fax numbers, e-mail address) should be indicated. Such details are essential for any kind of consultation on the matter. Requests for clarification or additional information should be exchanged directly between the relevant authorities.

2. Requested authority

The official title and address, as well as contact details of the requested authority should be indicated. This information is necessary for preparation. If the matter was discussed between central authorities and the to-be-requested party at a preliminary stage, before the request was officially sent, and where the latter gave its 'green light' to proceed, the judicial authority of the requested party should be identified and notified. This authority should be then clearly and precisely identified in the request. Again, this will allow direct contacts for the purpose of follow-up.

3. Person(s) and offence(s) concerned

- Personal information on the person concerned (identity, date of birth, nationality, address, ID number etc.)
- Offence(s)

Suspects who may also be legal persons and victims should be identified as precisely as possible. Where available, fingerprints, photos and / or DNA profiles of possible suspects should be included. In addition, such means of identification may be also useful where victims are missing or if the specific concerns violent and/or sexual crime.

4. Indication of attachment (copies of documents/files)

An inventory of the information and/or evidence available is crucial to carry out a first preliminary assessment of the facts of the case. If it appears that there are other issues which should be examined or if evidence seem to be lacking in order to properly proceed, such items should then be clearly identified and indicated. A good inventory list itemises

all available case file documents and physical pieces of evidence. A short description of each item prevents lengthy searches and the need to actually dig into the evidence.

A complete and detailed inventory is probably the most important element of any preparatory bilateral consultation for a request for laying information (and a request for the transfer of proceedings for that matter) which involves very serious or complicated facts.

5. Offence

- Legal qualification must be indicated
- Legal provisions and maximum penalty applicable should be indicated

The legal basis or qualification of the offence should be given in the form, which includes the exact wording of the criminal law provisions applying in the requesting State. This particular type of request should always solely concern offences. The term 'information' not only refers to any 'information' but rather to evidence from a case file which may still be at an early stage of proceeding or, which may have reached a well advanced phase.

6. Summary of facts

Outlining the facts of the case is essential to asses the seriousness of the matter and in addition, to perform the double criminality test on the side of the requested party. The first step to verify procedural grounds for prosecution concerns the (re)qualification of the alleged criminal acts and omissions.

The facts should clearly and precisely indicate the existing link(s) with the requested State, such as the nationality or location of the suspect and / or the victim(s). On the basis of the summary of the facts it should already be clear that it is impossible to prosecute in the requesting State and/ or should be therefore executed in the requested State.

Specifying the place and time of the offence(s) is the minimum type of information which should be provided which further helps establishing (extra)territorial jurisdiction in concreto.

7. Evidence

- Indication of the evidence to prove the offence (i.e. witness statements, documents)

This item follows logically from the previous item. The request should also indicate how, where and when the targeted facts came to the attention of the prosecuting authorities of the requesting State and means employed to reveal the truth and eventually to prosecute. This item immediately refers back to the inventory of attached evidentiary documents and items. Cross-references are very important, especially when the matter is a complicated one and contains a lot of evidence.

8. Reason for the request

- Existence of proceedings pending in the requesting State
- Motivation for the request shall be indicated (i.e. suspect is national of and living in the requested state)
- The legal basis for the request

At this point the request is justified. The very essence of the request concern the existence of proceedings and moreover the reason for which these proceedings cannot be continued and should be 'taken over' by the requested State.

Where the laying of information follows from the impossibility or the refusal to extradite a national, a reference should be made to the initial extradition request or at least the SIS (EU) or Interpol red notice or request for provisional arrest used to initiate the extradition process.

In such cases, the treaty basis is a combination of article 6, para. 2 of the 1957 Extradition Convention and article 21 of the MLA Convention.

This item should also provide clear indications on the statutes of limitation (lapse of time). In "older" cases, in particular, eventual further acts which have interrupted or suspended the application of "lapse of time" should be listed in detail.

9. Measure requested

Initiation of proceedings in the requested State and feedback.

The request itself is basically straightforward. Its purpose is that the requested party evaluates the matter and the evidence included in the request and informs the requesting party about its intentions.

Where the request was duly prepared in cooperation with the to-be-requested state at a preliminary stage before the request was officially sent, the outcome concerning the prosecution by the requested State should already be known and the request itself therefore stands as a mere formality.

10. Additional information

- Contact person of the requesting authority
- Seal and signature

Finally specific contact points, including at the level of police authorities which deal or dealt with the case and / or expert witnesses or defence lawyers, as well as contact details of victim(s) should be included. The latter are more specific contact persons which are of particular importance for future proceedings within the requested State.

APPENDIX I**PROJECT PROPOSAL*****Effective practical tools to
facilitate judicial cooperation in criminal matters*****Summary**

This project aims to improve judicial cooperation in the criminal field between the member states, based on a more efficient implementation of the Council of Europe's conventions on international cooperation in criminal matters.

At present, the member states have very different requirements and conditions for granting legal assistance, and a requesting state frequently encounters difficulties accessing the correct information on the procedures and conditions necessary for the request to be dealt with in a successful and speedy manner. This seriously hinders the process of international cooperation in combating transnational crime.

The project will provide a concrete solution to these obstacles through the creation of information sheets and standard model request forms for each member state, taking account of their internal requirements and procedures for granting judicial cooperation in criminal matters.

The information sheets and model request forms will be hosted on a database set up on the Council of Europe's Internet site, permitting easy access for the competent authorities of one member state presenting a request for cooperation to another member state.

The result will be a useful tool strengthening international cooperation in the fight against transnational crime in Europe.

1. **Title:** Creation of standard model request forms to facilitate judicial cooperation in criminal matters

2. **Location:** Council of Europe member states; Strasbourg

3. **Duration of project:** 2009 - 2011 – duration 24 months

4. **Budget:** 413 500 €

5. **Overall objective:**

To facilitate and improve judicial cooperation in criminal matters between the member states of the Council of Europe

6. **Estimated results and deliverables:**

- Information sheets created for each member state setting out the internal requirements and conditions for granting judicial cooperation in criminal matters.
- Standard model request forms created for each member state.
- A database on the Internet site of the Council of Europe hosting the information sheets and standard model request forms.
- The guarantee of obtaining clear, reliable and immediately accessible information for practitioners and central authorities responsible for submitting requests for judicial cooperation in criminal matters and wishing to present a request to another member state.
- Increased transparency concerning the internal requirements of member states in the area of presentation of requests for mutual assistance and information on the possible actions which could be taken in the requested state – consequently a greater “predictability” in obtaining cooperation and a better anticipation of the possible obstacles which could be encountered - and a rationalisation of the decision-making procedures.
- Exchange of good practices between the member states.
- Facilitation, simplification and acceleration in dealing with requests for judicial cooperation, increase in the level of satisfaction of requests for judicial cooperation, optimisation of the cooperation instruments and tools applicable between the member states.

7. **Partners:** The European Commission (Technical Assistance and Information Exchange - TAIXE), the European Judicial Network (EJN)

8. **Beneficiaries and stakeholders:** All Council of Europe member states and observer states, Israel.

9. **Description and rationale of the project:**

The Council of Europe Conventions on co-operation in criminal matters, in particular those relating to extradition, mutual legal assistance and transfer of sentenced persons are among the most widely ratified conventions of the Council of Europe and continue to provide a pan-European framework for legal co-operation in the criminal field.

One of the main findings of the Reflection Group on developments in international co-operation in criminal matters (PC-S-NS) in its “New Start” report (2002) was that those involved in criminal co-operation must have simple tools to help them apply European rules and regulations, in particular standard forms (international requests for judicial assistance,

models for the exchange of criminal records, requests for provisional arrest pending extradition, extradition requests, etc).

The importance of ensuring a better implementation of these legal instruments has also been reiterated on several occasions at the highest political level, notably at the 26th Conference of European Ministers of Justice (Helsinki, 7-8 April 2005, in particular Resolution No. 5 "on the functioning of the Council of Europe conventions on judicial co-operation in criminal matters"), the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005) and the High level Conference of the Ministries of Justice and of the Interior (Moscow, 9-10 November 2006).

In accordance with the "New Start" report and the conclusions of these events, the Council of Europe's priority has increasingly been the development of practical measures aiming at improving the application of existing standards in this field, rather than the elaboration of new standards.

In this context, the PC-OC (Committee of Experts on the operation of European Conventions on co-operation in criminal matters) launched, as a first step, a database on national procedures regarding extradition, mutual legal assistance and transfer of sentenced persons in 2008, as well as a network of single points of contact in the field of international co-operation in criminal matters.

This project will build on and improve the efficiency of existing tools, as well as allow the development of further practical measures improving the implementation of the Council of Europe standards in this field. These tools will create a further incentive for practitioners in member states to make full use of these standards, increase their visibility, contribute to improved cooperation between member states and ultimately strengthen the fight against transnational crime in Europe.

10. Project activities:

Activity 1

Preparatory work by three specialised experts, involving the collection of information on the requirements and procedural conditions in the different states and a report summarising the elements common to all states, existing good practices and proposals for draft model request forms. A one-day meeting of the experts in Strasbourg.

Activity 2

A launching conference with the participation of all the member states, observer states and the three experts to examine and discuss the report prepared by the experts and to decide the format of the models.

Activity 3

On-site visits to support member states with the creation of the models:

- For the member states of the European Union:
A number of models corresponding to the implementation of European Union instruments on criminal judicial cooperation have been developed by the EJM and are used for cooperation between the member states of the EU. In addition to these, models adapted to the Council of Europe instruments will have to be created (adaptation of existing models or creation of new models) with the support of the EJM.
- For the countries which are not members of the EU:
New models for requests for judicial cooperation in criminal matters will need to be created. Expert on-site visits to each of the countries concerned will be undertaken. These visits will involve meetings between the experts and the national authorities directly involved in international cooperation in criminal matters and are intended to support the creation of the models in the light of national legislation.

Activity 4

A final conference with the participation of all the member states, observer states and the experts in order to complete the models.

Activity 5

Creation of the website and database on the Internet site of the Council of Europe and placing the information sheets and standard models developed on-line for access by the member states' competent authorities.

Activity 6

Follow-up and regular updating of the contents of the database.

11. Project timeline:

Activity 1	September 2009 – February 2010
Activity 2	March 2010
Activity 3	April 2010 - January 2011
Activity 4	February 2011
Activity 5	March-June 2011
Activity 6	Updating on an annual basis

12. Project management:

The overall responsibility for the project lies with the Criminal Law Division, Law Reform Department, Directorate General of Human Rights and Legal Affairs. The project will be implemented in the framework of the programme *Monitoring the operation of conventions on cooperation in the criminal field*, under the close supervision of the PC-OC (Committee of Experts on the operation of European Conventions on co-operation in criminal matters) and the CDPC (European Committee on Crime Problems).

The on-site visits will be conducted by 2 experts from the member states with one staff member of the Council of Europe.

The construction of the database to host the relevant information and standard forms for each member state will be entrusted to consultants, in cooperation with the Directorate of Information Technology (DIT).