

**UK (INITIAL) DISCUSSION PAPER FOR THE THIRD ADDITIONAL PROTOCOL
TO THE 1959 EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN
CRIMINAL MATTERS**

1. This paper provides initial suggestions for discussion, within the PC-OC group, to determine possible provisions to be inserted into the future Third Additional Protocol to the 1959 European Convention on Mutual Assistance in Criminal Matters ("3AP"). At this stage, the UK is looking to set out these early suggestions with the expectation of developing formal proposals for discussion at the PC-OC Plenary meeting in November.
2. The 1959 European Convention on Mutual Assistance in Criminal Matters ("1959 MLA Convention") and its two Additional Protocols are important instruments which facilitate mutual legal assistance ("MLA") based on common practice and principles between signatories. The UK considers that, following the pandemic, there is an opportunity to update this framework to make it more efficient and to take account of recent technological developments. The UK has consulted with domestic practitioners and has drawn on previous discussions with other member states in the context of the Council of Europe (PC-OC group and the roundtable held 4 October 2021 on New Means of Communications in Criminal Matters) to develop these suggestions.

UK suggestions for consideration in the 3AP

Video conferencing

3. The use of video links in judicial proceedings has grown during the pandemic and this method of communication is increasingly being used to facilitate MLA requests, particularly voluntary witness testimony. This growth in the use of video links has exposed weaknesses in the existing provisions of the Second Additional Protocol to the 1959 MLA Convention ("2AP") and has led to extensive domestic discussion on suggested proposals to reform Article 9 of the 2AP (see Annex A). The UK considers these changes would improve access for witnesses to engage in judicial proceedings, improving pathways for justice. This would ensure a more flexible and less resource intensive process that could be used in appropriate circumstances. Discussions on a 3AP provide the opportunity to achieve the following:
 - a) **Review of the one size fits all approach which requires video links to be facilitated in the presence of the judicial authority of the requested state.** The aim would be to provide greater flexibility to allow for cases where the individual's participation is voluntary, whilst also reducing the burden on judicial authorities. To complement this increased flexibility, relevant safeguards would also need to be included to ensure that requests are dealt with in a way which protects the individual's fundamental rights.

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- b) **Re-balancing language of the 1959 MLA Convention so that the use of video links is not treated as a secondary option when relating to cases involving witness testimony.** While there may be instances where video conferencing is a less favoured alternative to physical attendance, video conferencing is a valuable tool in and of itself and can offer a more efficient and cost-effective method of facilitating proceedings. Currently the 2AP does not reflect this, particularly Article 9, paragraphs 1 and 3 (see Annex A). Instead it implies that use of video conferencing is less desirable than attendance in person. The choice to request a video link should be based on the specifics of the MLA case in question and whether a video link acts as the most efficient and effective way for an individual to give evidence, while also incorporating relevant safeguards.

Digitisation and Electronic Transmission

4. The UK has taken steps to expand the use of electronic transmission as a method of ensuring the efficient transmission of MLA requests and evidence through secure digital processes. There are benefits to the requesting and requested country including facilitating a more efficient process, reducing the time taken to process requests, creating a more secure route, improved compliance with data protection requirements and reduced costs compared to paper-based transmission. The 3AP provides an opportunity to encourage provisions which promote the adoption of digitalisation relating to MLA requests and the surrounding process. Subject to discussion, provisions on this matter could include:

- a) **Standardising methods of communication including discouraging use of outdated methods such as fax.** The current text provides scope for all methods of communication to be used including where these are no longer practical. For example, while there are no specific references in the 1959 MLA Convention or the Additional Protocols to the use of fax, provisions continue to allow for this outdated method of communication. The UK would be seeking to standardise and enhance clarity on what methods of communication are acceptable given technological advances.
- b) **Incorporating a ‘preferred hierarchy’ of communication methods.** We would want to encourage the adoption and use of the most efficient and effective method of transmission via encrypted IT systems. This is preferred to broader electronic transmission via email which in turn is favoured to paper-based transmission (e.g. by post). The 3AP provides an opportunity to make this approach and hierarchy explicit and in turn reduce reliance on transmission via less efficient means.

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- c) **Defining the use of electronic signature as an accepted method of certification.** One of the main drivers of paper-based transmission is the practice of using wet signature to authenticate documents. The 3AP provides an opportunity to move to provisions which explicitly state that electronic signature is deemed an accepted certification method for MLA requests.

Confidentiality

5. In the UK, it is standard practice for central authorities (and executing authorities) not to disclose the existence of or content of an MLA request outside of government departments or agencies, the courts or enforcement agencies in the UK. Where disclosure may be necessary to execute the MLA request, permission from the requesting authority will be sought. Therefore, for the UK confidentiality of an MLA request is the default position rather than confidentiality having to be requested. We understand that this is also the case for other state parties. The UK proposes to use discussions on the 3AP to establish the use of confidentiality as a standard operating procedure, to the extent it can be without hindering action on the request.

Conclusion

6. We welcome the discussions in the PC-OC group to consider provisions for the 3AP to the 1959 MLA Convention. As mentioned in the introduction to this discussion paper, this is a list of UK initial suggestions, and we reserve the right to supplement these as discussions on scope and content develop. In this vein we recognise, as do many other state parties, that ahead of any formal MLA process, the need to encourage law enforcement to law enforcement engagement is essential and we are keen that this should factor into our collective discussions on the 3AP, as appropriate.

Annex A

Second Additional Protocol - Article 9 – Hearing by video conference

1. If a person is in one Party's territory and has to be heard as a witness or expert by the judicial authorities of another Party, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by video conference, as provided for in paragraphs 2 to 7.
2. The requested Party shall agree to the hearing by video conference provided that the use of the video conference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Party has no access to the technical means for video conferencing, such means may be made available to it by the requesting Party by mutual agreement.
3. Requests for a hearing by video conference shall contain, in addition to the information referred to in Article 14 of the Convention, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.
4. The judicial authority of the requested Party shall summon the person concerned to appear in accordance with the forms laid down by its law.
5. With reference to hearing by video conference, the following rules shall apply:
 - a. a judicial authority of the requested Party shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Party. If the judicial authority of the requested Party is of the view that during the hearing the fundamental principles of the law of the requested Party are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
 - b. measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Parties;
 - c. the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Party in accordance with its own laws;
 - d. at the request of the requesting Party or the person to be heard, the requested Party shall ensure that the person to be heard is assisted by an interpreter, if necessary;
 - e. the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Party.

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6. Without prejudice to any measures agreed for the protection of persons, the judicial authority of the requested Party shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested Party participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the competent authority of the requested Party to the competent authority of the requesting Party.
7. Each Party shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory, in accordance with this article, and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.
8. Parties may at their discretion also apply the provisions of this article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving the accused person or the suspect. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Parties concerned, in accordance with their national law and relevant international instruments. Hearings involving the accused person or the suspect shall only be carried out with his or her consent.
9. Any Contracting State may, at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, declare that it will not avail itself of the possibility provided in paragraph 8 above of also applying the provisions of this article to hearings by video conference involving the accused person or the suspect.