



## **ROMA-LYON GROUP**

### **Addressing Requests for Mutual Legal Assistance in *De Minimis* Cases**

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## Background

Mutual legal assistance (MLA) is an essential tool in the fight against organized crime. Increasingly, countries find they need to seek evidence from other countries in order to investigate and prosecute cases successfully. It is through the use of numerous mechanisms, such as bilateral treaties and multilateral conventions, as well as traditional letters rogatory, that states seek and obtain such evidence. In the context of an MLA regime within each member state, the Group of 8 (G8) reviewed the issue of *de minimis* cases, relatively minor cases that are the subject of requests to G8 member states. The report is a practical compilation of ways to address such requests, and details a number of considerations that states may wish to take into account in deciding how to prioritize or otherwise handle the significantly increasing number of such requests and the burden they place on states' Central Authorities, the offices that process MLA and extradition requests.

The G8 countries hold a wide variety of views on this issue, including what constitutes a *de minimis* request for each particular country. While several delegations reported overwhelming caseloads of thousands of requests per year, many of which are for relatively minor cases, the principle of mandatory prosecution as well as applicable treaties make it difficult to develop universally applicable standards for dealing with *de minimis* requests for MLA. Rather, this report will set forth a series of considerations that states may wish to take into account, where they are allowed by their laws to do so, in deciding how to address these types of requests. Depending on its domestic legal framework and applicable treaties, a state can decide which of these considerations, if any, it can usefully employ in developing its own response to the challenges posed by *de minimis* requests.

Every G8 member that had data reported more incoming requests than outgoing. This can be explained by virtue of larger, developed states having more banks and Internet service providers than other countries and the tremendous increase in the number of requests for bank records and computer data in recent years. Given the global nature of banking and Internet use, it is reasonable to assume that the disparity between incoming and outgoing requests for assistance will grow, as more developing countries trace proceeds of criminality and criminals commit their crimes at least in part through the use of the Internet.

Several G8 states gave examples of minor cases that consumed the resources of their Central Authorities and, at times, prosecutors in regional offices that execute the requests, including cases involving “dine and dash” allegations, speeding tickets, the theft of a can of gas, eBay fraud for failure to deliver a phone valued at 300 euros, shoplifting of seafood and wine, the theft of a mobile phone, overcharging a taxi fare by 75 euros, theft of 70 liters of gasoline, and the theft of a wallet containing \$20. One state reported receiving 300 such cases per year. Some states reported that pursuing these cases interfered or threatened to interfere with the Central Authority’s ability to handle serious cases such as those involving terrorism, violent crime, and major frauds. For some states, the large number of MLA requests in *de minimis* matters has led to a very unbalanced relationship with a partner country in terms of workload. For example, one country reported during the discussion that its MLA caseload with one partner consisted of 241 incoming requests, many of which were *de minimis*, and three outgoing requests.

Requests in *de minimis* cases arise in two different contexts: (1) outgoing requests, or when a state decides to make such requests of other countries and what steps, if any, that state can take to screen for *de minimis* requests before they are transmitted, and (2) incoming requests, or when a state receives requests in *de minimis* cases and what steps, if any, that state can take in prioritizing or declining the request or assessing the proportionality of executing the request. In both of these contexts, it is important to consider the type of assistance being requested, as less burdensome assistance (assistance, for example, that does not require court intervention) may be appropriate even in cases that are relatively minor.

For outgoing requests, a few states reported that they monitor their outgoing requests to ensure they are proportionate to the crime being prosecuted and are not otherwise *de minimis* in nature. Central Authorities may play this screening role. Some states, however, cannot interfere with the decisions by prosecutors to seek assistance in particular cases, provided the request conforms to domestic law and any relevant treaty. Some of these states provide training to prosecutors on relevant legal standards and treaties in an attempt to sensitize them to the issues surrounding *de minimis* requests.

For incoming requests, several states reported the need to prioritize requests for assistance while several stated that no such prioritization was permitted and that all cases were processed. One state explained that due to a huge volume of serious cases, deciding that a case was low priority could

indefinitely delay its execution. Some states responded that MLA treaty obligations or the principle of mandatory prosecution prevented the Justice Ministry from deciding that a case was not significant enough to warrant processing. One state, however, said that cases could be declined if the effort to respond to the request was disproportionate to the offense alleged.

One state pointed out that due to differing income levels, the amount of money stolen in the Requesting State might be significant to persons living there, but in the Requested State where interviews or bank records are sought, the amount might not be viewed as significant. Accordingly, this state considers relevant income levels when assessing incoming requests for legal assistance.

Multiple follow-up inquiries seeking to learn the status of pending requests in less significant cases also take resources away from work on more urgent cases. Some countries routinely send such follow up inquiries by letter and email after very short periods of time, such as weekly or bi-weekly.

Several member states reported that *de minimis* requests were also becoming a problem with regard to extradition. For example, requests have been made under the European Arrest Warrant for very minor offenses that nonetheless meet the requirements set by the Framework Decision of the European Arrest Warrant. Some states also reported receiving requests for extradition for defendants wanted to serve just a few months in prison, where the length of the extradition litigation far outlasts any remaining imprisonment in these cases. Such *de minimis* cases raise serious concerns of proportionality, in particular for convictions that are already ten to fifteen years old. Some states expressed the view that in such cases the cost of confinement is effectively transferred to the Requested State.

In short, there are several states for which requests for assistance in minor cases burden the Central Authority and prosecutors to the extent that pursuit of other more serious cases is jeopardized. The G8 states have various ways of dealing with this issue. Some can process requests without difficulty and others maintain that doing so is a legal obligation under relevant treaties that cannot be avoided. On the other hand, some states may find a request to be disproportionate to the crime or may deem it a low priority. In any event, requests for mutual legal assistance can be expected to grow in the coming years due to globalization and the ease of cross border activity of all sorts, consideration should be given to coping with caseloads

increasing far beyond the available resources, while keeping in mind treaty obligations and the need to maintain mutually beneficial relationships.

### Issues in Addressing Requests in *De Minimis* Cases

To that end, the following is a list of considerations that states may wish to take into account in addressing requests for assistance in *de minimis* cases when the burden of such requests detracts attention from more serious cases.

#### For both outgoing and incoming requests:

- Engage in consultations between Central Authorities about concerns regarding minor cases, including a description of such cases, and to discuss ways in which requests in minor cases can be handled, consistent with treaty requirements and the domestic laws of both states. For example, instead of effecting service of process on behalf of a Requesting State, the Requested State could authorize the Requesting State to deliver the process from the embassy in the Requested State or to transmit it directly to the person(s) to be served. Another example might be to refer small Internet-based frauds to a specialized unit in an investigative unit in a law enforcement agency. For example, the Federal Bureau of Investigation (FBI) has a unit that accepts complaints from the public about small Internet based frauds and investigates them, in part to determine if the crime reported is part of larger scheme of criminal activity. Accordingly, the United States has authorized several foreign partners to send requests for assistance in small Internet fraud cases directly to the FBI.
- Review relevant treaty provisions and consider whether consultations on amendments are advisable to address specifically the issue of *de minimis* requests.
- Issue guidance on what your state deems to constitute a *de minimis* request.

For outgoing requests:

- Make law enforcement authorities, prosecutors, and judges aware of the difficulties posed by requests in minor cases. Where appropriate, this may include training measures and materials which could address, consistent with domestic legislation, among other things: how important the foreign evidence is to the prosecution; whether it is in the public interest to pursue the foreign evidence (considering the resources involved in executing the request); whether there are alternatives to seeking formal international cooperation; and whether court intervention in the Requested State is required.
- Encourage coordination between Central Authorities and law enforcement authorities and/or prosecuting officials so that the officials requesting assistance have weighed the assistance sought against the resources required to obtain it. Such coordination should occur at the earliest possible opportunity (i.e., prior to drafting the request).
- Where allowed, have Central Authorities screen requests to ensure that requests sent to other states are not *de minimis* in nature or require measures to execute the request that are disproportionate to the matter at issue.

For incoming requests:

- Have Central Authorities review incoming requests, to the extent permitted, to determine whether the assistance requested is disproportionate to the matter at issue; how the request should be prioritized; and whether there are grounds for denying the request if it is considered to be *de minimis* in nature.
- Consider granting priority to requests that:
  - Involve serious criminal offenses (e.g., murder or other crimes of violence, organized crime, terrorism, corruption, or wide-scale fraud).
  - Involve evidence that is at risk of being concealed or destroyed.

- Involve ongoing offenses or where the safety of witnesses or the public is at risk.
- Involve limitation periods that will soon expire.
- Involve an imminent trial date.
- Are made pursuant to treaties.
- In accordance with domestic law and any applicable treaty, decline requests that require assistance deemed to prejudice the sovereignty, security, public order (*ordre public*) or other similar essential interests.
- Consider declining requests, when permitted by domestic law and any applicable treaty, that:
  - Would require measures to execute the request which would be disproportionate to the matter at issue. When considering the proportionality of a request, the importance of the case should not be weighed only by the amount of the financial loss or the number of victims; rather, the case should be evaluated in its entirety, including its impact on public security or public confidence in the criminal justice system, as well as the necessity and importance of the assistance requested to the investigation or prosecution.
  - Require intrusive and time-consuming measures (such as search warrants, surveillance and other court-ordered assistance) that are disproportionate to the seriousness of the crime under investigation or being prosecuted.
  - Meet the Requested State's description of what constitutes a *de minimis* request.
  - Does not specify the necessary evidence, does not clearly demonstrate the relevance of the assistance sought, or fails to establish a nexus to the Requested State. [Note: Normally in serious cases, requests that fail to identify a required piece of evidence or show the relevance of the evidence sought to the crime under investigation often result in consultations between

the Requested and Requesting States, to determine if that gap can be filled with supplementary information, rather than an outright denial of the request. If the case is relatively minor, the case could be denied rather than the subject of consultations.]

- Do not provide, in a timely manner, required supplementary information after it is sought by the Requested State.
- Consider giving low priority to or declining requests, when permitted by domestic law and any applicable treaty, that:
  - Require time, effort or resources in executing the request that is disproportionate to the matter at issue. When considering the proportionality of a request, the importance of the case should not be weighed only by the amount of the financial loss or the number of victims; rather, the case should be evaluated in its entirety, including its impact on public security or public confidence in the criminal justice system, as well as the necessity and importance of the assistance requested to the investigation.
  - Require the service of process on behalf of foreign authorities to be done by their local embassies.
  - Are follow-up requests to previous *de minimis* requests (whether or not those previous requests were executed).
- Central Authorities or, where applicable, executing authorities may inform Requesting States that their request has been given low priority and the request is unlikely to be executed in the short term. Given this information, the Requesting State should contact the Requested State if assistance is no longer required. If assistance is still required, the Requesting State should avoid repeatedly sending reminders or follow-up letters.

#### Extradition Requests:

- In extradition cases, consider the following combination of circumstances, when applicable and permitted by domestic law and any

applicable treaty, in deciding whether to make a request or whether to execute a request:

- The gravity of the offense.
  - The possible sentence, including whether the sentence involves imprisonment.
  - Any delay in making the request as well as the reason for the delay.
  - The prejudice to the person sought and whether or not he/she has faced justice in some way.
  - Whether the person sought has previous criminal convictions.
  - Whether a fugitive is a danger to the community.
  - In cases involving lengthy delays, whether the fugitive has been charged with or been convicted of any offenses in the period between the offense for which extradition is sought and the time of the request.
  - Whether the case, while in itself minor in nature, is part of a larger public safety concern in the Requesting State.
  - In deciding whether to execute a request, consult with the Requesting State to allow them an opportunity to advance any additional information that might factor into a final decision on whether or not to proceed.
- In extradition cases, consider whether new treaties should contain, or consultations should be pursued to interpret or amend existing treaties concerning, provisions that would address *de minimis* cases, such as provisions defining extraditable offenses as those for which there is dual criminality and where the potential punishment is greater than one year's imprisonment, and provisions that make discretionary extradition in cases where the sentence to be served is less than a certain amount of time (e.g., four months, six months or one year).