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Criminal Assets Recovery Project

CRIMINAL ASSETS RECOVERY PROJECT IN SERBIA (CAR)

EXPLANATORY NOTE: Draft International Co-operation in Criminal Matters Act

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EXPLANATORY NOTE

Article by Article

Article 1 sets out the parameters of ‘international co-operation in criminal matters’ and creates a framework that is practical and permissive, and is, thereby, in accordance with current international thinking and best practices.

In its definition of ‘criminal matters’, this Article sets out the essential condition precedent for making or receiving (‘executing’) a request: namely that an investigation, prosecution or judicial proceeding be extant in relation to one of more of the matters set out in (a) to (d).

It should be noted that (a) to (d), in themselves, act as a reminder that specialty must be satisfied and so called ‘use limitation addressed. Thus, each of the possible criminal offences that are/might foreseeably be under investigation or subject to proceedings should be set out in the request, along with the type of proceeding in which the evidence is intended/is likely to be adduced (for instance, this ought explicitly to include confiscation proceedings or any other ancillary proceedings if it is foreseeable that such may take place).

The definition of ‘criminal matters’, coupled with the final phrase of the Article, is intended to encompass, inter alia, a request to Serbia in relation to a criminal matter concerning a legal person from a state with only administrative, rather than criminal, liability in respect of legal persons.

Article 2 provides an inclusive definition for international co-operation for the purposes of the Act.

Article 3 provides an inclusive definition for the different forms of evidence-gathering that amount to ‘mutual legal assistance’ when requested by one state from another. It should be stressed that, as with Article 2, above, the definition is not exhaustive. It is likely that, as times progresses, additional evidence-gathering methods or procedures will emerge; an inclusive definition (as here), rather than an exhaustive list, will ensure that no legitimate process or, indeed, type of evidence, is precluded.

Article 4 explains what amounts to a ‘competent authority’; that is to say, those who are able to make and execute mutual legal assistance requests. The Article also provides an explicit direction that certain actions that form part of the mutual legal assistance process in Serbia must be carried out by the relevant ministry or body provided for under the law.

In the event that a request to Serbia is transmitted to the wrong competent authority, it will be forwarded within Serbia to the appropriate competent authority, with notification provided to the requested state.

Article 5 confirms that the Ministry of Justice is the central authority within Serbia for the purposes of mutual legal assistance requests.

This Article sets out, at (a) to (f), the competences of the Ministry in its role as central authority. It also provides that a request from another state to Serbia may be transmitted directly to the competent authority without being sent via the Ministry of Justice (in its role as central authority). However, when direct transmission has been made, the request must be referred by the Serbian competent authority to the central authority as soon as practicable in order that a record of the request may be made. In addition, such a referral will also be for other 'relevant purposes'; those will include making the central authority aware so that it is in a proper position to respond to any later enquiries may of it by the requesting state in circumstances such as alleged delay in execution by the competent authority that received the original direct transmission.

Article 6 preserves the capability of a competent authority in Serbia to make or receive/execute a request other than by formal mutual legal assistance. This provision ensures, for instance, that prosecutors and investigators are able to co-operate fully and effectively with colleagues from other jurisdictions by way of administrative (informal) assistance. Such administrative assistance is a vital capability as not only information and intelligence, but also evidence not requiring a coercive power to be exercised, should generally be requested and received without needing to have recourse to a formal letter of request being issued. In that regard, it should be had in mind that evidence gathered administratively/informally will be in formal, evidential, form.

The description 'administrative' or 'informal' refers to the procedure for making and executing the request, not to the nature or quality of the material produced consequent upon such a request. Moreover, there is generally nothing unfair, improper or unlawful about the making and executing of an administrative request, providing that the actions requested and undertaken are lawful in the requested state and that the making of the request is lawful in the requested state.

Article 7 provides that the central authority, and any competent authority, in Serbia may provide information spontaneously (without the need for a request being made of it) to a competent authority abroad. The only condition precedent is that the information must relate to a criminal matter.

Article 8 addresses the granting of mutual legal assistance by Serbia to a foreign state. Assistance may be given pursuant to treaty obligations or, in the absence of a treaty, on the basis of reciprocity/comity. The Article makes clear that the provisions of the Act (i) regulate such assistance in the absence of a treaty and (ii) where the request is pursuant to a treaty, serve to fill any lacunae in the framework established by the instrument itself.

The Article explicitly states that the Act also applies to requests from the International Criminal Court, the European Court for Human Rights or an international tribunal established under (i) an agreement ratified by Serbia or (ii) a binding decision of the United Nations.

Article 9 reflects the modern realities of making effective requests. Thus, a request may be sent by hard or soft copy and, in urgent cases, orally and reduced into writing thereafter. That latter provision will be of particular use in, for instance, a case where urgent action is needed to avoid dissipation of assets, a 'live' kidnapping or hostage

situation has arisen, or special investigative means require need immediate deployment.

Article 10 sets out each of the matters that should be set out in a letter of request to Serbia. Although there is not a single prescribed form for a letter, there are certain details that should appear; those are reflected in (a) to (h). A letter must be signed and a Serbian translation also provided.

Articles 11 and 12 have specific practical importance: Although an incoming request will be executed in accordance with Serbia's own laws and its rules and procedures, it should be possible for the requesting authority to make an express request that Serbia carries out procedures in accordance with the requesting state's law and procedure insofar as that is not inconsistent with the law of Serbia.

That is international good practice for an obvious reason: A fundamental difficulty, often overlooked, is that different states have different ways of presenting evidence. The whole purpose of a request is to obtain useable, admissible evidence. That evidence must therefore be in a form appropriate for the requesting state, or as near as possible to that form as circumstances allow. At the same time, the requested state cannot be expected to be familiar with the rules of evidence-gathering and evidence-adducing in the requesting state; the request therefore needs to spell out what is needed. The request may then be executed to the extent that the procedures required are not inconsistent with Serbian law.

Article 13 complements Articles 11 and 12 by providing that the procedures instituted in Serbia pursuant to a request shall be subject to the Criminal Procedure Code and any other relevant law, save as specifically provided for under the Act (i.e. Articles 11 and 12).

Article 14 gives the central authority the power to refuse a request for assistance. As the international imperative is for mutual legal assistance to be as permissive as possible, refusal should only occur rarely. Usually, it is envisaged that consultation and discussion will ensure that difficulties are resolved at an early stage; to that end, the Article also allows for the imposition of conditions.

This Article sets out general grounds for refusal: namely that the granting of the request would prejudice the sovereignty, security, *ordre public* or other essential public interest of Serbia. In addition, *non bis in idem* (double jeopardy) is also a ground, as will be the other internationally recognised grounds for refusal, such as human rights concerns. Bank secrecy or the fact that the matter concerns fiscal offences will not amount to a ground for refusal.

Article 15 provides for confidentiality of an incoming request. An official in Serbia with knowledge of the request shall not disclose the contents save to the extent necessary to execute the request.

Article 16 provides for the procedure in Serbia when a request has been made for the gathering of evidence. The Article addresses the issuing of an order by the competent authority, the test that authority will apply and the nature of the order itself. The

Article also reflects relevant elements of the Criminal procedure Code, including refusal to answer questions/the privilege against self-incrimination.

Article 17 provides for evidence to be gathered in Serbia by video or audio technology. It also sets out the conditions that may be attached to an order under this Article. This power reflects a growing international trend and is expressly provided for in the EU MLA Convention 2000.

Article 18 enables the Serbian court to issue an order for a search to be conducted of, for instance, a premises or vehicle. The search will be in accordance with Serbian law, save that it may be ordered that investigators from the requesting state are present at, or participate in, the search.

It should be noted that, internationally, search and/or seizure can sometimes be problematic. Essentially, the competent authority making the request should be careful to provide as much information to the Serbian authority as possible about the location of the premises etc. It must be remembered that different jurisdictions set different thresholds. A request to Serbia will involve the national court applying the thresholds in place under Serbian law.

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

Any state requesting a search be conducted in Serbia should have adopted the good practice of having written regard to the core principles of the ECHR, namely necessity, proportionality and legality. Interference with property and privacy in European States is now usually justifiable only if there are pressing social reasons such as the need to prosecute criminals for serious offences.

Article 19 provides for the transfer of a person detained or serving a sentence of imprisonment in Serbia to be temporarily transferred to another state, upon a request, for the purposes of giving evidence or assisting the court in that other state. The person concerned must consent to such a transfer and the request itself must be in the form of a letter of request (even though it is consensual).

Article 20 provides for safe conduct in respect of the transferee referred to in Article 19. In particular, it ensures that the transfer process cannot be used as a ‘veiled’ extradition, that the person’s assistance will only be sought in relation to the matters specified in the request and that he will be returned to Serbia once the assistance has been given before the foreign court or judicial authorities.

Article 21 ensures that time spent detained in a foreign state pursuant to an Article 19 request will count towards time served (in respect of a sentence of imprisonment in Serbia).

Article 22 set out the process and authorisation framework for a detained person who is travelling from one state to another for the purpose of giving evidence etc in the requesting state and transiting through Serbia.

Article 23 establishes an appeal mechanism for a person subject to an Article 19 request.

Article 24 reflects a key international 'norm' (often explicitly set out in international MLA instruments) that a witness or expert in Serbia who is subject to a summons from a foreign state and who fails to respond shall not be liable, in Serbia, to either enforcement measures or sanction.

Articles 25 to 35 (inclusive) address MLA requests to Serbia that seek financial investigation, temporary seizure and/or confiscation of the proceeds of crime. The Articles provide a supplementary framework to the MLA procedures contained in the rest of the Act and their objective is to ensure that Serbia is able to assist in response to such a request (in line with its obligations under relevant international instruments, such as the 1990 Council of Europe Convention on Seizure etc, UNTOC & UNCAC etc), whilst, at the same time, doing so in accordance with Serbian national law, the Serbian Constitution and international human rights law.

This part of the Act sets out the respective role of the Prosecutor and the Court and also, in Article 28, details the extra information required within a letter of request that seeks to engage the Article 25 to 35 framework.

It should be noted that Article 30 provides for additional definitions and that Article 34 seeks to safeguard the rights of bona fide third parties. Further, transmission of a request that falls within Article 25 to 35 will be (save in urgent cases) to the relevant prosecutor or court via, in the first instance, the central authority.

Articles 36 & 37 provide for the expedited preservation and disclosure of stored computer data in response to an MLA request made to Serbia. This set of two express provisions reflects the growing importance of cyber material in criminal investigations and contains additional definitions to assist in actioning concisely such requests.

Articles 38 to 41 contain miscellaneous, but nonetheless important provisions. Particularly of note is Article 38, which provides that the rendering assistance in Serbia shall be conducted without charge to the requesting state, save that Serbia may require the refund of any costs incurred by the attendance of experts in its territory or the transfer of a person in custody, and, in addition, any costs of a substantial or extraordinary nature. This provision reflects internationally accepted practice.

In addition, the Article also states that the costs of establishing a video or telephone link, costs related to the servicing of a video or telephone link in Serbia, the remuneration of interpreters provided by it and allowances to witnesses and their travelling expenses will be refunded by the requesting state, unless otherwise agreed.

It should also be noted that Article 39 allows for an investigator or prosecutor from the requesting state to be present for the execution of a request in order to assist the process and that Article 41, in line with recent European initiatives, envisages the setting up of joint investigation teams by agreement between Serbia and a foreign state.

Articles 42 to 46 detail the framework and procedure for a request made to a foreign state by a competent authority in Serbia (an outgoing request).

Article 42 states, inter alia, that a request made by a competent authority in Serbia shall include the matters set out in Article 10, (a) – (h). That is to say, the same ‘checklist’ as for incoming requests.

Article 43 addresses the transmission of a letter of request to a foreign state and states that the letter, along with other supporting documents, issued by a competent authority shall be transmitted to the requested State by the central authority of the Republic of Serbia. In addition, where the law of the requested state permits the direct transmission of a letter of request to a competent authority, a Serbian competent authority may transmit a request directly. In such a case, a copy of the request shall be submitted to the central authority of Serbia. (In an urgent case, a copy of a letter of request may also be submitted to the International Criminal Police Organisation (INTERPOL).)

Articles 44 and 45 provide, respectively, for (i) the transfer of a prisoner to give evidence or otherwise assist the court, in Serbia and (ii) safe conduct for such a person. The safe conduct provisions mirror those contained within Article 20, above.

Article 46 sets out the specialty principle in relation to evidence obtained by a Serbian competent authority. Such evidence may only be used in relation to the offence or offences particularized in the request and solely for the proceedings that were also detailed therein. This provision is in accordance with established international principle.

Articles 47 to 554 (inclusive) provide the framework and procedure for the assumption of a criminal prosecution from a foreign state by Serbia. The role of the Prosecutor and the Court are each set out, along with safeguards.

Articles 55 to 61 (inclusive) address the transfer of a criminal prosecution from Serbia to a foreign state.

Articles 62 to 69 bis (inclusive) provide the framework for the execution, in Serbia, of a criminal judgment made by the court of a foreign state.

Articles 70 to 74 (inclusive) also address execution of a criminal judgment from a foreign state, but, here, in circumstances where a Serbian citizen is in custody in that foreign state and is to be transferred to Serbia to serve his sentence.

Articles 75 to 81 (inclusive) allow for the execution of a criminal judgment made by a Serbian national court to take place in a foreign state, in circumstances where the convicted person is a national of the foreign state concerned or is ordinarily resident in that foreign state.

Articles 82 to 87 (inclusive) also provide for the execution of a criminal judgment made by a Serbian national court to take place in a foreign state, but, this time, with the convicted person being transferred to his state of citizenship or residence in order to serve his sentence of imprisonment.

Article 88 allows for a writ to be served (via diplomatic channels) upon a Serbian national living abroad.

Article 89 allows for a writ to be served (via diplomatic channels) on a person enjoying diplomatic immunity.