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**Support to the Prosecutors' Network in South-Eastern Europe
Regional Project**

Report on compliance of project areas with the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 182) and the EU Convention on Mutual Assistance in Criminal Matters of 2000

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After a career at the Ministry of Finance he became a Magistrate of the Public Prosecutors Office (Crown Public Prosecutors Office in Brussels) specialised in financial crimes, such as money laundering and corruption, and criminal tax cases.

He has written articles in French and English on money laundering, and has lectured abroad (Poland, Hungary, Senegal, Moldova, Ukraine, Jordan). He participated as a speaker in the **European Union/Council of Europe Joint** Programme on International Co-operation in Criminal Matters in Ukraine (UPIC).

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He has been a member of different working groups concerning the follow-up Project against Money Laundering and Terrorist Financing in Ukraine (Moli-UA2). He was a member of the Training Strategy Working Group (AML/CTF Training) and the Legal Working Group until the end of the project (in 2009).

1. INTRODUCTION

1. The report on compliance has been prepared within the framework of the joint project of the European Commission and Council of Europe "Support to Prosecutors' Network in South-Eastern Europe". The project aims at strengthening the capacities of the CARDS countries[1] and Kosovo[2] (further in text project areas) to develop and implement judicial co-operation against serious crime based on the EU *acquis* and other European and international standards and practices by supporting the Prosecutor's Network[3].

The aim of this report is to present the analysis of compliance of project areas with the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 182) and EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000 (EU MLA Convention).

The analysis was made by taking into account the replies provided by project areas to the questionnaires sent by the Council of Europe Secretariat, and it was finalised after the Regional Conference on Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 182) and EU MLA Convention, which took place in Tirana, Albania from 21-23 September 2009.

2. The regional conference on the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 182) covered two closely related activities: a *workshop* on the compliance with the CETS 182 and the EU MLA Convention and a *Regional Thematic Training* on practical measures as foreseen by the CETS 182.

Its purpose was to assess the level of compliance of project areas' legislation with the CETS 182 and the EU MLA Convention and to provide prosecutors and officials from the ministries of justice a better insight into the mechanisms of mutual legal assistance in criminal matters as well as legal advise on how to apply tools available for this crucial type of international co-operation in criminal matters.

The regional conference was constructed around the most recent Council of Europe instrument in the field of international co-operation, i.e. the 2001 Second Additional Protocol to the 1959 Mutual Legal Assistance Convention (CETS 182).

3. The starting point of the conference was the questionnaire on the "implementation" of the CETS 182 and the EU MLA Convention in each of the seven project areas. In most cases the questionnaires were completed by legal consultants in co-operation with the project's contact points from the Ministries of Justice[4].

The comparative analysis of the answers showed that some project areas resort to the direct application of the CETS 182 rather than introducing specific (new) legislation in the field of international co-operation in criminal matters in general, or specifically mutual legal assistance in criminal matters. To some extent, the application of certain types of co-operation was left to general legislation, e.g. criminal procedure codes. In

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[1] Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia, "the former Yugoslav Republic of Macedonia".

[2] *"All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo".*

[3] Prosecutors' Network was established by the Memorandum of Understanding for Regional Co-operation Against Organised Crime (MoU) signed on 30 March 2005 in Skopje within the framework of the CARDS Judiciary Project for Western Balkans.

[4] The support from project contact persons to the locally hired legal consultants varied significantly from one project area to another. Is some cases the legal consultants had to finalise the questionnaire on their own.

certain cases reciprocity is explicitly mentioned as a requirement to apply certain provisions of the CETS 182. This very preliminary "conclusion" will be further elaborated below.

While the first part of the conference dealt with the legislative side of the issue and the level of compliance of legislation of project areas as such, the second part of the conference was mostly dedicated to the presentation of cases and the exchange of experiences related to practical application of measures and tools foreseen in these two international instruments. From these cases, the prosecutors and officials from the ministries of justice present in the conference were encouraged to apply the CETS 182 to the fullest possible extent. The concept of direct co-operation between judicial authorities is the central idea prescribed by the CETS 182. Classic thresholds connected to state-to-state co-operation should be abandoned or at least mitigated in favour of efficient cooperation between those entities which are in charge of the pre-trial or trial proceedings. Prosecutors and (investigating) judges are at first hand involved to seek out relevant evidence and asses the admissibility of the evidence received from foreign colleagues.

The latter issue (admissibility) is often disregarded. At this point, the issue of the "aftermath" or legal consequences of mutual legal assistance is raised. Mutual legal assistance instruments such as the Council of Europe's 1959 "Mother Convention" and its protocols hardly address the transmission of the evidence obtained and the further effects of that evidence in the (formerly) requesting state. The shift from the principle of "*locus regit actum*" to "*forum regit actum*" is apparent in the CETS 182 (2001 Protocol). Article 8, is instrumental for the admissibility of internationally obtained evidence, but many issues in relation to admissibility remain to be agreed upon formally. Discussions on admissibility should be initiated, with a focus on cases drawn from real life practice and recent decisions of the European Court of Human Rights dealing with this essential topic.

The final 1,5 days of the conference were divided into three main groups of topics. The division was roughly based upon the structure of the CETS 182 (the 2001 Protocol). Topics under Group I (day two, AM) dealt with the 'procedural' aspects of MLA. Topics in that group included: the complexities regarding the transmission of requests, execution and problems related to it (such as the legal principle of *forum regit actum* (as opposed to *locus regit actum*); the postponed execution; the assistance of officials (such as police officers and/or magistrates from the requesting state); the costs involved in the execution of mutual legal assistance request; communication during the execution - including with respect to supplemental requests - and finally the return of evidence and issues of (in)admissibility.

Group II was called 'tools': these are not always 'new' instruments to obtain assistance. Old, yet refined tools, include the temporary transfer of detained persons and the use of modern means of communication such as telephone and video links to hear suspects, witnesses and experts. The latter tools are rarely used. The conference also stressed the importance of use of those tools in preparatory phases, not for purposes of rendering MLA, but as means to facilitate the drafting and transmitting of requests for the provision of MLA.

Group III dealt with the real novelties of CETS 182. The 2001 Protocol provides the basis for the use of *special investigative techniques*. These as such are not new, but are now 'covered' by an international instrument at the Council of Europe level. The countries parties to the Schengen Agreement and EU Member States, provide early experiences of the use of cross border observations and controlled deliveries. Cross border covert operations imply specific legal issues such as the possibility to 'provoke' suspects and the use of civilian undercover agents. Differences in domestic legislation may well prohibit or limit the deployment of undercover operations. Cases presented showed how to deal and to overcome what sometimes seem to be insurmountable

obstacles during undercover operations. Part of the discussions focused on Joint Investigation Teams (JITs). Hardly used even within the EU, JITs provide a completely new way to co-operate. In essence, a JIT is an *alternative* to MLA since two or more treaty parties literally join forces and create a well defined and case-focused legal space within which the free flow of information and evidence is assured. On a formal level, successful JITs require a supervising structure such as EUROJUST, in order to provide the necessary oversight and preliminary co-ordination.

The above description contains in a nutshell the legal issues that were addressed during the conference. The expected outcome would be better knowledge of the tools for MLA and, by and large further acknowledgment of the importance of mutual legal assistance. It should also translate into practical daily application of the protocol and related domestic legislation , to enable the application of measures and tools prescribed therein.

Even though the EU MLA Convention (applicable only in EU member states) is not applicable in the seven project areas from SEE, this instrument was included in the discussions because many project areas are either in negotiations for accession, or aspire to enter into such negotiation in the foreseeable future. In addition, from a theoretical point of view, the reference to this EU instrument makes perfect sense since the CETS 182 Protocol is an almost identical copy of the EU MLA Convention. The Council of Europe drafters actually explicitly mentioned the EU-roots of the CETS 182 Protocol in the explanatory report to the latter instrument. The Council of Europe aimed to apply the EU evolutions in mutual legal assistance more widely. Potentially, a Council of Europe instrument encompasses 47 member states, 20 more than the European Union. Even third parties, states that are not party to the Council of Europe, may under certain conditions accede to this instrument.

4. One important element was the evaluation of the Prosecutors' Network itself. which was established within the framework of the CARDS Judiciary project, by conclusion of the *Memorandum of Understanding (MoU)*[5]*,*signed on 30 March 2005. The Prosecutors' Network is a crucial cooperation instrument in itself. Even if the MoU does not have the status of a treaty or a convention in the sense of the 1969 Vienna UN Treaty on Treaty law, it contains the essential preconditions for what could be called *reinforced regional cooperation*. Regional networks of reinforced cooperation emerge even within the area of justice, freedom and security of the European Union. One example is the so-called EUREGIO (created in 1976) cooperation in the tri-country Maas – Rhine area that covers a number of neighbouring judicial districts of Belgium, the Netherlands and Germany and which lead to the creation of a '*common* prosecutor's office' in Maastricht (the Netherlands). This judicial cooperation is coordinated by the so called BES (Bureau Euregionale Samenwerking – Bureau Euregional Cooperation) which was created in 2003. BES is based in Maastricht's Prosecutor's Office.

Even when countries have no common borders, mutual understanding laid down in a MoU-type of document is an optimum tool to create a framework of reinforced or enhanced cooperation based upon mutual issues such as certain types of cross-border criminality. A prime example of the latter type of reinforced cooperation is the Protocol of Partnership that was signed on 9 September 2008 in Brussels, between the Belgian Federal Prosecutor's Office and the Romanian DIICOT, the national Prosecutor for the fight against organised crime and terrorism. This Belgian – Romanian reinforced cooperation framework, emerged as a result of the growing problem of organised thefts committed in Belgium by Romanian criminal organisations[6].

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[5] MoU was signed by General Prosecutors of Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia and "the former Yugoslav Republic of Macedonia"

[6] Similar bilateral frameworks are now being developed between Belgium and some of the Prosecutors' Network partners; Romania is setting up analogous structures with Spain and Italy.

Local reinforced cooperation structures represent the latest development in the field of mutual assistance in criminal matters and more generally, international cooperation in criminal matters. Basic characteristics are direct and ideally, even personalised contacts between judicial authorities that are centralised in order to assure a maximum level of coordination and to assure single contacts points for communication. This working document, dedicates some time to this latest development in the area of mutual legal assistance.

5. This report on compliance of project areas with CETS 182 and EU MLA Convention is constructed as follows:

Part 1 - Introduction
Part 2 - a brief history and analysis of mutual legal assistance. This part aims at setting the stage for the conference. Part 2, provides a thorough analysis of CETS 182.
Part 3 - an overview of the answers to the questionnaires in general and on a project area by project area basis.
Part 4 contains - initial conclusions and an overview of topics discussed during the conference.
Part 5 - analysis of the instruments and the assessment of the implementation by the project areas to the regional initiatives to reinforce cooperation. At this point, the Memorandum of Understanding is taken into account.
Part 6 - general and specific recommendations that aim at improving the compliance to the CETS 182. These recommendations are divided into:

- a general part – applicable at all seven project areas;
- and a series of project area specific recommendations;

6. The first draft of the report was made on the basis of two main clusters of source material. The first one consisted in a thorough re-reading and analysis of *the Council of Europe's instruments* regarding mutual legal assistance, i.e. the 1957 'Mother Convention' (CETS 030), the 1978 (first) Additional Protocol (CETS 099) and the 2001 Second Additional Protocol (CETS 182) and all relevant documents such as the explanatory reports to these instruments and the reservations and declarations that were made. The second cluster of information contained in this report consists of the assembled answers to the questionnaires completed by project areas. The answers to questionnaires were major source of information for the section of the report which deals with seven project areas specifically .

7. The final version of this Report took into consideration all relevant information and documentation gathered during the Conference (21 September 2009) and the *Regional thematic training,* (22-23 September 2009), both held in Tirana, Albania, authors' personal notes and observations of this combined event, the detailed report prepared by the Council of Europe Secretariat and information that was received shortly after the seminar. On the basis of the above listed information and documentation, a series of general ('horizontal') and project area specific recommendations were formulated. These are contained in part 6 of the report.

2. A BRIEF HISTORY OF MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

2.A. Growing Independence

8. Since the groundbreaking *European Convention on Mutual Assistance in Criminal Matters* of 20 April 1959 (CETS 030)[7], mutual legal assistance became an *independent form of international cooperation in criminal matters*. Until the entering into force of the 1959 MLA Convention, mutual legal assistance was a mere *annex of extradition*, i.e. a kind of 'material extradition' that assured the international surrender of evidence *alongside* the surrender of the person sought. This nexus is apparent when we look at bilateral extradition treaties or conventions that were concluded in the 19th and early 20th centuries. These instruments contained – or contain since many of them are still applicable today - just a few articles regulating the transmission and execution of so-called 'letters rogatory'. In most cases these treaties only referred to the interrogation of suspects and witnesses, the execution of house searches and seizures and the service of judicial documents such as subpoenas or judgments[8]. More recent bilateral extradition treaties – postdating World War II – usually contain a more elaborate distinguished 'chapter', 'division' or 'title' regarding mutual legal assistance, mostly still in its historical denomination 'letter rogatory' or 'rogatory commission'[9]. Contrary to these 'traditional' extradition instruments, recent bilateral treaties in the field of international cooperation do not any longer combine extradition and mutual legal assistance in criminal matters. Both forms of international cooperation are dealt with in separate treaties[10]. The evolution of bilateral treaties clearly shows the growing independence of mutual legal assistance, mainly due to the impressive work of the Council of Europe back in 1959. The essential reason for the separation of mutual legal assistance and extradition is that mutual legal assistance does not need to meet the same criteria as extradition. Since 1959, mutual legal assistance should be granted in cases that would not allow extradition. Some of the traditional requirements to extradition do not even apply to mutual legal assistance. Nationality for instance is not a ground for refusal. Double criminality is also not always required (see 10).

9. Being the first major multilateral mutual legal assistance instrument, the 1959 Convention came to replace the old(er) scant MLA provisions of the bilateral extradition treaties. Apart for the independent character of MLA, the Convention also offered a full range of mutual legal assistance types. Apart from the classical types of cooperation such as the obtaining of documents (article 3.3), the hearing of witnesses or experts (article 3.1), the appearance of witnesses, experts or prosecuted persons (article 7), the service of legal documents such as subpoenas (article 7, 8, 9, 10 and 12).

Coercive measures like house searches and seizures are mentioned indirectly in article 5. This article indicates that double criminality is normally *not* a requirement for mutual legal assistance. Only for coercive measures, double criminality *can* be required if the party to the Convention declares so[11]. The convention also provides for the

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[7] The text of the 1959 Convention, the status of accession and ratification, the declarations and reservations and the explanatory report of the 1959 MLA-Convention and all other conventions of the Council of Europe are on the excellent Council of Europe's Treaty Office website www.conventions.coe.be. The English text versions of the Council of Europe's Conventions that regard international cooperation in criminal matters are also published: Co-operation against crime: the conventions of the Council of Europe, 2006, Strasbourg, Council of Europe Publishing, 336 p. (also available in a French version). See www.book.coe.int for availability.

[8] E.g. the Extradition Treaty concluded between *Belgium and Bolivia* of 24 July 1908 (article 15) and the slightly older Extradition Treaty between *Belgium and Chile* of 29 May 1899 (article 15) and more recently the Extradition Treaty between *Belgium and Lebanon* of 24 December 1953. The latter contains four articles (16 to 19) – out of 20 - on 'rogatory commissions'.

[9] E.g. Extradition and MLA Treaty between *Belgium and Algeria* of 12 June 1970. Title II, containing articles 18 – 31, regards MLA.

[10] E.g. the separate Extradition Treaty and MLA Treaty between *Belgium and Morocco*, both dated 7 July 1997, replacing the 'mixed' bilateral Extradition and MLA Treaty of 27 February 1959.

[11] Most parties to the 1959 Convention did actually declare that mutual legal assistance with respect to house searches and seizures does indeed require double criminality in accordance wit article 5.1 a). For a further explanation regarding the article 5 reservations – to be made trough a declaration – see *infra*, 10.

temporary transfer of detained persons (article 11), the exchange of criminal records (article 22) and the so-called *laying of information* (article 21). The latter type of cooperation allows a party to transmit a case file in order to request the prosecution of the matter. The laying of information is an informal type of cooperation that *may* assure prosecution in case the requesting state is not competent – for lack of extraterritorial jurisdiction or lack of interest in accordance with domestic prosecution policy. The laying of information is to be sharply distinguished from the transfer of proceedings as regulated by the Council of Europe's European Convention on the Transfer of Criminal Proceedings of 15 May 1972[12]. This instrument creates an obligation to the parties to transfer / accept proceedings, at least insofar the conditions thereto are fulfilled and no ground for refusal applies[13]. Under the 1972 Convention the transfer of proceedings has as an effect that the requesting state will *transfer its jurisdiction*, while the requested state *obtains a – secondary – jurisdiction* over the offence(s). The laying of information does under no circumstances generate any transfer of jurisdiction. The party that sends the information – the case file containing the relevant evidence that should enable the 'requested state' to pursue the matter – will at any stage continue to hold its original jurisdiction over the matter.

10. The 1959 Convention was amended by a *Protocol* dated 17 March 1978[14]. This (first) Protocol contains just some minor amendments to the 1959 Convention. It makes the 1959 Convention applicable to certain fiscal offenses – or rather limits the traditional ground for refusal - while diminishing the effect of a possible lack of double criminality in that case (articles 1 and 2).

The (first) Protocol also widens the field of application of the MLA-type *service documents* to the service of documents regarding the enforcement of sentences, the recovery of fines or the recovery of the costs of the proceedings, as well as documents that relate to the execution of sentences, when the execution was suspended or linked to fulfilment of certain conditions (article 3). The latter amendment thus widens mutual legal assistance to the post-trial phase, albeit it seems from the text, only to that particular type of MLA. Finally, the (first) Protocol reinforces article 22 of the 1959 Convention related to the exchange of criminal records (see article 4).

11. Despite this revolutionary step in the development of international cooperation in criminal matters, the 1959 Convention remains an instrument of *state-to-state cooperation*. Although the Convention introduces the notion of *central authorities* that are directly responsible for the transmission and receipt of mutual legal assistance requests instead of the far more formal and 'remote' diplomatic channel, at the core remains the concept of sovereign States. The central authorities are usually services within the respective Ministries of Justice that are part of the executive and not the judiciary. A few member states however consider their Prosecutor General's Offices as central authorities. Russia and Portugal providing two prime examples.

In some areas, the Convention still contains direct links between MLA and extradition. Article 5.1 b) allows the Parties to reserve the right to make the execution of letters rogatory for search or seizure of property dependent on the condition that the offence motivating the letters rogatory is *an extraditable offence* in the requested country. Some member states indeed made the reservation with respect to article 5.1 b). Another direct reference to extradition is to be found in article 1.2 that excludes military offences from its scope of application[15]. Also article 2 a. mentioning mutual legal

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12 CETS 073. See www.conventions.coe.int.

13 See articles 6, 7, 10 and 11 of the 1972 Convention.

14 Additional Protocol to the European Convention in Criminal Matters, CETS 099. See www.conventions.coe.int.

15 Compare to the military offence exception to extradition in article 4 of the European Convention on Extradition, 13 December 1957, CETS 24, see www.conventions.coe.int.

assistance with respect to political[16] or fiscal offences[17] as a ground for refusal, contains loud and clear echoes of the old extradition-foundation of MLA.

12. In this respect, mutual legal assistance between Council of Europe Member States is essentially a formal process involving exchanges of mutual legal assistance requests between central authorities that usually belong to the executive branch of the member states. Delays for execution are often prolonged since multiple levels of authority need to be involved *before* the competent judicial and police authorities are reached. The latter are bodies directly involved in the mutual legal assistance process. The drafting of requests, the execution of the request and further exploitation (or not) of the results – the evidence obtained – is actually always under their authority.

13. Evolutions at the EU-level have introduced more direct ways to cooperate. At the Benelux-level (1962)[18] and later within the Schengen group of EU Member States (1990)[19], the principle of *direct transmission* between the judicial authorities involved was introduced for the first time. At the Council of Europe level, the direct transmission of mutual legal assistance requests was only allowed in case of *urgency* (article 15.2). Direct transmission was the exception to the rule of a state-to-state transmission between central authorities that have a mere administrative role. The Council of Europe's Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters[20] provides the basis for modern mutual legal assistance in criminal matters, beyond the European Union's perspective. This instrument does have a pedigree. Before analysing the 2001 Protocol, again, a brief history will shed some light on its provisions.

2.B. Modern ways of investigation and alternatives to mutual legal assistance

14. The Second Additional Protocol (hereafter "the Protocol") marks a significant progress to the 1959 "Mother" Convention and the First Additional Protocol of 1978 that contains only a small number of very specific, minor amendments (see above, 9). Between 1978 and 2001 the mutual legal instruments of the Council of Europe did not evolve at all.

After Council of Europe groundbreaking work in 1959, the, the European Union "took over" the leading role in the development of instruments in the field of international cooperation in criminal matters. First via the *Schengen acquis* in 1990 and ten years later, a major leap forward was marked by the conclusion of the EU MLA Convention. This convention offered for the first time a legal framework for direct cooperation, excluding the primary role of central authorities. It also provided for the international deployment of modern means to obtain evidence such as telephone and videoconference and the application of special investigative techniques such as cross-border observations, controlled deliveries and the use of undercover agents – 'covert investigations'. Last but not least, the EU MLA Convention provides for a legal basis for Joint Investigation Teams (JITs). This novelty is to be seen as an alternative for 'traditional' mutual legal assistance, even if it includes the deployment of special

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[16] Compare to the political offence exception to extradition in article 3 of the Extradition Convention.

[17] Compare to the fiscal offence exception to extradition in article 5 of the Extradition Convention. See also supra, 9 with respect to the (first) Additional Protocol of 17 March 1978 that limited the traditional fiscal offences exception to mutual legal assistance.

[18] Benelux Extradition and Mutual Legal Assistance Convention, 27 June 1962.

[19] *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders* (Schengen I) signed on 14 June 1985, supplemented by the *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders* (Schengen II), signed on 19 June 1990, *O.J.*, L 239 , 22 September 2000, 19–62. And the consolidated non-obligatory Council document entitled *Schengen Acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999*, published in *O.J.*, II, 22 September 2000, 1 – 470. See: http://eur-lex.europa.eu/.

[20] Strasbourg, 8 November 2001, CETS 182. All relevant documentation on www.conventions.coe.int.

investigative techniques such as covert operations. A JIT is basically a temporary and case-specific legal space that enables a free flow of information and evidence. *Instead* of sending mutual legal assistance requests back and forth between two or more countries, *the JIT itself* generates the evidence.

15. The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 182) is essentially a copy of the EU's 2000 Convention, brought to the level of the 47 Member States of the Council of Europe. Since it is a Protocol, this instrument *changes*, for the second time, the 1959 Convention.

This change is twofold. Under Chapter I, the articles of the Protocol that change, or rather replace some of the provisions of the 1959 Convention are grouped. Chapter I comprises articles 1 to 6. Chapter II of the Protocol contains the new articles, i.e. the provisions that do not bare a reference to the 1959 Convention. The new articles are articles 7 to 29. These provisions are thus *added to* the 1959 Convention. Chapter III contains other usual final provisions that are as such, of no relevance here.

The division of the amended provisions under Chapter I and the novel provisions under Chapter II make perfect sense in view of the relation between the Protocol and the 'Mother Convention' of 1959. When considering the Protocol on its own, the order of the articles in relation to their content is quite confusing. In the light of the assessment of the compliance to the Protocol, another order is needed. For that reason, the Protocol is taken apart and re-ordered according to the following scheme. Before explaining the regrouping, the articles are briefly indicated according to the order of the Protocol, i.e. according to the Chapter I / Chapter II division.

16. Chapter I (articles 1–6) regards:

ARTICLE	**SUBJECT**	**CONTENT**
1	Scope	Enlarged to administrative offences and offences committed by legal persons
2	Execution of requests	Presence of officials of the requesting party
3	Type of assistance	Temporary transfer of detained persons to the requesting party
4	Formalities of assistance	Channels of communication
5	Execution of requests	Costs
6	Formalities of requests	Judicial authorities – definition

17. Chapter II (articles 7–29) regards:

ARTICLE	SUBJECT	CONTENT
7	Execution of requests	Postponed execution
8	Execution of requests	Applicable law – *forum regit actum*
9	Means to execute requests	Hearing by video conference
10	Means to execute requests	Hearing by telephone conference
11	Type of assistance	Spontaneous information
12	Execution of requests (post execution)	Restitution
13	Type of assistance	Temporary transfer of detained persons to the requested party
14	Type of assistance	Personal appearance of (previously) transferred sentenced persons – specific variety to articles 3 and 13
15	Formal requirement	Language of documents to be served – a formal requirement attached to service of documents (article 16)
16	Type of assistance	Service by post
17	Type of assistance special investigative technique	Cross-border observations
18	Type of assistance special investigative technique	Controlled delivery
19	Type of assistance special investigative technique	Covert investigations
20	Alternative to MLA	JIT
21-21	Alternative to MLA	JIT regulation of liability of the JIT members
23	Type of assistance special investigative technique	Protection of witnesses
24	Means to execute requests	Provisional measures
25	Formal requirement	Confidentiality
26	Formal requirement	Date protection
27	Formal requirement	Administrative authorities - definition
28	Protocol	Relations with other treaties
29	Protocol	Friendly settlement

18. The order of the articles as indicated above, is not much of an ‘order’. Formal requirements, types of assistance, means to execute requests, etc. The subject matters of the articles are most often listed in random order. For that reason an alternative order is provided here. The overall *structure* of the Protocol is given below. The structure is based upon the *content* of the Protocol’s provisions and not the Chapter I / Chapter II division that is based upon the Protocol’s relation to the 1959 Convention. The articles are regrouped accordingly.

As indicated above, Chapter III, that comprises the Articles 28 to 35, which are the (usual) formal final sections with respect to the Protocol itself, are not taken into consideration.

One important exception is *article 33* that contains the regulations with respect to the *reservations* (by means of a declaration) that can be made. This article lists some of the articles of the Protocol that are eligible for a reservation by means of a declaration to be deposited at the time of the ratification. Articles 16, 17, 18 and 20 are mentioned in Article 33. More specifically these articles regard the service of documents, cross-border observations, controlled deliveries and the 'founding article' regarding JITs. Under 34 and following, the reservations made by the project areas are analysed and compared in detail. Also articles 28 and 29 are not related to the mutual legal assistance as such but rather to the Protocol itself. Article 28 deals with the relation between the Protocol and any other bilateral or multilateral instrument regarding mutual legal assistance. Article 29 provides the CDPC, the European Committee on Crime Problems, with the authority to deal with interpretation or application issues and to settle these in a friendly matter. Essentially articles 28 and 29 belong to Chapter III of the Protocol.

19. The articles are 'regrouped' into six groups of articles. These groups are based upon the content of the articles, i.e. the aspect of MLA that is dealt with. The six groups deal with (I) the scope of application of the Protocol, (II) the formal requirements of MLA, (III) types of MLA, (IV) means to provide MLA, (V) special investigative techniques and (VI) Joint Investigating Teams.

20. Group I contains the articles that amend the scope of application of the 1959 MLA convention. These articles widen the application of the 1959 Convention to *administrative 'offences'* and to the offences committed by *legal persons*. The sole relevant article in this group is article 1, more precisely article 1.3 and 1.4. Article 1 amends the 1959 Convention.

21. Group II regroups all articles that deal with formal requirements of MLA. This is the largest group that encompasses the articles regulating or amending the 1959 Convention requirements with respect to the transmission of MLA-requests. These articles are related to the definition of the competent authorities that are 'judicial authorities' or 'administrative authorities', the execution of MLA-requests, the presence of authorities of the requesting state, restitution, costs, languages, confidentiality and data protection. The relevant articles in this group are: articles 4 (channels of communication), 6 (judicial authorities), 27 (administrative authorities), 7 (execution of requests, postponed execution), 8 (execution of requests, procedure), 2 (execution of requests, presence of official of the requesting party), 5 (execution of requests, costs), 15 (execution of requests, language of documents to be served – this article is linked to article 16), 12 (execution of requests, restitution), 25 (confidentiality) and 26 (data protection). This group contains both articles that simply amend or change the provisions of the 1959 Convention (under Chapter I of the Protocol) and articles that introduce novelties and are thus under Chapter II of the Protocol. Merely amending articles, are articles 4, 6, 2 and 5. Articles 7, 8, 15, 12, 25 and 26 are completely new and are part of Chapter II of the Protocol. The order of the articles is also changed within the same group. Instead of following the order 2, 4, 5 etc., some articles are reversed. A logical *order* is followed. Channels of communication (article 4) precede the execution of request, i.e. for instance the aspect of the presence of officials of the requesting state (article 2). That is why article 4 is listed *before* article 2.

22. Group III contains the articles regulating *means* than can be used to execute MLA-requests. The Protocol introduces two modern means to do so, namely the use of telephone and videoconference for the purpose of hearing witnesses or experts. The articles of this group are articles 9 and 10, respectively regarding videoconference and telephone conference as a means to obtain expert/witness testimony. Article 24 regarding provisional measures is also under group II.

23. Group IV regroups the articles that amend the existing *types* of MLA of the 1959 Convention. The Protocol also introduces new articles regulating temporary transfer of prisoners, service by post and spontaneous information. Except for the spontaneous exchange of information, these novelties are actually mere evolutions of pre-existing types of cooperation. The articles that are concerned here are: article 3 amending the existing regulation of article 11 of the 1959 Convention on the temporary transfer of detained persons to the requesting party; article 13 that introduces the temporary transfer to the requested party; and article 14 that regulates the situation regarding the detained persons *that were previously transferred* on the basis of the 1983 Convention[21] on the transfer of sentenced persons or the 1997 Additional Protocol to that convention[22]. Regarding service by post, the Protocol amends the existing article 7 of the 1959 Convention to the extent that service by post should be done directly to the person concerned. The new article 16 introduced the principle of direct service by post to the person concerned.

Finally article 11 on the spontaneous exchange of information is really new. It is a type of mutual legal assistance and at the same time it is not. The transmission of information that could be useful to another party to the Protocol is not a request for evidence. The *information* – as opposed to *evidence* – may lead to an investigation and the subsequent transmission of a mutual legal assistance request to the party that initially spontaneously transmitted the information.

24. Group V regroups the articles on special investigative techniques. Essentially these are new types of mutual legal assistance. Group V is actually a *subgroup* of group III. Four articles are relevant here, those that regulate cross-border observations (article 17), controlled deliveries (article 18), covert operations (article 19) and the protection of witnesses (article 23).The latter article only obliges parties to "endeavour to agree on measures for the protection of (witnesses)". The article clearly leaves protective measures to the domestic legislation and practises of the requested state.

25. Group VI concerns also the newly introduced regulations regarding Joint Investigation Teams. JITs are a new type of mutual legal assistance, meaning that group VI is also a *subgroup* of group III. The unique legal features of a JIT justify a separate cluster.

26. Simply listed accordingly, the scheme is as follows:

I. Scope of application (*ratione materiae*)

Articles 1.3 and 1.4.

II. Formal requirements of MLA: a) transmission of requests & channels of communication b) judicial authorities & administrative authorities c) the execution of requests (procedure), d) execution of requests (postponed execution), e) execution of requests (presence of officials), f) costs, g) languages, h) restitution of evidence (after execution), i) confidentiality, j) data protection.

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[21] Convention on the Transfer of Sentenced Persons, 21 March 1983, CETS 112. See www.conventions.coe.int
The transfer of sentenced persons aims at the transfer of the execution of a prison sentence or measure involving the deprivation of liberty for the purpose of the enhancement of the re-insertion into his or her country of nationality. A transfer requires the consent of the sentenced person and cannot be temporary.

[22] Additional Protocol to the Convention on the Transfer of Sentenced Persons, 18 December 1997, CETS 167. See www.conventions.coe.int. Article 3 of this Protocol introduced the possibility to transfer a sentenced person without his / her consent in case the person is also subjected to a measure to be removed from the territory of the state of conviction for immigration reasons.

a) Article 4

b) Articles 6 & 27 (article 27 is in direct connection to article 1.3).

c) article 8 (applicable law for the execution of requests: "forum regit actum")

d) article 7

e) article 2

f) article 5

g) article 15 (connected to article 16 – service of documents)

h) article 12

i) article 25

j) article 26

III. Types of MLA: a) temporary transfer of prisoners b) service by post c) spontaneous information

a) articles 3, 13 and the common article 14 in case of a formerly transferred detained person

b) article 16 (connected to article 15 as to the language requirements for the service of documents)

c) article 11

IV. Modern means to provide assistance: a) video conference, b) telephone conference and c) provisional measures

a) article 9

b) article 10

c) article 24

V. Special Investigative techniques: a) cross-border observations, b) controlled deliveries, c) covert investigations and d) protection of witnesses

a) article 17
b) article 18
c) article 19
d) article 23

VI. An alternative to MLA: Joint investigation teams, including civil and criminal liability of the team-members

Articles 20-22

27. This division brings some logical order in the Protocol's provisions and helps further analysis of both the Protocol and the project areas 'compliance' with the Protocol.

3. THE PROTOCOL IN SEVEN PROJECT AREAS

3.A. Compliance: direct application versus 'implementation'

28. All project areas have acceded to the Protocol, most of them even shortly after the conclusion of the Protocol. Given the specific status of Kosovo, this is the sole exception. The Protocol also entered into force in all the project areas. Given the fact that even some "founding member states" of the European Union such as Germany, the Netherlands and Italy have not to this date ratified the Protocol[23], this is an excellent accomplishment for all project areas.

29. An essential instrument to measure the level of compliance to the Protocol is the number and the character of the *declarations and reservations* that were made to the relevant provisions of the Protocol. Certainly, the possibility to make declarations and reservations is offered (and at the same time limited) by the Protocol itself. The drafters and signatories have created to some extent the possibilities to divert from the Protocol or even reduce its application to some extent. *In general, three groups of categories of implementation can be distinguished*.

30. The first group of project areas opted for an implementation via *dedicated mutual legal assistance legislation*. This means that the content of the Protocol is introduced in a new or amended MLA-statute. Insofar domestic legislation with respect to mutual legal assistance reflects the Protocol's provisions, the Protocol may be considered as being 'implemented' into national legislation, rather than merely ratified.

31. A second group opted for a minimal implementation through a mixture of specific MLA-legislation and general provisions in the Criminal Procedure Code or specific statutes regarding international cooperation with respect to the use of special investigating methods (cross-border observations, undercover operations). This group resorts more to "general" criminal (procedure) law instead of dedicated legislation regarding international cooperation in criminal matters or even more specifically mutual legal assistance in criminal matters.

32. The third group relies in general on the *direct application* of the Protocol via the domestic accession procedure, i.e. ratification by the national parliament. The latter group did not really "implement" the Protocol, but rather considers the Protocol as such as the primary – and sometimes sole – legal basis for the types of mutual legal assistance covered by the Protocol.

33. From this threefold distinction, we can derive that *the more specific and detailed domestic legislation is drafted, the higher the level of compliance*. Or put differently: 'implementation' guarantees a higher level of compliance than mere ratification. Domestic legislation that offers a clear legal basis for the different (new) types of mutual legal assistance and the new means to provide it, also offers a higher level of certainty for the requesting state. If at least a legal basis allows for e.g. covert operations, the likelihood that such a type of MLA can be accommodated upon a foreign request is at least considerable. Countries that rely heavily on the direct application of the Protocol seem to lack the necessary legal tools to provide the full range of MLA-possibilities offered by the Protocol. Moreover, the execution of a request that is based upon the Protocol may not be executed due to the fact that domestic judicial authorities may not consider that the international instrument prevails over domestic legislation (which is lacking).

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[23] Italy and Greece for instance have not even ratified the EU 2000 mutual legal assistance convention. Belgium ratified the Protocol only this year. It entered into force on 1 July 2009. The current parties are: Austria, Belgium, Denmark, Finland, Spain, France, Sweden, Germany, UK, Portugal and Netherlands and later on joined by Malta, Hungary, Cyprus, Czech Republic, Slovenia, Slovakia, Poland, Lithuania and Latvia (since 5 October 2005). Since their entry in the EU on 1 December 2007, Romania and Bulgaria are also parties to this convention. For a current status see: http://www.statewatch.org/semdoc/protocol-to-2000-mla-convention.html.

3.B. Reservations and declarations made by the project areas

3.B.1. GENERAL OVERVIEW

34. As indicated above (see 18) the Protocol contains in its Chapter III (the final provisions) article 33 that lists the articles to which a *reservation* can be made. The articles are 16, 17, 18, 19 and 20. More precisely the articles regarding the (direct) service of judicial documents (regarding pre-trial or trial proceedings such as writs or subpoenas, or regarding the post-trial phase such as judgments or orders with respect to the execution of a sentence or other consequences of a criminal conviction), the article that regulates cross border observations, the article with respect to controlled deliveries, the covert operations provision and the basic article regarding JITs. With respect to those types of mutual legal assistance, pertaining mostly to special investigative techniques and the alternative to mutual legal assistance, such as the JITs, reservations limiting the application *wholly or in part* can be made.

35. With respect to articles 4, 6, 9, 13, 26 and 27 only *declarations* can be made. These mainly concern the indication of the authority that is competent for the receipt or the transmission of requests in general or with regard to the specific type of assistance regulated. In some cases however the declarations – if made – are *de facto* reservations since they clearly limit the application of the relevant article. These articles relate to:

- the general mode for the transmission of requests as well as any communication surrounding the request and its execution (article 4). *Here, the declaration is simply the indication of the (judicial) authorities that are competent to send or receive requests*.

- the article defining 'judicial authorities' (article 6). This is clearly an article that requires a declaration *to indicate the relevant judicial authorities*. The same goes for article 27 that needs a declaration in order *to indicate the administrative authorities* for the purpose of the application of the Protocol to administrative 'offences' as indicated in the scope of the Protocol (see article 1.3).

- the article with respect to hearing by video conference (article 9). A declaration to this article has *the effect of a reservation*. Article 9 allows the use of video conference in order to hear a *suspect*. By means of a declaration, a party may however exclude the scope of article 9 and thus expressly limit the use of video conferencing to the hearing of witnesses and experts.

- the article that regulates the new subtype of temporary transfer, namely the transfer of a detained person to the requested party (article 13). Again, as in article 9, a declaration to this article limits the application of the provision. A declaration has thus *the effect of a reservation*. The declaration regards the consent of the 'to be temporary transferred detained person'. If his or her consent is required, the transfer in fact may not be possible.

- the article regarding data protection (article 26). With respect to this article, the declaration that can be made is again, like for article 9 and 13, a *de facto reservation* since it may limit or even exclude the use of personal data that was transmitted according to the 1959 Convention or the Protocol for the purposes listed in paragraph 1 of article 26.

- Article 27 on the administrative authorities is discussed under article 6 on the judicial authorities and needs no further explanation. This is also a mere *indicative declaration*.

36. Like most parties to the Protocol, all but one project area has made reservations under article 33. Albania is the sole project area that did not make any reservations to the provisions of the article 33. All but one country that made reservations, have made reservations with respect to articles 17, 18 and 19, i.e. the articles with respect to the special investigative measures. Since Albania did not make any reservations at all, this project area will apply the Protocol to its fullest extent. The special investigation technique provisions in particular, will be applied in accordance with the Protocol's provisions 17, 18 and 19. One project area limited its reservation to article 16 regarding service (of legal documents) by post.

None of the project areas made a reservation to article 20, regarding the JITs, which is quite remarkable. This means that all project areas parties to the Protocol accept to apply – if necessary – the JIT provisions as they stand. It should be noted that the deployment of a JIT is a legally and practically a highly complex and expensive form of cooperation in criminal matters. As discussed below, a JIT is justified only in large scale investigations, most of the time involving more than two states, and which would require significant amounts of MLA-requests and other types of cooperation going back and forth. A high level of *mutual trust* is a basic requirement for JIT partners. At this point, it is quite obvious that the number of JITs will be extremely limited. Perhaps the Memorandum of Understanding that was signed on 30 March 2005 by the project areas may create or enhance an environment of mutual trust and further promote the use of JITs.

37. It is important to underline that the declarations that were made and, even more so the reservations, provide some indication about the level of applicability of an international instrument, in this case, the Protocol. Reservations and declarations show the limits or possibilities of domestic legislation. If for instance a party makes a reservation that excludes the (international) deployment of covert operations, this may be a clear indication that domestic law simply does not allow for covert operations or, that such operations are limited to domestic use. Declarations and reservations are as such a link between the international instrument and domestic law. In the end domestic law contains the limits and possibilities for international cooperation in criminal matters.

From a passive perspective – i.e. from the point of view of the party to the instrument *as the requested state* – domestic criminal law and criminal procedure law and specific legislation regulating international cooperation, are instruments that define the way in which a foreign request can be accommodated. This is the very essence of the principle of *locus regit actum*. The law of the requested state governs the execution of all incoming requests for mutual legal assistance. As we have seen, the Protocol contains article 8 that allows the requesting state to "*export*" procedural requirements – usually those regarding evidence and the admissibility of evidence obtained abroad more specifically. This enables the requesting state to have its request executed along or at least on the level of the crucial aspects of its domestic law. The requested state needs to take into account this foreign legislation and apply it on its territory. The principle of *forum regit actum* may however, create some reluctance on the side of the requested state since it needs to 'give up' to some extent its own law. Reservations to some provisions, especially those that regulate rather intrusive investigating methods such as covert operations, also exclude or limit the application of the *forum regit actum* principle. When covert operations can not be requested, the fear of having to apply the law of the requesting state is taken away.

3.B.2. Overview per project area (in alphabetical order)[24]

1 ALBANIA

38. Albania made no declarations or reservations. The Protocol applies thus to its full extent. As to formal requirements, Albania accepts direct communication, also in non-urgent matters. There is no indication of judicial authorities, which may lead to the conclusion that all common courts and prosecuting authorities are to be considered as judicial authorities.

As to the types of MLA, Albania does not require the preliminary consent of a detained person for his or her temporary transfer to the requested states under article 13. A temporary transfer can thus be "forced" upon the detained person.

There is also no requirement for preliminary consent for the use of personal data for the purposes listed in article 26.1 provided after the execution of an MLA-request.

As to the *article 33 reservations*, direct service by mail of legal documents is allowed. No limitations apply to the execution of requests aimed at deploying the special investigative measures contained in articles 17, 18 or 19 or to the use of JITs.

2 BOSNIA AND HERZEGOVINA

a) Declarations

Article 4 Channels of Communication

39. Bosnia and Herzegovina opted for a central authority that receives all types of MLA-requests. The possibility for direct communication between judicial authorities is apparently excluded, except in urgent matters as provided for in article 15.2 of the 1959 Convention. In these urgent cases Bosnia and Herzegovina requires a copy of the request to be sent to the central authority. The central authority is the Ministry of Justice of Bosnia and Herzegovina.

Article 6 Judicial authorities

For Bosnia and Herzegovina, the judicial authorities are the ordinary courts and prosecutor's office. The term "ordinary courts" seems to exclude administrative bodies that are brought under the scope of application of the Protocol (see article 1).

Article 13 Temporary transfer of detained persons to the requested party

Bosnia and Herzegovina declared to require the consent of the detained/to be transferred person, before the agreement to temporary transfer can be given.

Articles 17, 18, 19 Cross-border observations, controlled delivery and covert investigation

Bosnia and Herzegovina made declarations regarding articles 17, 18 and 19. These are all limited to the indication of the Prosecutor's Office of Bosnia and Herzegovina as a competent authority for receiving requests and decision making in accordance with these three articles. In addition to the Prosecutor's Office of Bosnia and Herzegovina, the Ministry of Security is indicated as:

[24] The official texts of all reservations and declarations are on the Council of Europe's Treaty Office website www.conventions.coe.int. These texts were confronted and compared to the responses to the questionnaire.

- Authority responsible for receiving the notice in line with Article 17, paragraph 2;
- Authority responsible for execution, management and control of undertaken actions in line with Article 18, paragraph 3;
- Authority responsible for providing legal assistance in accordance with Article 19.

3 CROATIA

40. a) Declarations

Article 4 Channels of Communication

Croatia also opted for a "classic" central authority, i.e. the Ministry of Justice. Direct transmission is thus *de facto* limited to urgent cases as indicated in article 15.2 of the 1959 Convention. The modern way to deal with mutual legal assistance – i.e. directly between the concerned judicial authorities – does not apply to Croatia.

Article 6 Judicial authorities

"Courts and state attorneys" are considered judicial authorities according to Croatia's declaration. In the light of the declaration made to article 4, these authorities are in principle only at a secondary level concerned. Only in urgent cases the judicial authorities are the first receivers or senders of requests.

Article 9 Hearing by videoconference

Croatia excluded the use of video conference as a means to hear the accused person or the suspect. *Croatia is the only project area that declared to limit video conference hearings to (expert) witnesses*.

Article 13 Temporary transfer to the requested state

Croatia requires the preliminary consent of the detained person in order to agree to his or her temporary transfer to the requested party.

Article 26 Data protection

Croatia requires preliminary consent for the use of personal data that was provided on the basis of an executed MLA-request, even if that use is well within the limits of article 26.1. This means that the consent-requirement is extended beyond article 26.2 that limits the consent requirement to the use for any other purpose than the purposes contained in article 26.1 (under a to c).

b) Article 33 Reservations

Croatia did not accept articles 17, 18 and 19. The explanation of the complete exclusion of the three special investigative technique provisions is that these are either not allowed (non-authorised cross border observations) or are regulated by bilateral cooperation agreements. As such the Protocol cannot serve as a treaty basis for those three types of MLA.

For cross-border observations (art. 17), Croatia excludes the possibility for non-authorised (upfront) operation, while in case of a proper request and authorisation before the observation is carried out, only bilateral agreements with neighbouring countries allow these observations. Croatia cites the bilateral agreement with Slovenia.

Regarding controlled deliveries, Croatia refers to bilateral agreements – e.g. with the Czech Republic – that concerns police or customs cooperation. The seemingly exclusive limitation to police and / or customs cooperation is unclear. Does this mean that the results of a controlled delivery – carried out on the basis of the bilateral agreement cannot generate evidence that is (ultimately) to be used in a court? Or does this mean that the competent police or customs services have 'judicial' powers that enables them to generate evidence by deploying this particular type of cooperation. The explanation in the questionnaire seems to suggest that controlled deliveries, despite being fully incorporated in the Protocol that is a mutual legal, i.e. *judicial*, assistance instrument, is a mere police to police or customs-to-customs type of cooperation that is to be distinguished from judicial cooperation.

As to covert operations, as provided for by art. 19, Croatia refers to domestic criminal procedure law – art. 337 of the *Criminal Procedure Code* and to bilateral agreements such as the one with Austria. Again, the title of that Agreement (in the sense of a Treaty or Convention?) clearly mentions *police cooperation* and not judicial cooperation. This agreement also requires the offense involved being eligible for covert operations under the law of the requesting party. This means that reciprocity is a condition under this agreement.

4 MONTENEGRO

41. a) Declarations

Montenegro limits its general declarations to the indication of the judicial authorities. These are the courts and the State Prosecutor.

Montenegro did not make any declaration with regard to article 4. Direct transmission of MLA-requests, even in non-urgent situations, is allowed.

b) Article 33 reservations

Montenegro does not accept article 16 concerning service by post. This means that legal documents to be served to a person located in Montenegro, must transit through the competent (central) authority.

In accordance with Articles 17, 18 and 19, Montenegro applies these provisions to their full extent. The designated competent authority is of a (central) judicial kind, namely the State Prosecutor.

5 SERBIA

42. a) Declarations

Serbia limited its declarations to article 6. For the purpose of the protocol, judicial authorities are the regular courts and public i.e. state prosecutors offices.

b) Article 33 declarations

Serbia also excludes article 16 regarding service by post. Direct transmission of 'to be served documents' is thus not allowed. Request for service of documents must be directed to the territorially competent state prosecutor's office.

Serbia does apply to the fullest extent articles 17, 18 and 19. For incoming MLA-requests seeking to execute cross border observations, controlled deliveries or covert investigations, the Prosecutor of the Republic of Serbia is the competent/central judicial authority.

6 THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

43. a) Declarations

Article 4 Channels of Communication

"the former Yugoslav Republic of Macedonia" also declared to limit the transmission of MLA-requests and communications related to them to a central authority, i.e. the Ministry of Justice. An exception is made in urgent cases, as provided for in article 15.2 of the 1959 Convention.

Macedonia made an explicit declaration with respect to the acceptance of electronic or other versions of MLA-requests, on the condition that an original is send by post.

Article 6 Judicial authorities

Judicial authorities in "the former Yugoslav Republic of Macedonia" are the courts of first instance with extended competence. This seems to suggest an exception to normal competences or jurisdiction. It is not clear whether this extension regards an extension on a territorial level (*ratione loci*) and / or on the level of the case (*ratione materiae*).

Article 13 Temporary transfer of a detained person to the requested state

"the former Yugoslav Republic of Macedonia" also requires the preliminary consent of the detained person in order to be able to agree to his or her temporary transfer.

Article 26 Data protection

"the former Yugoslav Republic of Macedonia" also requires the preliminary consent to the use of personal data that was transferred following the execution of an MLA-request, even though the use is limited to the purposes listed in article 26.1.

Article 27 Administrative authorities

For "the former Yugoslav Republic of Macedonia", administrative authorities are defined as "administrative authorities and other relevant authorised authorities for the supervision of the implementation of laws which can investigate offences and are empowered when the investigation is concluded, to pass sanctions in those proceedings". "the former Yugoslav Republic of Macedonia"" is the only project area that made a declaration with respect to article 27.

b) Article 33 reservations

"the Former Yugoslav Republic of Macedonia" does not accept article 16. This means that the direct transmission of procedural documents or judicial decisions directly to the person concerned is not allowed. Such request needs to transit trough the competent judicial (or central?) authority, even if the correct address of the person located in Macedonia is known.

With respect to Articles 17, 18 and 19 "the former Yugoslav Republic of Macedonia" designated the Public Prosecutor's Office as the competent authority to receive and handle these (incoming) requests. "the former Yugoslav Republic of Macedonia" allows these types of cooperation involving special investigative techniques in accordance with the Protocol.

7 Kosovo

44. Having in mind a specific status of Kosovo, and the fact that Kosovo is not party to the Council of Europe, and as such not to the Protocol, there are no declarations or reservations. The analysis below is solely based upon the answers to the questionnaire.

Kosovo refers to the *International Convention on the Postal Deliveries* with respect to the application of article 16, i.e. the service by post (of legal documents). This reference is quite remarkable since the cited Convention does not concern mutual legal assistance or international cooperation in criminal matters as such. It remains unclear whether Kosovo would apply article 16 as it stands – *per analogiam*.

Cross-border observations (cf. article 17 of the Protocol, also *per analogiam*) with authorisation (including safeguards) are only possible if based on *agreements*. Cross-border observations without initial authorization are in any case not allowed. It is unclear whether Kosovo negotiated or signed agreements which, *inter alia*, allow cross-border observations. *Controlled deliveries* and *covert operations* are not covered in the special chapter of the domestic international legal assistance law. As such we can conclude that Kosovo cannot accommodate covert investigation MLA-request, i.e. art. 19 – again, *per analogiam*.

3.C. Compliance per project area

3.C.1. Albania

45. Albania quickly acceded to the Protocol. It entered into force in 2002. The Protocol is directly applicable. This is reflected in the answers to the questionnaire since in general, there is a reference to the principle of direct application throughout the provisions of the Protocol.

As to the *scope* of its application, the criminal code provides for the criminal responsibility of legal persons.

The *formal requirements* are also derived directly from the protocol. An item that requires more information is the application of article 8. In this respect, Albania refers to the procedure in terms of notification of the receipt of a request. This is not what is meant. Article 8 is about the law that applies or may apply to the execution of a request, i.e. the application of the *forum regit actum* principle. To what extent can Albania accommodate the application of the law of the requesting state on its territory? Also article 7 needs more attention. Albania refers to "interests of the state" as possible reasons for the postponement of the execution. Article 7 refers to practical or legal reasons for postponement. The question thus arises under what circumstances Albania could postpone the execution in the light of the answer given.

The *types of assistance* do not need special attention. The direct application and the lack of declarations and reservations seem at least to assure a full compliance.

As to the *means of execution of requests* Albania indicates that under article 9 on hearing by video conference, the accused person's extradition must have been refused. The link to extradition is not clear. Is this a condition to the application of article 9? Perhaps the link makes sense when there is a reference made to cases whereby the accused person is an Albanian national and therefore not eligible for extradition.

The *special investigative techniques* – namely controlled deliveries – raise a question. Is this type of assistance exclusively limited to drug offences (drug trafficking)? The term '*simulated purchase'* from Article *20* of the Law n° 8750, may suggest that '*provocation*' of a drug offence is allowed in Albania.

Since article 20 on *JITs* was not subjected to a reservation, full compliance is established. One could raise the question how such a far reaching method can be deployed without domestic regulation.

3.C.2. BOSNIA AND HERZEGOVINA

46. Bosnia and Herzegovina relies on domestic legislation, i.e. the criminal (procedure) code and additional specific criminal (procedure) statutes. This is combined with references to the direct application of the Protocol. For instance for the special investigative technique provisions (17-19), direct application seems to allow the use of these methods. A Law on international cooperation in criminal matters has entered into force on 15 July 2009.

With respect to the *scope of application*, domestic law limits international cooperation to more serious offences, minor offences being excluded. Proportionality is thus built-in. Given the limits of the law enforcement capabilities, this is a reasonable limit, especially when many countries do not execute requests pertaining to minor offences or offences that generated limited (pecuniary) damages such as small fraud cases.

As to the *formal requirements*, Bosnia and Herzegovina opted for a central judicial authority. Direct cooperation is as such not the case but given the size of the country, a central point of entry makes perfect sense. The other aspects regarding formalities give no rise to discussion. Compliance seems to be to the fullest extent, although, a comprehensive statute on mutual legal assistance or more generally, international cooperation in criminal matters would enhance the "publicity" of the compliance

The *types of assistance* do not give rise to problems. Temporary transfer for instance does not require the consent of the detained person, thus maximising its application. The only remark to be made is the strange shift in competent authority when the service by post is requested. The application of article 16 requires the involvement of the Ministry of Justice and not the Prosecutor's Office that is the (central) judicial authority under article 4.

The *means to execute* requests are also not limited by domestic restraints. Compliance seems to be to the fullest extent.

As to the *special investigative techniques*, "agreements" are needed to activate for instance, cross border observations. According to the information obtained during the conference, the new Law on international co-operation in criminal matters which entered into force on 15 July 2009, does not regulate cross-border observations (article 17 Protocol). It is not clear what the legal basis then would be, nor who the competent authority is to receive and / or execute such requests. As to the *agreements* that were mentioned in the answers to the questionnaire, it is not clear what kind of agreements are meant. Are these ad hoc (case-related) agreements or agreements of a general nature? The same applies for article 18, controlled deliveries. Finally, Bosnia and Herzegovina limits the use of covert operations to domestic situations. International cooperation in that field is excluded. At the same time the direct application of the Protocol seems to contradict the "domestic approach" to this method. Again competent authorities seem to need to conclude 'agreements' first to accommodate – and transmit – such requests. The legal situation is unclear. The criminal procedure law prohibits the international application of covert operations, then the direct application of the Protocol would allow it but then 'agreements' may be needed.

The *JIT* provisions would also be directly applicable but are also subject to specific agreements. The remark about covert operations is also relevant to JIT provisions.

3.C.3. CROATIA

47. Croatia has a separate law on international legal assistance in criminal matters (Law on Mutual Legal Assistance in Criminal Matters, Official Gazette, 178/04) of 2004 that entered into force on 1 July 2005. Furthermore, the Criminal Procedure Code contains a chapter (XIV) on "legal assistance" (articles 162a–162c) that was amended by an Act dated 18 October 2006. In this case, compliance is assured by a special domestic act and as such not by direct application of the Protocol provisions. Insofar a ratified international instrument – such as the Protocol – would contain provisions that are not covered by domestic legislation, the international instrument prevails. The national law is considered as subsidiary legislation.

As to the *scope* of the Protocol, there are no bars to the application to administrative offences or legal persons.

The *formal requirements* are also covered. Direct transmission of request applies insofar reciprocity is guaranteed. The answer to the questionnaire is not compatible with the declaration Croatia made to article 4. The declaration designates the Ministry of Justice, the classic central authority (of non-judicial nature) as the sole authority for the transmission of requests. This seems to be a contradiction and needs further discussion. A clear exception is the case of spontaneous communication of information. The application of article 11 requires the use of central authority, being the Ministry of Justice. Article 18 of the Law on Mutual Legal Assistance in Criminal Matters provides the basis for this type of cooperation. The explanation of this exception is unclear. This designation is in line with the declaration to article 4[25].

The *types of assistance* do not need detailed discussion. A limit to the temporary transfer is the requirement of the consent of the detained person. This is in conformity with the declaration to article 13, but the requirement for a consent also applies to the article 3 - temporary transfer – i.e. to the requesting state. According to the additional information provided by Croatia, the temporary transfer of a Croatian (detained) national would not possible due to a constitutional bar[26]. Article 9.2 of the Croatian Constitution prohibits the "exile" and the "extradition" of Croatian nationals. Although the Constitution seems to limit the 'removal' of Croatian nationals only in cases of exile and extradition, a temporary transfer for pre-trial procedures – even if this is limited to providing witness testimony - is not possible.

The *means to execute* requests are also limited. Video conferencing is possible but only for the hearing of witnesses (and experts), not for suspects. Croatia declared to limit the application of article 9. The hearing of witnesses and experts by video conference is regulated by article 162b of the Criminal Procedure Code which was amended in 2006. Again, detailed domestic legislation covers all possibilities offered by the Protocol but sometimes the declarations and reservations do pose limits to the assistance that can be offered. Another remark should be made as to the limitation of *telephone conferences* to pre-trial procedures (see article 162c of the Croatian Criminal Procedure Code). In the scope of the Protocol and the 1959 Convention, this is logical since mutual legal assistance is meant to collect evidence, i.e. usually but not exclusively during the pre-trial phase. Why should a telephone conference not be possible in the realm of assistance in the trial phase or even in the post-trial phase when for instance documents regarding the execution of a sentence need to be served as well? None of the Council of Europe's instruments prohibits that. Moreover, since article 16 of the Protocol regarding the *service (by post)* of judicial documents can also be used to serve judgments or documents regarding a suspended sentence, this combination should not

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[25] See also document "Measure 148 : An overview of compliance of Croatian legislation with the provisions of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters", p. 4.

[26] Document "Measure 148 : An overview of compliance of Croatian legislation with the provisions of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters", p. 3.

be excluded. Domestic legislation also allows for *witness protection* as loosely provided for in article 23 of the Protocol. The Law on Witness Protection contains an article 42 which enables Croatia to cooperate internationally with respect to witness protection. *Provisional measures* (article 24) can also be applied. Article 23 of the MLA-Law even allows for (temporary) restrictive measures against the suspect in order to avoid the loss of evidence.

As to the *types of cooperation* (group III), Croatia is one of the few project areas that does allow the direct service (by post) of judicial documents (see article 7 of the MLA-law). The document should however be accompanied by a Croatian translation, or if that is not possible, an English translation.

As to *special investigative measures*, Croatia declared not to apply articles 17, 18 and 19. Agreements with neighbouring countries are the basis to use these methods in cross border / international situations. As for cross-border surveillance, article 180.1.3 of the Croatian Criminal Procedure Code provides for regulation. In a more general fashion, this article allows 'restricting' measures to be taken against an alleged perpetrator that is associated with other perpetrators. The link with organised crime is clearly made. The investigating judge is the authority that may order these measures that include (technical) surveillance methods. Article 170.3 of the Criminal Procedure Code allows foreign police officers or other officials to operate on Croatian territory. The Ministry of Interior should provide its authorisation for these cross-border operations. At first sight, domestic legislation seems to reflect article 17 of the Protocol. The restriction to offences contained in, or referred to in article 181 Criminal Procedure Code, may limit the use of the cross-border surveillance provision. For that reason, the reservation to article 17 was made. The reservation that excludes article 17 seems to be an overreaction, since cross-border surveillance is usually used only in organised crime cases. The complete exclusion of article 17 should be reconsidered.

Article 18 is also completely excluded due to more restrictive domestic law. Article 180.1.6. of the Criminal Procedure Code and its direct reference to the offences contained in article 181, also limit the use of controlled deliveries to a shorter list of offences than the Protocol allows. Again, this discrepancy is based on the reservations made by Croatia. Croatia indicated that on the basis of the 20 December 1988 UN Convention against the Illicit Traffic in Narcotic Drugs, controlled deliveries of drugs are possible. The limitation to drug-trafficking may be problematic since the use of this special investigative technique in – e.g.- cases of trafficking of human beings becomes increasingly important.

The same applies to article 19. Although article 180.1.4 of the Croatian Criminal Procedure Code allows the use of covert operation, and the international use of undercover agents is legally grounded given the direct application of article 19 of the Protocol, the limitation as to the type of offences provided by article 181 of the Criminal Procedure Code, obliged Croatia to make a reservation to article 18. Legally speaking, undercover operations can only be used in (organised) *corruption cases*, which seriously limits the scope of article 18.

For the time being, on the basis of a bilateral agreement, *JITs* are possible only with Austria. On a domestic level, article 15a of the Law on the amendments to the law on the Office for Suppression of Corruption and Organised Crime provides partially for the establishment of JITs. The Department of International cooperation and Joint Investigations is the competent authority. The application of JITs is limited to the offences listed in article 21 of the Law on the Office for Suppression of Corruption and Organised Crime. This list of offences is more limited – so it seems – than article 20 of the Protocol allows. This may lead to the conclusion that Croatia is not fully compliant with article 20 of the Protocol, similarly as in the case of articles 17 – 19. A strict limitation on the use of JITs however, is justified since it is a highly complicated type of

cooperation. Its high level of complexity and the costs involved, limits its use to organised crime and terrorism.

3.C.4. Montenegro

48. Montenegro relies on its Law on International Legal Assistance in Criminal Matters to regulate most of the Protocol's provisions. Some provisions apply directly.

The *scope* of the Protocol, for instance is a matter of direct application. The Law refers to this principle insofar matters are not regulated by the law. The application of assistance to cases of criminal responsibility of legal persons is also covered trough domestic legislation.

The *formalities* do not give rise to particular problems. The direct transmission and communication to, and between judicial authorities applies. These are defined through a declaration to article 6. The postponed execution is clearly defined in terms of the protection of domestic proceedings.

As to the *types of cooperation*, compliance seems to be complete. The answer regarding article 16 is not quite clear since it regards only article 15 – on the languages. Given the fact that Montenegro made a reservation that excludes the direct transmission of documents to the person, article 16 only applies insofar a request is send to the proper judicial authority.

Special investigative techniques apply fully. The State Prosecutor is a specialized dedicated central – judicial – authority. As to article 17, the questionnaire contains an answer that regards extradition. This is not at all relevant in this context.

Joint investigation Teams require 'mutual agreements' between Montenegro and other states. This seems to limit the application of article 20. There is no available information on whether any agreements to that end have been concluded so far.

3.C.5. Serbia

49. Serbia relies mostly on domestic legislation. Recently the Law on Mutual Assistance in Criminal Matters entered into force. The Law was published on 19 March 2009. This act is a small part of a much wider reform of criminal legislation and the organisation of the judiciary. There is a crucial shift in terms of criminal procedure law and its actors, i.e. the increased responsibility of the prosecuting authorities, rather than the investigating judge. The central role of the prosecuting authorities in the pre-trial stage, has direct effects on international cooperation, especially mutual legal assistance.

As to the *scope*, there is full compliance with article 1. Administrative offences can be subjected to international cooperation under the MLA Law , while legal persons are criminally responsible under a specific act (Liability of Legal Entities for Criminal Acts Act).

The *formalities* do not create problems. Serbia applies the central concept of direct cooperation. The state prosecutors are designated as 'judicial authorities' in the sense of article 6 of the Protocol. As to the postponement of MLA-requests, Serbia refers to extradition (article 34 MLA-Law). Article 97 of the MLA-Act is relevant since this article regards the postponement of MLA-requests. The ground for postponement is ongoing pre-trial investigation. Serbia indicates that in that case, the requesting state will be notified. Serbian domestic legislation also provides for the application of article 8 of the Protocol. Procedural requirements of the requesting state can thus be taken into account when executing the request. As indicated in the Protocol and in the Law, the limit for the

application of the *forum regit actum* rule is the 'public order', the fundamental principles of Serbian (criminal procedure) law.

As to the *types of cooperation*, only the service by post is limited since the direct service is excluded. The temporary surrender of sentenced persons is limited to cases whereby the detained person gives his or her consent to the transfer. The transferred person can only be heard as a witness (or expert) during pre-trial stages. Article 92 and 93 of the MLA-Law provides for domestic legal basis for this type of cooperation. A special feature of Serbian law is the possibility to provide 'information' without a mutual legal assistance request. Article 98 of the MLA Law allows this type of cooperation, provided that reciprocity is assured. The information has to be related to 'known offences and perpetrators', and should be considered as possibly useful to the foreign investigation. After the transmission, the competent Serbian authority may also request to be informed about the effects of the transmission of the information.

The *means of execution of requests* do not give rise to any particular limitation or restriction. Hearing of witnesses or experts via video or telephone conference techniques is covered by domestic law. The concept of restitution is also connected to extradition. This is not what 'restitution' means in the sense of the Protocol. It *seems* that Serbia cannot accommodate mutual legal assistance requests that aim to obtain e.g. stolen goods in order to give them back to victims located in the requesting state. As to provisional measures, Serbia indicated that article 82 of the Criminal Procedure Code regulates seizure, but this is not to be seen as a temporary measure. Serbia also has a separate internal law of the protection of witnesses – the Law on the Protection Programme for Participants in Criminal Proceedings. The title of the law suggests that it regulates not just the status of mere protected witnesses but also of so-called 'pentiti', as developed in Italian criminal procedure law.

Serbia also fully applies the *special investigative techniques*. Serbia has designated the Republic's Prosecutor as the central judicial authority. As to *cross border observations*, the Police Cooperation Convention for South-Eastern Europe ratified by Serbia in July 2007, provides a legal basis for this type of cooperation. Cross-border surveillance is thus perceived as a type of police cooperation, while it is in fact a type of judicial cooperation, hence its regulation in the Protocol. *Controlled deliveries* are – by contrast - regulated by the MLA-Law (article 83) and in substance by article 503 of the Criminal Procedure Code. A part of the legal basis is also to be found in the *South-Eastern Europe Police Cooperation Convention*, more precisely the law that ratified this instrument (article 14 of the ratification law). The legal basis provides thus for a mixed judicial and police character. This is also reflected in the designation of the competent authorities: the Republic's Public Prosecutor (in Belgrade) *and* the Ministry of Interior. *Covert operations* have a similar "mixed" legal basis. On the international level, article 83.2 of the MLA-Law contains the legal ground for the international application of this type of MLA. Article 504 of the Criminal Procedure Code regulates undercover operations as such, and the South-Eastern Europe's Police Cooperation Convention (article 16 of the ratification law) is the basis for the police-aspect. Again the, competent authorities are the central office of the Public Prosecutor and the Ministry of Justice. Undercover operations must be authorised by an investigating judge who evaluates subsidiary and proportionality.

Finally *JITs* are indeed possible to set up. Here the legal basis is also differentiated: article 96 of the MLA-Law for the obvious international aspect and article 27 of the Police Cooperation Convention for South-Eastern Europe. Contrary to cross-border observations and covert operation, there is no legal basis in the Criminal Procedure Code. Here the legal basis is more reliant on the direct application of the Protocol.

3.C.6. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

50. On the basis of the initial answers to the questionnaire, we preliminarily concluded that "the former Yugoslav Republic of Macedonia" applies the Protocol's provisions directly. Some provisions in the Criminal Procedure Code also support the application of international instruments on mutual legal assistance[27].

The *scope* of the Protocol is fully covered due to the direct application. There *seems* to be full application of the Protocol.

The *formal requirements* do not give rise to discussion. Exception to this is also the designation of a "traditional" central authority, i.e. the Ministry of Justice. Article 503 of the Criminal Procedure Law contains the full range of transmission channels as they are listed in article 4 of the Protocol. Direct cooperation is thus limited to urgent cases. In the questionnaire, reference is made to article 503.1 of the criminal procedure code that allows the courts to communicate directly, also with foreign (similar?) judicial authorities. This seems to be a contradiction to the declaration that was made to article 4. Also the indication of the 'judicial authorities' in the sense of article 6 as the courts seems rather strange. In pre-trial proceedings, the main, if not sole 'field of operation' of mutual legal assistance, prosecutors and maybe investigating judges should be the prime judicial authorities that cooperate amongst each other.

The *types of assistance* contain one limitation as to the requirement of the consent of the detained person to his or her temporary assistance (article 13). As to the service by post, the direct service is excluded, which limits the use of this enhanced type of cooperation. A request to that end should be transmitted via the Ministry of Justice.

The *means to execute* requests seem to be fully applicable.

The *special investigative* methods are also not bound by any limits. "the former Yugoslav Republic of Macedonia" only indicated a dedicated central authority – the Public Prosecution Office for Organized Crime Suppression - to deal with these requests. From a viewpoint of experience and know-how, this is most probably an interesting approach to this kind of highly specialised cooperation. According to the amended law on Courts, the Basic Court Skopje 1 is a dedicated 'judicial department' that is nationally competent to deal with organised crime and corruption cases.

JITs are also possible in view of the direct application of the Protocol. Just like for the application of articles 17-19, the Public Prosecutor's Office for Organised Crime Suppression is the authority that has exclusive competence.

3.C.7. KOSOVO

51. Kosovo relies mainly on the *direct application* of the Protocol. Given its specific status, Kosovo is not a member state of the Council of Europe and as such did not accede to the 1959 Convention and consequently, the Protocol.

Domestic legislation is currently under development. Specific MLA (or international cooperation in criminal matters) legislation is not yet in place. A status on these developments is needed in order to further evaluate the compliance *per analogiam*.

During the conference, Kosovo indicated that it had concluded bilateral agreements with Italy and "the former Yugoslav Republic of Macedonia".

[27] This part also includes the additional information that was provided after the conference.

4. CONCLUSIONS AND RECOMMENDATIONS

4.A. Conclusions

52. In general, all project areas reach a high to very high level of compliance with the Protocol. Most project areas have recent and very well detailed mutual legal assistance or international cooperation in criminal matters legislation in place or are in the process of drafting such legislation. Insofar recent MLA-legislation is in place, a higher level of compliance is reached. However, some project areas rely almost entirely on the direct application of the Protocol. In those cases, especially when no reservations or declarations with such an effect were made, compliance seems to be perfect, but that is not the case. Declarations and reservations sometime seriously hinder the application, for instance when articles 17 – 19 are completely ruled out or when domestic legislation lacks any kind of regulation.

53. Some project areas provided answers to the questionnaire, which were not in line or even ran contrary to the declarations or reservations they have made. In such cases, clarification was requested during the Conference. It became clear during the works of the conference that, despite the exclusion of the application of articles 17-19 and quite often article 20, domestic legislation does allow for the application of special investigative techniques. Looking at reservations and declarations made by the majority of the project areas, the opposite seemed to be the case. This is also due to the fact that most project areas have in the mean time – in particular in the course of 2009 – put new, separate MLA-legislation in place or are working on new legislation. Some of the answers to the questionnaire were no longer up to date.

54. The most important issue to follow up in the future, is the development of domestic legislation in the field of special investigative techniques, JITs and legislation that regulates mutual legal assistance on its own, or as part of an international cooperation in criminal matters law.

Overall, we can conclude that a combination of the provisions of the Protocol, the declarations and reservations made and the answers given to the questionnaire, did not always provide a very detailed and complete picture of all the legal possibilities and limits that exist in the seven project areas. Some project areas made references to their domestic legislation or even provided relevant sections of their domestic legislation. In some cases the legislation provided turned out not to be applicable, although such excerpts or references to national legislation, helped to obtain a better insight into the situation in the project area concerned. The information gathered during the conference, and additional information obtained after the conference, proved to be crucial to rectify or supplement the data available.

55. A final word needs to be said about direct – *reinforced* – cooperation between the project areas. The MoU of 30 March 2005 contains in our view, all conditions for a reinforced/needs based cooperation. Such cooperation has become the latest development in mutual legal assistance. Even within the EU, there is a growing need to reinvent, or change for that matter, bilateral and / or regional cooperation. The need exists especially between bordering countries, of which the seven project areas in SEE are an almost perfect example. In the EU, the booming number of instruments, both classically intergovernmental ones and those based upon mutual recognition (framework decisions) have made matters more complex for prosecutors. At the same time, organised crime phenomena is on the rise. Organised thefts and burglaries, and laundering of the proceeds, new cybercrime phenomena such as very large scale *skimming* of bank and credit cards, pose new challenges to law enforcement authorities.

Given such evident challenges, prosecuting authorities directly involved with facing such challenges, are seeking to cooperate in a better and more efficient manner. In that context, Belgium and Romania, have stepped up cooperation to create the

preconditions for more and better cooperation and exchange of information on the problems they face. Intensive seminars have lead to an advanced mutual knowledge of each other's legal systems, especially those aspects regarding mutual legal assistance. Ultimately, a Protocol of Partnership was signed between the Federal Prosecutor's Office and DIICOT, the Romanian prosecutor's office to the Supreme Court, responsible for the fight against organised crime and terrorism. The basic agreements in there is that both authorities – well defined – *will meet each other regularly to discuss pending cases and horizontal problems arising from these, as well as the new developments in their respective criminal legislations*.

The content of the MoU signed by 6 project areas in March 2005 is very similar to the above mentioned cooperation. The parties have agreed to have an optimum judicial cooperation, concentrate on organised crime and related phenomena and to have direct lines of communication. The concept of *regular meetings* to discuss casework and all related items is also a central part of the MoU. The challenge ahead, is practical implementation of the provisions for cooperation as described in the MoU and in full accordance with European and international legislation and standards.

4.B. Recommendations

4.B.1. General Recommendations

56. The first recommendation applies to all project areas and concerns reservations, in particular those with respect to articles 17-19 and to some extent also article 20. Such reservations should be revised in the light of recent or forthcoming domestic legislation. Insofar this legislation allows the transnational deployment of special investigative measures, the reservations made should be withdrawn or revised.

57. The second recommendation follows immediately: domestic legislation is key to compliance. The 'implementation' of the key provisions of the protocol is very important to practical application. Third parties – the other parties to the Protocol - should be able to assess the possibilities before transmitting MLA-requests. Legislation that is in line with the relevant international instruments, provides a higher level of assurance towards third parties. Efforts should be made to develop modern MLA-legislation. The project areas should not hesitate to make use of available aid instruments and programmes, such as for ex. EULEX or TAIEX, in order to obtain EU-funded support and expertise.

58. The third recommendation concerns training and material needs. Regarding human resources, adequate training is needed for judicial officials on practical implementation of measures foreseen by the CETS 182. Regarding the material needs the equipment for videoconferencing should be provided to those institutions which are responsible for handling the hearings by this particular mean of communication.

59. The same applies to the level of material support. The use of a centralised database in order to register and track all incoming and outgoing mutual legal assistance requests is an obligation. Precise statistical data can be generated and that, in turn, is essential to steer policy. A second aspect of material needs includes the installation of updated video conference equipment. In some project areas the existing equipment may not be able to create a sufficient link to the requested or requesting party; very often, the equipment is available only in central location(s). To be able to provide adequate material tools, or to enhance the existing ones, international project funding should be considered.

60. The fourth general recommendation concerns the designation in each central (judicial) authority and the locally competent judicial authorities of specialised 'reference' magistrates that deal with incoming and possibly also outgoing mutual legal assistance requests. These magistrates, should ideally be prosecutors. They have a coordinating role and should also be able to execute requests themselves, in cooperation

with the police services, the courts and insofar as applicable the investigating judges. One single or a limited number of designated MLA-prosecutors or magistrates, can easily keep track of the requests and provide updates as to their status. As a good practise, the requested party can be adequately kept informed about the (non)execution of their requests. If the 'reference' magistrate is also competent to transmit – centrally – outgoing requests, the information flow to, and from the requested party, will be better managed. Reference magistrates should also confer amongst each other within each project area, and also between all or some project areas. Joint meetings, also for *training purposes* should be promoted. The reference magistrates can also play a key role in the maintenance and updating of the Memorandum of Understanding through periodical regional meetings.

61. The fifth general recommendation is about promoting and enhancing good practises. These include:

- the prompt transmission of an acknowledgement of receipt to the requesting party, especially when this is explicitly requested. The other way around, the project areas should not hesitate to request a similar reaction from the requested party.
- the provision of information on the status of the execution. Reasons for the (partial) non-execution should be provided.
- the transmission of the evidence should be done in such a way that loss or damage is excluded. If needed that practical issue should be discussed with the requesting party. In case a request or a series of requests is partially executed, the evidence should not be accumulated until full execution is reached. The transmission of the evidence should also be partial.

62. The final general recommendation regards the use of already available tools. Liaison officers are often crucial before and during the transmission and the execution of mutual legal assistance requests. Their involvement should be assured. Another tool is the Council of Europe's contact point system. The past two years the PC-OC – the expert committee on the operation of the conventions on international cooperation in criminal matters - has developed a list of contact points and basic information similar to the EJN's tools. The regular updating of these contact points, and basic information (on extradition, mutual legal assistance and transfer of sentenced persons) should also not be ignored.

4.B.2. Recommendations per project area

1 Albania

63. Overall, Albania has a very high level of ratification of international instruments regarding international cooperation in criminal matters. Reservations and declarations – including those that may limit the application of the instrument – are rarely made. At first sight, this seems to allow a maximum level of compliance and thus a maximum level of cooperation (in criminal matters). The almost absolute reliance on the direct application of international instruments does however contain negative side-effects. The lack of clear, comprehensive domestic legislation that does not 'show' via reservations and declarations, creates a high level of uncertainty for the (potentially) requesting parties to those very same international instruments, such as the Protocol. This lack of clearness creates the impression that any type of MLA and any means to obtain assistance is allowed, which is normally not the case. A first and foremost recommendation to Albania is to put into place domestic legislation that regulates MLA. A working group of experts is currently working on this issue. Forthcoming legislation should contain provisions that allow the complete range of MLA types and the means to obtain that assistance. If the legislation is in place reservations and, more importantly, the declarations that indicate the relevant competent authorities can be made. In this

case all other parties to the instruments, especially to the Protocol, would have a much better view on the possibilities and limits of MLA when dealing with Albania.

To some extent, and as a result of information provided during the conference, project areas parties to the Protocol, have a much better view on the possibilities and limits of MLA with regard to Albania.

On a more specific level, Albania should indicate to what extent foreign law can be applied in Albania when executing requests (article 8 Protocol). Also the ground for the postponement of the execution of foreign MLA-request should be clearly indicated.

On a technical level, Albania should improve video conference facilities, if possible including at district court level. Additional training and guidance may be needed.

2 Bosnia and Herzegovina

64. Bosnia and Herzegovina introduced new legislation in the field of international cooperation in criminal matters in July 2009. For the proper application of this new legislation, the practitioners need adequate training.

It seems the law does not contain a regulation of special investigative techniques. Local agreements between prosecuting authorities provide a legal basis, but this is not 'general' enough i.e. with respect to third parties. For instance for cross-border observations, the competent authority is not clear. The law needs to be revised or supplemented to accommodate these types of cooperation. At least an indication of the competent authority or authorities should be given.

On a technical level, more investments are needed to allow video conferencing. Modern equipment and training should fill the exiting gap.

3 Croatia

65. New legislation that would adopt the existing MLA-Act of 2004/2006 to the Protocol's provisions is being prepared. The most important amendment should regard the application of articles 17-19 of the Protocol. The current legal provisions restrict the international use of special investigative techniques too much, for instance only to corruption. New legislation that should be in place by 2011 may resolve this problem. This is to be followed up. Also the use of JITs is narrowed down to cases in which a bilateral agreement – such as with Austria – is available. In general Croatia reaches a very high level of compliance. Implementation of forthcoming legislation should be accompanied by adequate training for Ministry of Justice staff and, most important, the public prosecution services.

One specific element that needs to be cleared up, possibly by the upcoming amendments to the MLA-Act, is the temporary transfer of detained persons, more precisely Croatian nationals. There seems to be some confusion in the light of article 9.2 of the Constitution. As a principle there should be no bar at all to the temporary transfer of (detained) nationals, neither under the traditional form (article 3), nor under the 'adverse' type as defined under article 13 of the Protocol. A temporary transfer should not be confused with extradition. The transfer is by definition temporary as well.

As to *video and telephone conferencing*, the field of application should be enlarged to trial and, possibly even post-trial stages. Nothing prohibits the limitation of such technical means of MLA, to the pre-trial stage.

4 Montenegro

66. Given recent developments in the criminal procedure system, the implementation of the new legislation, such as the Criminal Procedure Code is important. From the beginning, adequate training should be provided to prosecutors, especially to those that will be specialised on international cooperation in criminal matters.

Article 16 on service by post – seems to lack the domestic legal basis. During the conference it was indicated that the postal service creates practical problems. Maybe a practical way around such as the use of courier services may circumvent this obstacle.

5 Serbia

67. The new Criminal Code and Criminal Procedure Code of 3 September 2009 entered into force on 11 September 2009. Legislation is thus in place and should be followed by adequate training.

As to video conferencing, Serbia should consider widening the scope of application to suspects.

With respect to special investigative techniques, the allocation of competence to double authority - the Republic's Public Prosecutor and the Ministry of Interior (judicial and police) - may create confusion. A single authority – of a judicial nature in the scope of the applicable instruments – is advisable.

6 "The Former Yugoslav Republic of Macedonia"

68. New legislation that regulates mutual legal assistance ("mutual legal aid in criminal matters") has entered into force since the writing of this document. New legislation allows the direct service of judicial documents by post.

The competent authority for dealing with the MLA requests for the execution of special investigative measures is the Prosecutor's office for the suppression of organised crime.

"the former Yugoslav Republic of Macedonia" has indicated that for the purpose of article 9 (video conference), a change may be made in order to allow hearings of suspects as well. This approach, is encouraged and recommended.

7 Kosovo

69. Given the specific status of this project area, the protocol is not relevant. Legislation is being drafted with the aid of EULEX, including legislation on international cooperation in criminal matters. On an institutional level, the training of specialised magistrates is needed since these are not yet in place.