

MATTER FOR DEBATE ON THE FORUM OF THE ONLINE COURSE (Module II).-

Dear participants in the online course,

As you will have noticed, the majority of the materials for Module II of the course on judicial cooperation in criminal matters in Europe are available on the website of the online course. This includes, in addition to the text presenting the module, the three lecture units, their corresponding outlines and the self-assessment questionnaires for these units.

With a view to encouraging reflection and debate among participants in the forum of the online course, I feel it is a good idea at this stage to propose a matter for discussion related to the content of these subject units.

As you know, since its entry into force, the 1959 MACM Convention has been considered an essential instrument of reference in the sector of international legal cooperation, to that the extent that the conventions adopted subsequently, both in the sphere of the Council of Europe and in the ambit of the European Union, present themselves as instruments that aim to supplement and facilitate the application of the former convention, as opposed to completely replacing it.

Nevertheless, the 1959 MACM Convention has a number of deficiencies in the way it articulates the provision of international legal cooperation which has led to the development of complementary instruments, with the acknowledged purpose of improving the capacity of states to react to cross-border crime, by extending the range of cases in which mutual assistance can be requested and making the provision of such assistance faster and more flexible. The most noteworthy deficiencies traditionally attributed to the 1959 MACM Convention are:

- 1) The generalised application of the *locus regit actum* principle (execution of the rogatory letter pursuant to the law of the requested state) which, while it simplifies the provision of assistance in itself from the point of view of the judicial authorities in the requested state, could compromise its incorporation into the criminal proceedings of the requesting state and the full validity in said state of the actions taken by means of international judicial assistance, in the event that the essential requirements for validity set out by the domestic law of the latter state were not respected in the execution of the rogatory letter.
- 2) The exceptional nature of the direct transmission route between courts and the fact that it is usually the central authorities (Justice Ministries) that are involved, which entails an excessive delay in complying with the request for assistance.
- 3) The failure to regulate the rogatory letters related to investigations or freezing evidence in an express and detailed manner when they are particularly necessary in terms of fighting the new forms of cross-border crime (such as declarations via videoconference and teleconference, spontaneous information, controlled deliveries, undercover investigations or joint investigation teams, for example).

Attempts have been made to remedy some of these deficiencies in the context of the European Union with the 2000 MACM Convention (which will be dealt with by Topic 8 in Module III of this online course) and, in the context of the Council of Europe, with the Second Additional Protocol to the 1959 MACM Convention, which entered into force in February 2004 and, as you know, is

clearly inspired by the 2000 MACM Convention to the extent that it literally copies many of its rules.

It is however highly surprising to note that many Member States of the Council of Europe (some of which are also members of the European Union and have signed and ratified the 2000 MACM Convention) have not ratified – or indeed even signed – the Second Additional Protocol to the 1959 MACM Convention. In fact, Portugal, Bulgaria, Poland and Romania are the only states from among the group of countries represented by the participants on this course that have signed and ratified the Second Additional Protocol to the 1959 MACM Convention, while Belgium, France, Hungary and Germany have signed the protocol without ratifying it to date, and Spain has not even signed it.

In view of this brief outline,

- Do you think the Member States of the Council of Europe who have not yet done so should sign and ratify the Second Additional Protocol to the 1959 MACM Convention in order to ensure that mutual assistance in criminal matters in the sphere of the Council of Europe is provided on the basis of the principles enshrined in said Protocol (and, as such, in the 2000 MACM Convention)?
- Or do you believe, on the other hand, that the Second Additional Protocol to the 1959 MACM Convention is an unviable instrument due to the disparity of the legal systems of the Member States of the Council of Europe, which contrasts with the greater degree of homogeneity in criminal and procedural matters achieved by the Member States of the European Union?

I look forward to hearing your reflections and comments on this point.

Kind regards

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