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MODULE II

UNIT VI

Other Conventions

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Con el apoyo de la Unión Europea
With the support of The European Union
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AVAILABLE LEVELS

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LEVEL I: TOPIC

SUMMARY

1. *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* of 1990.
2. *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* of 2005.
3. *Convention on Cybercrime* of 2001.
4. *European Convention on the Transfer of Proceedings in Criminal Matters* of 1972.
5. *European Convention on the International Validity of Criminal Judgments* of 1970.
6. *Convention on the Transfer of Sentenced Persons* of 1983 and Additional Protocol of 1997.
7. *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders* of 1964.
8. *Additional Protocol to the European Convention on Information on Foreign Law.*

INTRODUCTION AND SCOPE OF THE TOPIC

The standard books on international law usually state, from a historical perspective, that after the desolation of the Second World War, inspired by the model of the United States of America, certain political groups proposed an associated Europe; but while the French and the Belgians wanted a Parliamentary Assembly with broad powers, the British proposal envisaged little more than a Council of Ministers with powers of coordination only and that as a compromise solution, the Council of Europe emerged, established by the Statute of London of 5 May 1949, in which both institutions coexisted, although the function of the Parliamentary Assembly was merely consultative, with the Council being configured as an international organisation of coordination, but not integration, which would emerge some years later in the form of the European Communities.

The Council of Europe aims to defend the values on which a pluralist, parliamentary democracy must be based; and in order to achieve this, from its outset it fosters the

signing of conventions and treaties: from the Convention on the Protection of Human Rights and Fundamental Freedoms, the year after it was founded, complemented by a guarantor instrument such as the European Court, right up into this century, with achievements as noteworthy as the Convention on Cybercrime of November 2001. It is also under the aegis of the Council of Europe that the conventional texts on judicial cooperation in Europe emerge, aimed at regulating the two basic instruments of cooperation: namely the Convention of 1957 on extradition and the Convention of 1959 on judicial assistance in criminal matters.

These are texts that, moreover, contain the basic rules that apply today, even in the European Union, since although the generation of new regulations has been constant, the actual implementation of the sources adopted has progressed at a slow, uneven and anarchic pace. Above all, the multiple instruments that regulate this area in the context of the Union, a raft of which have been approved, may be confusing, not so much because of their abundance, which has undoubtedly increased, but rather because of their coexistence with the original treaties born in the broader European context of the Council of Europe. Without repealing them, they are superimposed on them, purely with the intention of perfecting particular sections or simply in order to link them more closely with the more limited geographic scope of the European Union.

Except for the development of the instruments of mutual recognition, the instruments of judicial cooperation in criminal matters in the old Europe are essentially limited to those that saw the light of day under the Council of Europe. It is true that they are often developed with slight nuances for the Member States of the European Union and on occasion with areas of greater evolution in certain geographic-political regions, such as the Benelux or the Nordic countries, but the diversity of subject matter dealt with by the Council of Europe and the greater territorial extension of the validity of the instrument, on occasion transcontinental, still demands special attention to their content when dealing with cooperation in criminal matters, as they comprise the origin and explain the evolution of this area at other levels in Europe, with mutual influence on the development of the same.

More than two hundred conventions have been adopted in the context of the Council of Europe, of which we present the following eight as the most significant[1]:

A) Regarding the investigation stage

a. Dealing with property, the *corpus delicti*:

1. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990.
2. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005.

b. Dealing with obtaining evidence in electronic format:

3. Convention on Cybercrime 2001.

c. Dealing with the assignment of jurisdiction:

4. European Convention on the Transfer of Proceedings in Criminal Matters 1972.

B) Related to the enforcement stage:

5. European Convention on the International Validity of Criminal Judgments of 1970.
6. Convention on the Transfer of Sentenced Persons of 1983 and Additional Protocol of 1997.
7. European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 1964.

C) Instrumental to all of the above:

8. Additional Protocol to the European Convention on Information on Foreign Law.

1.- 1. CONVENTION ON LAUNDERING, SEARCH, SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME.

The 1959 Convention on Mutual Assistance in Criminal Matters of the Council of Europe (CETS 030), as explained in earlier units, in addition to being the original instrument in this sphere, continues to be the fundamental and primordial text on cooperation in criminal matters in the enlarged Europe even today; to date[2] it has been ratified by 48 states, which obviously include the twenty-seven Member States of the EU[3].

The explanatory report informs us that it deals essentially with the regulation of letters rogatory, in relation to receiving the testimony of witnesses and experts, the service of procedural documents and judgments, summoning witnesses, experts or detained persons, as well as notifying certificates of criminal records. Even though the contemplation of the real or material scope of the offence was scarce, to the extent that the reference to the letters aimed at monitoring and locating property and the subsequent seizure, it was only to allow declarations that conditioned or limited fulfilment, specifically in Article 5.

It also made it possible to condition the search or seizure of property to the existence of dual criminality, as well as seeking to punish an offence that made extradition possible and that the enforcement be in line with the internal procedure and material requirements of the requested state. The states made good use of said possibility, to the extent that many of them cumulatively formulated all the possibilities of limitation offered, which were necessarily repetitive.

Only France, Greece, Israel, Italy and Latvia voluntarily opted not to restrict cooperation on requests for seizure[4], so that the actual possibility of an international

request for seizure prospering were scarce, in particular because even if a state had made no reservations, it could allege a lack of reciprocity vis-à-vis those that had made reservations. Moreover, even in the absence of reservations, reluctance to cooperate was common; this was highlighted in the mutual assessment report prepared by the European Union on Italy[5], albeit there were differences depending on whether the ultimate aim was the confiscation or the securing of evidence, even when no reservations had been made, in practice, dual criminality and adaptation to national legislation were also demanded.

The 1978 Additional Protocol to the 1959 Convention (CETS no. 99) was approved with the aim of removing the possibility of refusing mutual assistance in the investigation of fiscal offences; however, in addition to not being ratified by Andorra, Malta, Monaco, San Marino, Switzerland, Liechtenstein, Bosnia-Herzegovina and Israel, important declarations and reservations were made by Armenia, Austria, Azerbaijan, Georgia, Germany, Luxembourg and Spain, most of which were aimed precisely at maintaining the dual criminality requirement or at least reserving the possibility of refusing cooperation when seizures related to fiscal offences were requested.

In order to alleviate such a restrictive system of mutual assistance where the material elements of the offence were concerned, the Council of Europe drew up the ***Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime***, done in Strasbourg on 8 November 1990 (CETS no. 141), with the express vocation to *facilitate mutual cooperation* in these areas, in awareness of the diversity of European legislations in this regard and even of the scarcity and absence of complete legislation.

The Convention aimed to achieve effective mutual cooperation in relation to illicitly acquired property, with different staggered instruments depending on the stage of proceedings in question: *tracing and seizure* are the measures aimed at securing evidence or the provisional securing of property liable for subsequent seizure or confiscation; the actual *confiscation* at the time of the judgment; and failing that, on a

second level, as secondary criminalisation, the deprivation of proceeds of crime by virtue of their classification as *laundering*. Indeed, in certain compared legal systems, the offence of money laundering is punished as an impediment to judicial confiscation, as one of the crimes against the administration of justice, although it is also true that it is an offence that is becoming increasingly autonomous, having proved itself to be one of the most effective instruments in fighting organised crime.

Essentially, this 1990 Convention is based on the earlier United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20-12-88 (Vienna Convention) and accepts its terminology and systematics. What it does not do is limit its scope to drug trafficking, as this limitation has caused many breakdowns in the prosecution of money laundering, and instead contemplates a universal formula of crime, although the Parties are allowed to make express declarations limiting its application to certain categories of crime.

The Convention is of great significance and does not contain the adjective “European”, because the *ad hoc* committee responsible for drafting it was comprised not only of representatives from this continent, but also experts from Australia (who would ratify it in 1997) Canada and the United States, as well as other bodies, from the European Community to the United Nations, Interpol or the International Criminal Law Association. Its importance is derived not only from the fact that it facilitates cooperation in this area, but also from the fact that it is a legal instrument, not a mere recommendation or commitment to act, which represents the start of the consideration of money laundering on an autonomous basis. Nevertheless, this does not mean that, seen from a pragmatic perspective, it does not ultimately represent the confiscation of the earnings and proceeds of the original crime. At present, the 47 Council of Europe Member States have ratified this Convention, as well as Australia, almost of all of them between 1996 and 2004. But its significance knows virtually no bounds, as it constitutes the international standard in the field, with the 35th recommendation of the FATF stating that it should be observed, in the section on international cooperation.

The Convention essentially aims to remedy some failings detected in the earlier regime: international assistance was based on common legal principles; faced with the diversity of legislations in the different states both regarding their material dimension and the different procedures, it became very difficult to exercise, leading this convention to seek to overcome the problem by means of the approximation of legislations, requiring members states to assume two obligations on an internal level:

a) Regulate the confiscation of instrumentalities and proceeds, or the corresponding value, as the case may be; and

b) Penalise the laundering of the proceeds of crime.

But it also requires legislation to be introduced on a national level regarding special investigative techniques, making bank, financial or commercial assets available to be subsequently seized, and even facilitating the identification and tracing of proceeds and the gathering of evidence thereto, including monitoring orders, observation, interception of telecommunications, access to computer systems and orders to produce specific documents.

In relation to *international cooperation*, it had also been detected that letters rogatory that were aimed at the tracing and seizure of property were not executed when the purpose was not the securing of evidence, but rather the subsequent seizure of the same; this made it necessary to introduce a series of measures, that the Council of Europe's own official summary describes as follows:

a) Forms of investigative assistance (for example, assistance in procuring evidence, transfer of information to another State without a request, adoption of common investigative techniques, lifting of bank secrecy etc.);

b) Provisional measures: freezing of bank accounts, seizure of property to prevent its removal;

c) Measures to confiscate the proceeds of crime: enforcement by the requested State of a confiscation order made abroad; institution by the requested State of domestic proceedings leading to confiscation at the request of another State.

The aim is for international assistance to have "the widest possible measure of assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation", meaning that it should include any measure aimed at presenting and obtaining evidence on the existence, location or movement, nature, and legal situation of such property, in accordance with the legislation of the requested state; however, when it is not compatible which such legislation, it establishes that it should be executed pursuant to the procedures set out in the request for assistance, including provisional measures. As a result, it restricts and lists the reasons for refusing judicial assistance, distinguishing between investigative measures, provisional measures or the enforcement of seizure (see Article 18).

However, the explanatory report expressly states that this wide-ranging nature does not authorise what are known as "fishing expeditions", i.e., general investigations, meaning that if requesting Party has no indication of where the property to be seized might be found, the requested Party is not obliged to search each and every one of the banks in the country.

Among the measures for promoting the enforcement of requests seeking the seizure of property, the Convention establishes that the requested party, according to its internal law, disposes of all the property it seizes, unless otherwise agreed by the parties concerned (Article 15), which translates into an incentive to reach *ad hoc* agreements to share the proceeds or property seized. This distribution of profits is being implemented in an increasingly general way in the different cooperation instruments.

The majority of the Member States had to legislate internally so as to materially and substantially adapt their Codes in order to bring them into line with the obligations that the ratification of the Convention obliged them to assume[6].

The numerous reservations and declarations on the rules governing the seizure of an equivalent value (Article 2.2), but above all the limitation of the list or category of main

or previous offences that could be classified as laundering, meant that cooperation in this field was never going to be fluid (Article 6.4).

For this reason, the European Union, logically limited to its own scope, in addition to the innovations brought by **Schengen**[7] developed this area in several instruments.

Even so, mutual assistance in relation to the property aspect of crime continued to be barely functional, which led to the approval of several instruments in the more reduced scope of the European Union which are worth mentioning in order to show how they fit into this area:

- Council Framework Decision 2001/500/JHA of 26 June 2001 on ***money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime***[8].

- Council Framework Decision 2003/577/JHA of 22 July 2003 on the ***execution in the European Union of orders freezing property or evidence,*** an instrument based on the principle of mutual recognition.

- Council Framework Decision 2005/212/JHA of 24 February 2005 on ***Confiscation of Crime-Related Proceeds, Instrumentalities and Property***.

- Council Framework Decision 2006/783/JHA of 6 October 2006 on the ***application of the principle of mutual recognition to confiscation orders***.

It is also worth mentioning the ***Additional Protocol*** to the Convention on Mutual Assistance[9], signed on 16 October 2001**,** in relation to this area, although it is restricted to the scope of the European Union Member States who have ratified it. It prohibits the refusal of assistance on the grounds of banking secrecy, and its object is to obtain:

a) *Information* on whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank

located in the territory of a particular state and, if so, provision of all the details of the identified accounts.

b) *Information on banking transactions* carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account; and

c) *Requests for the monitoring of banking transactions*; the content of which is regulated in the same way as the provisions contained in the 2000 Convention for supervised deliveries.

2.- CONVENTION ON LAUNDERING, SEARCH, SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME AND ON THE FINANCING OF TERRORISM

The Council of Europe also sought to perfect the assistance mechanisms envisaged in the 1990 Convention. Thus, in late 2003 the advisability of drawing up an additional Protocol to this Convention was considered in order to include the advances that had taken place in instruments and activities appearing both under the United Nations, the European Union, the FATF or the Egmont Group; particularly in order to include relevant provisions for the prevention of laundering (identification and verification of clients, identification of beneficial owners, reports on suspicious transactions, regulation of financial intelligence units or the transparency of legal persons) as well as terrorist financing.

As the resulting text contained substantial amendments to the 1990 Convention, it was concluded that an independent instrument was preferable; and this is how the **Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism** (CETS no. 198) came about, opened for signing in Warsaw on 16 May 2005.

Although not widely ratified, it entered into force on 1 May 2008; but its tacit link to the 1990 Convention and the fact that it is open to non-Member States, allied to the importance of its content, leads one to imagine that it will be widely accepted in the medium term.

The underlying idea in the final text of the Convention is that rapid access to financial information or information regarding the assets owned by criminal organisations (including terrorist groups) is essential for the success of both preventive and suppressive measures, and ultimately the best way to destabilise the activities of these organisations.

Although it gives individual systematic consideration to terrorist financing with special emphasis on preventive measures and the perfecting of certain cooperation mechanisms, it maintains the structure of the 1990 Convention:

a) Measures to be adopted at a national level:

General measures: aimed at facilitating confiscation measures; investigative measures; provisional measures; broad powers of seizure and confiscation; possibility to manage the seized property; special powers and investigation techniques; classification of laundering; responsibility of legal persons and the possibility of taking previous convictions into account.

Special measures: Creation of financial intelligence units with broad powers of access to financial and administrative information and the adoption of measures to prevent laundering, directly inspired in the recommendations from the FATF and European directives.

b) Measures of international cooperation:

It establishes in general terms the obligation to provide the broadest assistance possible in the tasks of investigation (identification and tracing for confiscation purposes, as well as securing evidence on the location, movements, nature, legal

status or value of instrumentalities and proceeds of crime) and on the procedures aimed at confiscation.

In particular: assistance regarding requests for information on bank accounts: holder, operations carried out and tracing or monitoring the transactions made, with parallel provisions to those contained to the Additional Protocol to the 2000 Convention, between Member States of the European Union.

It also regulates the spontaneous transmission of information.

Assistance extends to the obligation to order or enforce preventive measures with a view to confiscation.

It provides for wide-ranging assistance in order to facilitate the confiscation requested, the disposal of confiscated property and the use given to it.

It contains a detailed description of the reasons for refusing assistance.

It strengthens cooperation between financial intelligence units so that, in urgent cases, preventive measures aimed at preventing laundering operations can be adopted upon request from a foreign unit.

It is worth highlighting the regulation of the adjectival part of cooperation, i.e., the **procedure** established in this regard:

a) Central Authority.- Designated by each state and responsible for sending the requests made, answering them and enforcing or transferring them to the authorities competent for their execution.

b) Channels.- The central authorities will communicate with each other directly, although in urgent cases the requests and communications may be sent directly to the judicial authorities. INTERPOL may be used as an intermediary in this regard.

c) Notifications to the persons affected by the provisional measures or confiscation.-

It enables the widest measure of mutual assistance in the service of judicial documents, via all the channels recognised in the community civil cooperation regulations and the instruments of the Hague Convention on the service of legal documents: by postal channels, by civil servants or by the persons responsible for serving documents in the country of origin, as well as by consular authorities, judicial officers or other parties responsible for serving documents in the country of destination.

d) Form of the request.- In writing, although any electronic means that can be authenticated are permitted.

e) Language.- In the absence of a reservation to the contrary, neither the request nor the annexed documents need be translated.

f) Authentication of documents.- Not necessary.

g) Content of the request.- Authority making the request; object and reason for the request; matters, including the relevant facts to which the investigations or proceedings relate (unless it refers to a notification); if it implies coercive measures, the text of the statutory provisions and those that would allow an inverse request with the same content to be dealt with; if necessary and to the extent possible, the identification and location of the person and property sought; and an indication of any special formality required.

If the object is the enforcement of a judicial confiscation, it will also be necessary to provide a certified true copy of the decision, an attestation that it is not subject to appeal, information on the measure needed and whether it is necessary to adopt preventive measures.

h) Defective requests.- They can be remedied, although the requested party may set a time limit in this regard.

i) Plurality of requests regarding the same property.- In order to determine the preference the requesting states will be consulted, notwithstanding the possibility of adopting provisional measures if necessary.

j) Information.- On any vicissitude affecting the request both in the requesting and requested state: monitoring, result, obstacles, etc.

k) Restriction of use.- To the proceedings in relation to which the request was made, if so established by the requested state. It can also request that the use be *confidential* although this will not restrict its utilisation.

m) Costs.- Borne by the requested state unless they are substantial, in which case the two states will agree on the form of execution and who assumes the costs.

3.- CONVENTION ON CYBERCRIME

The ***Convention on Cybercrime*** **of the Council of Europe** (CETS no. 185), Budapest, 23-11-2001, in addition to its substantive part, which defines several types of criminal conduct, includes measures or powers of investigation in the course of specific criminal proceedings already underway, but is meant universally where there is an information technology angle, either due to the prosecution of the crimes envisaged in the Convention, of any criminal offence committed using a computer system or in order to gather electronic evidence in relation to a crime under investigation. Thus, it is the instrument that is to complete the set of classical conventions on mutual cooperation in criminal matters since the peculiarity of electronic or computer means, as well as the measures aimed at obtaining data from such systems, require the introduction of specific procedural instruments due to the logical absence of provisions in rules over the last few decades.

It has been in force since 1 July 2004, has been signed by 46 states to date, some of which do not belong to the Council of Europe, such as Japan, Canada or South Africa; although it has only been ratified by 30 states: Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Cyprus, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Latvia, Lithuania, Moldova, Montenegro, Norway, Netherlands, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, the Former Yugoslav Republic of Macedonia, the Ukraine; and of the non-member states, the United States.

Stored computer data cannot be obtained in the same way as tangible objects; for this reason it is necessary to contemplate this special feature, as the Convention does, notwithstanding the fact that the preconditions, such as the existence of specific evidence or a reasoned judicial decision considering the proportionality of the rights affected, also exist for computer data.

Thus, in addition to the confiscation of the entire computer, the seizure of the accessory elements is also covered (CD, diskette, zip disk, etc.); as well as the possibility of securing only the tangible format on which the data is stored (hard disk, CD, diskette, etc.) and also requesting copies of these elements (CD, removable disks, etc.) or the extraction of data by another means, such as printing, if possible.

It is also possible for the data, in view of the connectivity of computer systems, to be stored on a different computer to the one for which the search order was issued; for this reason the possibility should be envisaged for the object of the order to be extended to the computers linked in this way.

As is logical, the expression “search”, should be understood to mean read, inspect, examine data, search for data and also the examination of data; a term that is in any event complementary to that of “access”, which belongs more to the computer sphere. Moreover, the term “interception” should be interpreted in a broad sense, both in relation to the seizure of any physical media, and to the request of a copy as well as the seizure and use of the programmes necessary to access the data to be intercepted; or the use of similar means to obtain intangible data; or even make it inaccessible, either by encoding or blocking (as in the case of a virus or images of child pornography).

The Convention also regulates the obligation of the system administrator or any person who knows how the system works or who is privy of the measures adopted to protect the data (e.g. passwords), to supply all the information reasonably necessary to allow the search and seizure ordered.

But in addition to the search and seizure of computer data (Article 19), it also sets out less intrusive procedural measures, which are nonetheless instrumental, such as the order for the expedited preservation of stored computer data (Article 16); for subsequent disclosure (Article 17); or the production orders (Article 18) if there are difficulties with voluntary collaboration; moreover, in relation to all the means for

transfer of data or messages, the real-time collection of computer data (Article 20) or interception of content data (Article 21)[10]; while at the same time developing judicial cooperation in a broad sense, for the prosecution of these offences (by nature virtually always cross-border) and the use of the provisional measures mentioned earlier in order to obtain the corresponding evidence of the infringements[11]; as well as the creation of a 24/7 network (also under the auspices of the FATF), so that assistance is effective in this area, by virtue of which each party designates a point of conduct available on a 24-hour, 7-day-a-week basis, whose rapid intervention facilities a series of measures such as technical advice, the preservation of data, the collection of electronic evidence, the provision of legal information and the locating of suspects.

4.- EUROPEAN CONVENTION ON THE TRANSFER OF PROCEEDINGS IN CRIMINAL MATTERS

This instrument is also designed for the investigation stage, before the trial, in any event, and constitutes the greatest degree of cooperation as it implies full transfer of jurisdiction. The basic text is the **European Convention on the Transfer of Proceedings in Criminal Matters** *(no. 73)*, done in Strasbourg on 15 May 1972; by virtue of which any contracting state can ask another contracting state to bring proceedings on its behalf against a suspect in view of certain links, relations or a particular situation that it maintains with said state, or because it is easier for said state to do so[12].

Such wide-ranging assistance meant that it took six years to obtain three ratifications, which was the condition for entry into force; although it has now been ratified by 25 countries[13]: Albania, Armenia, Austria, Bosnia-Herzegovina, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Latvia, Liechtenstein, Lithuania, Moldova, Montenegro, Norway, Netherlands, Russia, Romania, Serbia, Slovakia, Spain, Sweden, the Former Yugoslav Republic of Macedonia, Turkey and the Ukraine.

The explicit purpose of the Convention was to avoid conflicts of jurisdiction, as it had become obvious that the Member States, in addition to the criterion of territoriality, established to a greater or lesser degree other criteria of attribution (real, personal, universal, etc.) which generated problems when the offence contained a foreign element, and on occasion even the criterion of territoriality itself could lead to conflict in relation to determining the place where the offence was committed.

But the explanatory report of the Convention clearly warns that the true nature of the instruments envisaged therein, the transfer of judicial proceedings, is regulated as a means of international cooperation in criminal matters, i.e. a form of mutual assistance. As a result, this procedure can only be used when one state begins proceedings at the request of another that is competent to prosecute the offence. This means that the requesting state is competent to take the legal action.

Requirements to which the transfer of proceedings is subject:

- First of all, the requirement of dual criminality (Article 7)
- But it must also be done in the interests of the proper administration of justice which is considered to be the case (Article 8):

a) if the suspected person is ordinarily resident in the requested State;

b) if the suspected person is a national of the requested State or if that State is his State of origin;

c) if the suspected person is serving or is to serve a sentence involving deprivation of liberty in the requested State;

d) if proceedings for the same or other offences are being taken against the suspected person in the requested State;

e) if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;

f) if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;

g) if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured;

h) if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so;

Extension or attribution of original competence.- In order to avoid problems of competence or the rejection of the request for assistance for this reason and in order the observe the requirement of the judge established by law, for the purposes of the Convention it is established that every contracting state will be entitled to prosecute, under its own criminal legislation, any offence to which the criminal legislation of another contracting state is applicable. However, the exercise of this power is conditioned upon the request of proceedings from the state that was initially competent.

Effects of the request for proceedings on the competence of the requesting state.- When the requesting State has requested proceedings, it can no longer prosecute the suspected person for the offence in respect of which the proceedings have been requested or enforce a judgment against him for that offence. Nevertheless, until the requested State's decision on the request for proceedings has been received, the requesting State shall, however, retain its right to continue the proceedings, short of bringing the case to trial, or, as the case may be, allowing the competent administrative authority to decide on the case (Article 21).

Communication between authorities.- Communication will be in writing, either between the respective Ministries of Justice or, by virtue of special agreements, directly between the authorities designated. These aspects are regulated in a similar manner to the rest of the European conventions, in Articles 13 to 20.

Legal validity of steps taken in the requesting state in the requested state, once the transfer of proceedings has been accepted.- Any actions taken by the authorities of requesting state shall have the same validity as if they had been taken in the requested

state, provided that assimilation does not give such act a greater evidential weight than it has in the requesting State (Article 26.1).

Problems raised by time limits:

a) Time limit in the requesting state.- There is no guarantee that a request for proceedings will be accepted by the requested state and the latter will have a time limit for responding; in this regard it is established that the request for proceedings will extend the time limit for the action in the requesting state by six months (Article 22).

b) Time limit for action in the requested state.- It should be established whether said state is already competent by virtue of its own law or if, on the other hand, its competence derives exclusively from this Convention. In the latter case, the time limit for the requested state is extended for six months (Article 23).

c) Interruption of the time limit.- Reciprocal effect; i.e., any act which interrupts time-limitation and which has been validly performed in the requesting State shall have the same effects in the requested State and vice versa (Article 26.2).

Prior complaint.- When the prosecution is conditioned upon a complaint by certain persons, it is clear that if said requirement is contained in the legislation of the requesting state, the transfer cannot be requested unless this requirement has been fulfilled; if it is required in both requesting and requested states, there will be no problem, as the complaint made in the requesting state is valid for the requested state (Article 24.1). The problem arises if the complaint is only required in the requested state, as then this state could bring proceedings even if the corresponding claim or complaint is not made, provided the person entitled to bring it does not oppose it within one month after receipt of the notification in which the competent authorities notifies it of said right.

This Convention also aims to regulate the situation where there is a ***plurality of criminal proceedings***, contemplating the possible scenarios in order to ensure proceedings are brought in the most expedient manner (Articles 30 to 32).

Moreover, it also envisages the possibility, after the announcement of a transfer, even if the competence of the requested state is based exclusively on the Convention, of *provisional arrest* of the suspected person if there are reasons to believe he/she may flee or suppress evidence and if the legislation of the requested state allows it. Persons detained solely for this reason will be released unless the requested state receives the request for proceedings within eighteen days as of the date of the arrest; which will not exceed forty days under any circumstances.

5.- TRANSFER OF ENFORCEMENT OF CRIMINAL SENTENCES

The key instrument in this area of judicial assistance is the **European Convention** (no. 70) **on the *International Value of Criminal Judgments*,** done in the Hague on 28 May 1970, by virtue of which any contracting state is entitled to enforce a penalty imposed by another contracting state if the state so requests, once the penalty is not subject to appeal and it also contains the offence behind it, which also constitutes an offence in the legislation of the requested state[14]. Its express purpose is to favour the re-integration of sentenced persons into society.

It entered into force with the third ratification on 26 July 1974 and to date 22 countries have ratified or adhered to it: Albania, Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Georgia, Iceland, Latvia, Lithuania, Moldova, Montenegro, Netherlands, Norway, Romania, San Marino, Serbia, Spain, Sweden, Turkey and the Ukraine.

The basic concept on which it is based, according to the explanatory report of the Convention, is the assimilation of a foreign judgment (from any contracting state) to a judgment emanating from the national courts. This concept is applied in three different

respects, namely to (a) the enforcement of the sentence, (b) the *ne bis in idem* effect, and (c) the taking into consideration of foreign judgments.

The enforcement of European criminal judgments takes up the largest part of the convention (Articles 2 to 52); where the *conditions* established for such enforcement can be summarised as follows:

1) on an absolute basis; even thought the text does not expressly state as much, the judgment must have been issued in accordance with the rights and freedoms recognised in the European Convention of 1950;

2) the acts that have led to the conviction must also constitute an offence under the legislation of the requested state (Article 4.1);

3) the judgment must be enforceable in the state where it was issued;

4) the request must be validly presented by the state where the judgment was issued, and must also fulfil other criteria of reasonability which will only be considered satisfied if one of the following conditions are fulfilled (Article 5):

a) if the person sentenced is ordinarily resident in the other State;

b) if the enforcement of the sanction in the other State is likely to improve the prospects for the social rehabilitation of the person sentenced;

c) if, in the case of a sanction involving deprivation of liberty, the sanction could be enforced following the enforcement of another sanction involving deprivation of liberty which the person sentenced is undergoing or is to undergo in the other State;

d) if the other State is the State of origin of the person sentenced and has declared itself willing to accept responsibility for the enforcement of that sanction;

e) if it considers that it cannot itself enforce the sanction, even by having recourse to extradition, and that the other State can.

The possible *reasons for rejecting a request for enforcement* are listed (Article 6):

a) where enforcement would run counter to the fundamental principles of the legal system of the requested State;

b) where the requested State considers the offence for which the sentence was passed to be of a political nature or a purely military one;

c) where the requested State considers that there are substantial grounds for believing that the sentence was brought about or aggravated by considerations of race, religion, nationality or political opinion;

d) where enforcement would be contrary to the international undertakings of the requested State;

e) where the act is already the subject of proceedings in the requested State or where the requested State decides to institute proceedings in respect of the act;

f) where the competent authorities in the requested State have decided not to take proceedings or to drop proceedings already begun, in respect of the same act;

g) where the act was committed outside the territory of the requesting State;

h) where the requested State is unable to enforce the sanction;

i) where the request is grounded on Article 5.e and none of the other conditions mentioned in that article is fulfilled;

j) where the requested State considers that the requesting State is itself able to enforce the sanction;

k) where the age of the person sentenced at the time of the offence was such that he could not have been prosecuted in the requested State;

l) where under the law of the requested State the sanction imposed can no longer be enforced because of the lapse of time;

m) where and to the extent that the sentence imposes a disqualification.

The application of the *ne bis in idem* principle, regulated in the Convention (Article 7) also hinders enforcement.

As for the *effects of the transfer of enforcement,* which start as of the presentation of the request (Article 11, with the exception of disqualifications –Article 51–) the reciprocal effect of acts that interrupt or suspend a time limitation is expressly envisaged between the states concerned (Article 8); the principle of speciality of the offence to which the transfer refers, unless there is consent from the transferor state or the sentenced person voluntarily returns to or fails to leave the territory of the

requested state (Article 9); the application of the legal system of the requested state to enforcement (although the requesting State alone shall have the right to decide on any application for review of sentence), while either of the states may grant an amnesty or pardon (Article 10).

The *requests* must be made *in writing* and include all necessary documentation, including a certificate that the penalty is enforceable, *addressed to* and issued by the respective Ministries of Justice, unless the authorities expressly agree to send it directly, which is permitted in urgent cases, with requests and communications being sent via INTERPOL (Articles 15 and 16). A *translation* of the requests and annexed documents will not be required unless the state in question has expressly reserved the right to do so (Article 19), although authentication will not be necessary under any circumstances (Article 20).

Significant problems arise in relation to *judgments in absentia*, particularly when the regulations on this area are so different in several European countries; it is clear that the direct enforcement of such judgments is not possible, but the complete exclusion of the same would lead the Convention to lose a large part of its effectiveness. In view of this it was decided to include the enforcement of judgments *in absentia* with the scope of application of the Convention, but under a special common system, by virtue of which the states guarantee the sentenced person the option of a hearing before the judgment is enforced, which will take place either in the requested or requesting state, at the discretion of the sentenced person (Articles 23 to 30).

As a result, once the sentenced person is notified of the request for a transfer of enforcement and the possibility of the opposition envisaged in the Convention, the possibilities are threefold:

a) The sentenced person does not lodge the opposition, in which case the judgment can be enforced and will be considered as having been rendered after a hearing of the accused.

b) The sentenced person lodges the appeal before the courts of the requesting state, in which case the hearing is convened; if the person appears –or is duly represented– and the opposition is considered admissible, the matter is tried anew. If he/she fails to

appear or the opposition is considered inadmissible, the judgment *in absentia* is considered as having been rendered after a hearing of the accused.

c) The sentenced person submits his/her appeal to a judge in the requested state (which is the case if the opposition is lodged and no choice is made): In this case, if the sentenced person fails to appear, the opposition is declared null and void and the judgment *in absentia* is considered as having been rendered after a hearing of the accused. The same occurs if the opposition is considered inadmissible. If the person sentenced appears and if the opposition is admissible, the act shall be tried as if it had been committed in that State.

A similar opposition system has been included for what are known as the *ordenances pénales*, which represent a simplified procedure for imposing lesser sentences, often merely of an administrative nature; and the result of criminal claims proceedings, although the corresponding declaration may be made to reserve the right to enforce both judgments *in absentia* and *ordenances pénales*.

After the provisions for interim or provisional measures, the Convention regulates the decision on the request for enforcement of the requested state, which if considered admissible, is followed by an *exequatur* process, always assumed by a court, although for the enforcement of fines and confiscations it may be charged to an administrative authority, provided that its decision can be appealed before the courts (Articles 37 and 38). Before issuing its decision, the court will give the sentenced person the chance to state his/her views (Article 39) and this decision will be subject to appeal.

If the sentence to be enforced involves the *deprivation of liberty,* the court of the requested state will replace the custodial sentence imposed by the requesting state with the sentence envisaged in its own law for the same offence, which while it may not aggravate the situation of the sentenced person, can be of a different nature or duration to the one imposed by the requesting state. Even if the latter penalty is less than the minimum that the law of he requesting state imposes, the court will not be bound by said minimum and will apply a penalty corresponding to the one imposed in the requesting state (Article 44.1 and .2). In any event, any part of the sentence served

in periods of detention or provisional arrest in one state or the other, will be deducted in full.

If the request for enforcement involves a *fine* or *confiscation* of a sum of money, the court (or the administrative authority in the terms set out above) will convert the amount into monetary units of the requested state, applying the rate of exchange at the time the decision is issued, although said amount will not exceed the maximum set out by the law of said state for the same offence. The requested state is obliged to respect all the facilities for payment in relation to the time of payment or payment by instalments granted by the requesting state (Article 45).

As for the destination of the proceeds of the fines and confiscations, they will be paid into the public funds of the requested state, notwithstanding third-party rights; and the confiscated objects that are of special interest may be remitted to the requesting state if it so requests (Article 47).

In the event that it is impossible to enforce the fine, and unless the request for enforcement establishes limitations, the courts of the requested state may impose *an alternative sanction involving deprivation of liberty* insofar as the laws of both states envisage it in such cases (Article 48).

As for sentences involving a deprivation of liberty or a fine that exceeds the maximum envisaged in the law of the requesting state or when, in relation to the fine or confiscation, this kind of penalty is not envisaged by the law of the requested state for the same offence, the requested state may impose more serious penalties, provided that its law allows it.

As for *disqualification* imposed in the requesting state, this will only be effective in the requested state if the law of the latter envisages disqualification for that offence. The court hearing the case will consider the expediency of enforcing the disqualification in the territory of its own State (Article 49). If it orders the enforcement of the disqualification, it will establish its duration within the limits established by its own law, but likewise without exceeding those established in the sentence imposed in the requesting state; although it may limit the disqualification to a part of the rights whose

loss or suspension has been imposed (Article 50). Moreover, the requested state is entitled to restore to the sentenced person to the rights of which he/she has been deprived in accordance with a decision taken in application of this section (Article 52).

International effects of European criminal judgments

a) *Ne bis in idem*.- Here this principle is projected to the international arena, derived from the trust between the Member States of the Council of Europe. In this regard, notwithstanding the existence of more wide-ranging internal regulations, it is established that the person in relation to whom a European criminal judgment has been issued cannot be tried, sentenced or subjected to the enforcement of a penalty for the same offence in another contracting state:

a) if he was acquitted;

b) if the sanction imposed:

i. has been completely enforced or is being enforced, or

ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or

iii. can no longer be enforced because of lapse of time;

c) if the court convicted the offender without imposing a sanction.

Nevertheless, an exception may be made if the offence was committed in its territory or if it was committed against a person, institution or property having public status in said state, or if the person on whom the sentence was imposed has public status in said state. In any event, if new criminal action is taken against a person who has been sentenced for the same offence in another contracting state, any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed[15].

b) *Taking into consideration.*- This refers to the different *indirect* effects on enforcement of the existence of previous European criminal judgments, envisaged in the national law for such judgments: determining the sanction, establishing reoffending; or the *complementary* effects, so that the measures regarding disqualifications (which are generally accessory) are effective[16].

This instrument, while not widely ratified, had the essential virtue of projecting judicial cooperation into a sphere that was unheard-of up to that point, namely the enforcement of criminal judgments. At present, in the more restricted sphere of the European Union, several instruments in the strengthened area of mutual recognition regulate different institutes of the enforcement stage on a sector basis:

- Council Framework Decision 2005/214/JHA of 24 February 2005 ***on the application of the principle of mutual recognition to financial penalties.***

- Council Framework Decision 2006/783/JHA of 6 October 2006 ***on the application of the principle of mutual recognition to confiscation orders***.

- Council Framework Decision 2008/909/JHA of 27 November 2008 ***on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.***

6.- CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

This instrument of assistance in judicial cooperation in criminal matters was initially aimed at the transfer of foreigners to their country of origin in order to serve a sentence involving the *deprivation of liberty*, using a simple, rapid procedure, with a view to favouring their re-integration into society, in addition to the humanitarian concerns regarding communication difficulties, language barriers and the lack of contact with the family.

The essential legal instrument regulating this field in the European sphere is the ***Convention on the transfer of sentenced persons*** *(no. 112)*, done in Strasbourg on 21 March 1983; and its birth is not far removed from the insufficiency and scant impact

of the 1970 ECIVCJ. Moreover, the clarifications made by the Convention on the Application of the Schengen Agreement (Articles 67 to 69, under the misleading chapter title of the transfer of criminal judgments) and by the Additional Protocol of 18 December 1997; and finally the Agreement regarding the application between the Member States of the European Communities of the Convention on the Transfer of Sentenced Persons, done in Brussels on 25 May 1987.

We should also consider the provision in Article 5.3 of the Framework Decision dated 13 June 2002 regarding the European arrest warrant and surrender procedures between Member States (2002/584/JHA): *where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.*

In addition to the instrument on mutual recognition that we mentioned earlier, Council Framework Decision 2008/909/JHA of 27 November 2008 ***on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.***

The European convention on the transfer of sentenced persons is applied with certain assiduity between the contracting states, having been ratified (or acceded to) by several countries outside the Council of Europe. Today it is applied in Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, the Ukraine and United Kingdom[17], as well as Australia, Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Honduras, Israel,

Japan, Korea, Mauritius, Mexico, Panama, Tonga, Trinidad and Tobago, the United States and Venezuela.

According to its explanatory report, the differences in the conception of this Convention in relation to the 1970 ECIVCJ are essentially the following:

a) The provision for a simplified procedure which makes the transfer period less cumbersome;

b) The transfer may be requested either by the sentencing state or by the state of which the sentenced person is a national (the administering state);

c) The transfer is subject to the sentenced person's consent;

d) The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on contracting states to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested State to give reasons for its refusal to agree to a requested transfer.

The *conditions* established for a transfer are:

a) if that person is a national of the administering State;

b) if the judgment is final;

c) if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;

d) if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;

e) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and

f) if the sentencing and administering States agree to the transfer.

Requests and replies will be made in writing and the envisaged channel is via the Ministries of Justice. No *verification* of the documents sent is necessary, except for the sentencing judgment and the legal provisions applied.

In practice, as there is no regulated *procedure*, it is usual for the one established for extradition in its governmental stage to be followed by analogy.

Once the administering state takes charge of the sentenced person, the immediate consequence is the *suspension of the enforcement of the sentence in the sentencing state*; and as a result it may no longer enforce the sentence when the administering state considers that enforcement of the sentence has been completed. *Enforcement will be governed exclusively by the law of the administering state*. Nevertheless, either party may grant *pardon, amnesty or commutation* of the sentence in accordance with its Constitution or other laws; but only the sentencing state will be entitled to decide on any *application for review* of the judgment.

Meanwhile the authorities of the administering state have a double alternative:
a) *continue* the enforcement of the sentence immediately or through a court or administrative order, in which case it will be bound by the legal nature and duration of the sentence as determined by the sentencing State, unless it is incompatible by nature or duration, which will entail an adaptation of the sentence without aggravating it; or
b) *conversion* of the sentence, through court or administrative proceedings, into a decision of the administering state, thus replacing the punishment imposed in the sentencing state with one envisaged in the legislation of the administering state for the same offence, in which case the authority performing the conversion:

- shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;
- may not convert a sanction involving deprivation of liberty to a pecuniary sanction;
- shall deduct the full period of deprivation of liberty served by the sentenced person; and

- shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

The ***Additional Protocol*** *(CETS no. 167) done in Strasbourg on 18 December 1997* deals with the regulation of scenarios not contemplated in the Convention:

a) Persons who have *fled* the sentencing state before serving their sentence, in order to avoid execution of the same, in order to take refuge in the territory of another state of which they are a national; in this case the sentencing state may ask the other state to take over the execution; a transfer of the execution in this case does not require the consent of the sentenced person.

b) Sentenced persons *subject to an expulsion order*, which formed part of the sentence or was simply an administrative consequence of the same; in which case at the request of the sentencing state, the state of which the sentenced person is a national can agree to the transfer of execution, without the need for the consent of the sentenced person.

It has been ratified by Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Iceland, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Moldavia, Montenegro, Norway, Netherlands, Poland, Romania, Russia, San Marino, Serbia, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, the Ukraine and United Kingdom.

The *Convention on the Application of the* ***Schengen*** *Agreement***,** with the express purpose of completing this 1983 Convention (Article 67), already offered persons who had fled the sentencing state to the territory of the state of which they were a national, the solution now regulated in the additional protocol consisting of a transfer not subject to the consent of the sentenced person (Articles 68 and 69)[18].

The object of the ***Agreement on the application of said Convention among the Member States of the European Communities*** of *1987*:

a) each Member State shall regard as its own nationals the nationals of another Member State whose transfer is deemed to be appropriate and in the interest of the person concerned, taking into account their habitual and lawful residence in its territory;

b) avoid declarations made pursuant to the Convention on Transfer applying with respect to Member States who are party to this Agreement.

Its entry into force requires ratification by all signatories, but Belgium, Denmark, Italy, Luxembourg and Spain have announced that they will apply it provisionally among the Member States who make a declaration allowing this possibility. Of the countries that have announced having finalised their procedure for its entry into force, only Ireland has not made a declaration on provisional application.

The new development introduced in Framework Decision 2008/909/JHA, mentioned above, in relation to the European Union countries, is due to its greater commitment, as neither the Convention nor the Protocol established a basic obligation to take charge of sentenced persons for the purposes of the enforcement of a sentence. The general criterion, and not just in the case of the exceptions in the Protocol, is now that the consent of the sentenced person is not necessary for the transfer of the sentence to another Member State.

7.- SUPERVISION OF CONDITIONALLY SENTENCED OR CONDITIONALLY RELEASED OFFENDERS

This is an area of judicial cooperation in criminal matters that allows better re-integration of the sentenced person and facilitates his/her social and family life by enabling him/her to leave the territory of the state where he/she was sentenced and

convicted, while on probation, with an undertaking from the authorities of his/her usual state of residence to ensure appropriate supervision.

The international text regulating this instrument is the **European Convention on the *Supervision of Conditionally Sentenced or Conditionally Released Offenders***, done in Strasbourg on 30 November 1964 (CETS no. 51).

Spain is not a signatory; and to date the following states are party: Albania, Austria, Belgium, Bosnia-Herzegovina, Croatia, Czech Republic, Estonia, France, Italy, Luxembourg, Montenegro, Netherlands, Portugal, Serbia, Slovakia, Slovenia, Sweden, the Former Yugoslav Republic of Macedonia and the Ukraine.

The Convention allows conditional measures to be established in the territory of a contracting state: suspended sentence, conditional release, "probation", early release or similar measures, which are simultaneous or subsequent to the conviction, imposed by another contracting state. This enables foreigners or persons resident abroad to benefit from such instruments, avoiding the option of confinement without alternative, once the supervision of the enforcement of the measure in the offender's country of residence has been ensured.

The decisions that order conditional measures must have *executive force*; and the offence on which the request is based must be punished by the legislation of both states (*dual criminality*).

There are *three types of assistance*:
a) to carry out *supervision only*; i.e. ensure the conditions are fulfilled; but leaving it up to the sentencing or requesting state to decide whether or not they have been fulfilled or whether the sentence that was suspended should be enforced;
b) carry out *supervision and if necessary enforce the sentence*; thus granting the possibility of inviting the state of residence to enforce the suspended sentence upon revocation of the conditional measure; such enforcement would have to be in

accordance with the legislation of the requested state; which allows a minimum margin for adaptation of the sentence to be enforced to the latter's national legislation;

c) *allow the state of residence to assume entire responsibility* for enforcing the sentence, which it will do as if it had been handed down in its own territory; this is recommendable when it is not thought that the offender will return to the sentencing state.

Supervision, enforcement or complete application will not take place (*absolute causes of refusal of the application*):

- if the request is regarded by the requested State as likely to prejudice its sovereignty, security, the fundamentals of its legal system, or other essential interests;
- if the request relates to a sentence for an offence which has been judged in final instance in the requested State;
- if the act for which sentence has been passed is considered by the requested State as either a political offence or an offence related to a political offence, or as a purely military offence;
- if the penalty imposed can no longer be exacted, because of the lapse of time, under the legislation of either the requesting or the requested State;
- if the offender has benefited under an amnesty or a pardon in either the requesting or the requested State.

While it may be refused (*relative causes*):

- if the competent authorities in the requested State have decided not to take proceedings, or to drop proceedings already begun, in respect of the same act;
- if the act for which sentence has been pronounced is also the subject of proceedings in the requested State;
- if the sentence to which the request relates was pronounced in absentia;
- to the extent that the requested State deems the sentence incompatible with the principles governing the application of its own penal law, in particular, if on account of his age the offender could not have been sentenced in the requested State.

As is standard in this type of convention, the *means of transferring* requests and answers is through the respective Ministries of Justice (in the case of urgency, via Interpol); translation of the request and annexed documents is not required unless a reservation states otherwise; documents do not have to be authenticated.

In the more restricted scope of the European Union, cooperation in this area has been stepped up by means of Council Framework Decision 2008/947/JHA of 27 November 2008 ***on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions***.

8.- ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON INFORMATION ON FOREIGN LAW

In the civil jurisdiction, it often happens that, under a rule of conflict of laws, internal or conventional, the applicable material law is that of another state, in which case the judges and authorities of the contracting states are obliged to apply foreign law in the same way the judges of the state whose law is applicable do, notwithstanding the fact that the parties may allege and prove the existence and content of the foreign law invoked.

Nowadays there are electronic means that facilitate the task of acquiring information on the laws of another state and the operation of the Judicial Cooperation Networks is also an essential instrument in this regard, although there will always be problems when it comes to locating the applicable legal texts and rules.

But even when the text of the foreign law is at one's disposal, there will still be other problems, such as the validity of the rule, changes in legislation, tacit derogations,

effectiveness upon systematic integration into the legal system, rules on transitional law applicable in said state, etc. It will even be necessary to be aware of the case law in order to determine the margin for application of the rule.

When the matter is transcendental, the parties to the proceedings will be sure to show the Court the applicable rule and its interpretations, even by means of "legal experts' reports".

In the criminal field, this problem also exists, albeit to a lesser extent, as the courts do not apply foreign law, However it is often necessary to be appraised of it, for example, in order to adjudge whether a planned request is viable, to know whether the conduct in question is also an offence in the other country, i.e. whether the principle of dual criminality applies, or whether it is punished by a certain minimum sentence (the case of extradition).

In order to facilitate these operations and ascertain the applicable legal rules in relation to a certain matter in another state, there are also cooperation conventions that make this possible. In the Council of Europe we have the ***European convention on information on foreign law*** *(no. 62)****,*** *done in London on 7 June 1968.* It has been ratified by 43 Council of Europe states and also by Belarus, Mexico and Costa Rica. Its scope is limited to civil and mercantile law and judicial organisation, although it can be expanded.

It states that any Judicial Authority, in the course of proceedings already underway, may ask the Central Authority of another state to inform it of the law applicable in that state in relation to a particular legal institution.

It has an ***Additional Protocol*** *(no. 97)*, signed in Strasbourg on 15 March 1978, which extends the scope of Convention no. 62 to criminal law and criminal procedure, including the activity of the of the Public Prosecutor's Office and the enforcement of criminal measures. It also covers the possibility of requests for information even when the proceedings have not commenced, if the purpose of the consultation is to consider

whether or not to start a particular investigation. It has been ratified by 37 Council of Europe Member States, as well as Belarus and Mexico.

The integration of the Protocol into the Convention to which it belongs entails the following:

a) Central Authorities.- Each state will appoint one or more bodies responsible for the receipt and processing of requests as well as a body in charge of transferring the requests.

b) Requesting parties.- Courts and judicial authorities competent in relation to the prosecution of offences or for the enforcement of final judgments.

c) Contents of the request.- Judicial authority from which it emanates; nature of the matter in question; determination of the questions in relation to which information is needed; specification of the judicial system in question if there are several in the requested state; summary of the facts to facilitate comprehension of the information requested.

d) Reply.- The information may be sent directly by the recipient body or be forwarded to another state or official body; a private body or qualified professional may exceptionally be charged with sending the reply (any costs involved will have to be approved by the requesting state).

The content of the reply will be objective and impartial and will include legal and regulatory texts and case law decisions, as well as extracts from doctrinal works and *travaux préparatoires*.

The information contained in the reply will not be binding on the judicial authority making the request.

e) Channels.- The judicial authority may send the request directly to the recipient body of the requested state. In this case the reply may also be sent directly to the requesting judicial authority.

f) Obligatory nature.- There is an obligation to prepare the reply as soon as possible, unless the interests of the requested state are affected by the dispute in question or if it represents an attack on its sovereignty or security. In the event of delay, information on the length of the delay foreseen will be provided.

g) Language.- The language of the requested state, which will reply in its own language.

h) Expenses.- No expenses will accrue unless the reply is charged to a private body or qualified professional, with the consent of the requesting party.

NOTES

1 The reason for the choice is:

a) in the first place, the classification as criminal matters that the Council of Europe itself gives rise to 31 instruments on its list:

No.	Title
024	European Convention on Extradition
030	European Convention on Mutual Assistance in Criminal Matters
051	European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
052	European Convention on the Punishment of Road Traffic Offences
070	European Convention on the International Validity of Criminal Judgments
071	European Convention on the Repatriation of Minors
073	European Convention on the Transfer of Proceedings in Criminal Matters
082	European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes
086	Additional Protocol to the European Convention on Extradition
088	European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle
090	European Convention on the Suppression of Terrorism
097	Additional Protocol to the European Convention on Information on Foreign Law
098	Second Additional Protocol to the European Convention on Extradition
099	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
101	European Convention on the Control of the Acquisition and Possession of Firearms by Individuals
112	Convention on the Transfer of Sentenced Persons
116	European Convention on the Compensation of Victims of Violent Crimes
119	European Convention on Offences relating to Cultural Property
141	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
156	Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances
167	Additional Protocol to the Convention on the Transfer of Sentenced Persons
172	Convention on the Protection of Environment through Criminal Law

173	Criminal Law Convention on Corruption
182	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
185	Convention on Cybercrime
189	Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems
190	Protocol amending the European Convention on the Suppression of Terrorism
191	Additional Protocol to the Criminal Law Convention on Corruption
196	Council of Europe Convention on the Prevention of Terrorism
197	Council of Europe Convention on Action against Trafficking in Human Beings
198	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

b) the second, by doing away with the archetypes regarding extradition and mutual assistance in criminal matters with their respective protocols, which have been dealt with separately in earlier units; and

c) the third exclusion refers to the conventions whose object is limited to a very specific type of crime, in relation to which a specific cooperation criterion has been established exclusively for said area (suppression of road traffic offences, non-applicability of statutory limitation to crimes against humanity and war crimes, corruption, suppression of terrorism or the fight against trafficking in human beings); so that we are left with eight conventions of a general nature and particular importance.

2 This text has been written in June 2010.

3 There is a unique application of its territorial scope; for example, while it is applicable in the French overseas territories, there are significant exceptions in relation to territories under the sovereignty of the United Kingdom; its application has been gradually extended to the Isle of Man and the *bailliage* of Guernsey, there are restrictions that often hinder the execution of letters rogatory in Gibraltar, for example. On the other hand, in addition to in the European states, it is valid in Israel.

4 In addition to Bosnia-Herzegovina, the former Yugoslav Republic of Macedonia and Serbia-Montenegro made no declarations or reservations when signing and ratifying the Convention.

5 Doc. 7254/00 CRIMORG 52.

6 Ad exemplum: France, Law 96-392, dated 13 May 1996, regarding the fight against money-laundering and drug-trafficking and international cooperation in relation to the seizure and confiscation of the proceeds of crime; Belgium: Law of 20 May 1997 on

international cooperation in relation to seizure and confiscation; Luxembourg, Law of 24 June 2001: approving the Convention and amending its internal rules.

7 Article 51 of the *Convention of 19 June 1990 on the Application of the Schengen Agreement of 14 June 1985;* states that the admissibility of letters rogatory for search or seizure may only be made dependent on the following conditions:
(a) the offence giving rise to the letters rogatory is punishable under the law of both Contracting Parties by a custodial sentence or a security measure restricting liberty of a maximum of at least six months or is punishable under the law of one of the two Contracting Parties by an equivalent penalty and under the law of the other Contracting Party as an infringement of the regulations which is prosecuted by the administrative authorities where the decision may give rise to proceedings before a criminal court.
(b) execution of the letters rogatory is consistent with the law of the requested Contracting Party.

8 It replaces Joint Action 98/699/JHA, with the same name, OJ L 333 dated 9.12.1998, p. 1.

9 OJEC Reference: C 326 (21/11/01)

10 In more detail, the measures or powers that the Budapest Convention on Cybercrime obliges the internal legislation of the states to contemplate, are the following:
a) Expedited preservation of stored computer data (Article 16)
The explanatory report states that measures in Articles 16 and 17 apply to stored data that has already been collected and retained for whatever reason (for example for subsequent billing) by data-holders, such as service providers. Data retention is the process of storing data. Data preservation, on the other hand, is the activity that keeps that stored data secure and safe. Articles 16 and 17 refer only to data preservation, and not data retention.
The Convention refers to the preservation of data without establishing any obligation to retain, store or collect data of one kind or another. Articles 16 and 17 merely grant the authorities in charge of prosecuting cybercrime the power to request, in the context of specific criminal proceedings already underway, the preservation of the data that has already been retained, stored or collected and that may be necessary to identify the perpetrators or as a source of evidence.
The drafters of the Convention debated long and hard on whether it should impose an obligation for service providers to routinely collect and retain certain data that could be necessary subsequently for the purposes of a criminal investigation, but in view of the opposition of the service providers and the computer industry, who objected to the excessive costs that such an obligation would entail, as well as the possible conflict with the right to privacy and data protection, it was decided not to include this obligation in the final text.
For the majority of countries, the preservation of data is a completely novel procedural power in their internal law, but one that is justified due to the high volatility of computer data, as well as the ease with which it is manipulated or deleted, so that legislative

evolution, on both a community and internal level in the Member States, has introduced this requirement.
Obviously, one of the means for preserving the integrity of the data consisted of the "entry and search" of premises and "interception and seizure" of the computer system of the holder of the data; but the explanatory report admits that where the custodian of the data is trustworthy, such as a reputable business, the integrity of the data can be secured more quickly by means of an order to preserve the data. For legitimate businesses, a preservation order may also be less disruptive to its normal activities and reputation than the execution of a search, being valid for indentifying the perpetrators of the illegal activity from data contained in past communications and on occasion for securing essential evidence (e.g.: copies of emails).
Nevertheless, the requirement to preserve the data is merely a provisional measure; the data must be preserved for an extendable term of 90 days or if the petition is the result of a request for international judicial assistance, the preservation will be maintained for at least 60 days (Article 29); but during this period of time, the data is not yet notified to the authorities in charge of the investigation. This is measure that is characteristic of the start of investigations and does not entail automatic access for the authorities to the data whose preservation has been requested; in order for the data to be disclosed, a supplementary measure is necessary: search, seizure, judicial authorisation for access to the data or a production order.
When the request refers to stored data, it is not necessary for it to be rendered inaccessible and that the legitimate owners not be allowed to use data or its copies, provided that its preservation is not jeopardised.

b) Expedited preservation and partial disclosure of traffic data (Article 17)
The difference in relation to the order for the preservation of traffic data is that in this case the requested party will not only be obliged to preserve said data, but also to immediately disclose it, especially when it makes it possible to identify the other service providers that intervened in the communication and the channels via which it was transmitted.
The text allows internal law provisions to be established making it possible to issue a single preservation order, even when several service providers have intervened, so that once a supplier receives an order it is obliged to notify the following provider in the chain of transmission of the order and so on along the path used by the perpetrator of the infringement.

c) Production order or obligation to inform (Article 18)
This is a power that the authorities have to oblige a person present in the territory of that state to supply the specified computer data provided it are in his/her possession or control, or to oblige a service provider who offers the data in its territory to provide data of its subscribers.
This measure is more flexible than a search and is particularly useful for third parties holding data, such as Internet service providers, who are often prepared to collaborate voluntarily but prefer to have legal grounds on which to base such aid, thus avoiding any kind of liability.
The Convention recommends differentiating between the data of subscribers that is known to everyone, which could be requested by the law enforcement agents, and that

in which any fundamental right may be affected, where the order must be issued by the judicial authority.

d) Search and seizure of stored computer data (Article 19)

Although the explanatory report mentions that any domestic criminal procedural law includes powers for "search and seizure" of tangible objects, it should be noted that while a search in an enclosed space is indeed a widely-regulated procedure in our legal systems, in relation to the elements and instruments of the crime, only "collection" is envisaged.

But in any event, the stored computer data cannot be obtained in the same way as the tangible objects; that is why it is necessary for the Convention to contemplate this detail, notwithstanding the fact that the pre-conditions, such as the existence of specific indications, a reasoned judicial decision weighing up the proportionality of the affected right, also apply to computer data.

In addition to the seizure of the entire computer, the accessory elements (CD, diskette, zip disk, etc.) must also be included as well as the possibility of collecting only the tangible medium on which the data is stored (hard disk, CD, diskette, etc.) as well as requesting copies of these elements (CD, removable disks, etc.) or the extraction of data by another means such as printing, if possible.

It is also possible, given the connectivity of computer systems, for the data to be stored in a different computer to the one for which the search order was issued; for this reason it will be necessary to issue the order extending its object to all the interconnected computers performing this function.

Logically, the expression "search", should be understood as read, inspect, examine data, search for data and even the examination of the data, an expression that complements "access" which is more appropriate for the field of IT.

Moreover, the term "seizure" (*saisie*), should be interpreted broadly, both in relation to the confiscation of any physical medium and the requesting of a copy; as well as the seizure and use of the necessary programmes to access the data that is to be seized; or the use of similar measures to sequester intangible data; or even render it inaccessible, either by encoding or blocking (in the case of a virus or images of child pornography).

The Convention also regulates the obligation of the system administrator or any person who is aware of how the measures adopted for protecting data (e.g. passwords) work, to supply all reasonably necessary information to allow the search and seizure ordered.

e) Real-time interception of data

Doctrine warns that in view of the progressive disappearance of the distinction between telecommunications and information technology, the powers of interception should apply to both, as well as to intermediate systems.

The collection of data is carried out without disturbing the communication or transfer of the same; this measure is the most invasive one of the right to privacy, as well as the one that is most analogous to the classic interception of telephone communications.

It is envisaged that the authorities will carry it out directly, with or without the help of the service providers (obliged in any event to provide assistance, even supplying the necessary technical means), or oblige the supplier to do so directly, in the context of its technical capacities.

e') …regarding traffic (Article 20)

This is defined in Article 1 as any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service.

The Convention envisages this measure for all offences under the Convention, despite being aware that in many legal systems the data is as protected as its contents.

e'') …regarding the contents (Article 21)

This is not defined by the Convention, although it logically refers to the message or the information transmitted by the communication.

Aware of the fact that this measure represents a serious invasion of privacy, in accordance with the case law of the ECHR and the internal regulations of many countries, the Convention authorises each contracting state to determine and specify the list of serious offences in which its use will be possible.

The Convention establishes the obligation on the part of the service providers to maintain the adoption of this measure confidential and logically prohibits them from giving the subject of the measure any indication of its existence.

11 In addition to the specific measures of international judicial cooperation envisaged in the Convention on Cybercrime, such as regulating the manner in which the adoption of such measures will be requested of another state, the uniqueness in relation to the provisions of national legislation resides in the two measures in Article 32, which are possible without the authorisation of the other party: *cross-border access* to publicly available data (open source) regardless of the geographic location of the same; and *access or receive, through a computer system in its territory, stored computer data located in another Party,* if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.

12 The *Agreement between the Member States of the European Communities on the transfer of proceedings in criminal matters*, done in Rome on 6 November 1990, also dates from the EPC period, and despite the fact that in relation to the countries that were parties to the European Convention on mutual assistance of 1959 or the European Convention of 1972, or the Benelux Treaty in this area of 1974, it will only apply to the extent that it completes or facilitates their provisions, has only been ratified by France and Portugal.

13 10 signatory countries have not ratified it.

14 The Convention between the Member States of the European Communities *on the enforcement of foreign criminal sentences*, done in Brussels on 13 November 1991, also dates from the EPC period, which in relation to the ECIVCJ of 1970 only operates on a subsidiary level insofar that it completes or facilitates the provisions it contains, but of the fifteen members, only Germany, Spain and the Netherlands have taken the steps necessary to ensure its entry into force, and of the new Member States, only Latvia. It has been provisionally applied in the Netherlands (including the Netherlands

Antilles and Aruba), Latvia and Germany since May 2005, pursuant to Article 21.3 of the same.

15 In this area, the development of the *ne bis in idem* prohibition in the European Union has also been unusual, although via the relatively surprising application of an instrument used for other purposes, such as the gradual suppression of internal borders and the corresponding stepping up of judicial and police cooperation: the Convention on the Application of the Schengen Agreement, Article 54 of which states that "*A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party";* this rule has been applied extensively by the Court of Justice of the European Communities: joined cases Gözütok and Brügge, C-187/01 and C-385/01, Miraglia C-469-03, Van Esbroeck C-436/04, Gasparini C-467/04; Van Estraten C-150/05; Kretzinger C-288/05; Kraaijenbrink C-367/05; Bourquain C-247/07; Turansky C-491/07.

In addition to Articles 54 *et seq* of the CASA, which have proven to be of particular practical use, as well as the provision for its observance in certain mutual recognition instruments (arrest warrant, seizure and securing of evidence, monetary penalties), we should mention the preparatory work for the Green Paper on conflicts of jurisdiction and the *non bis in idem* principle in criminal proceedings, of 23.12.2005 {COM(2005) 696 final}, in addition to the initiative from the Greek Republic with a view to the adoption of a Council Framework Decision regarding the application of the *ne bis in idem* principle (OJ C 100, dated 26.04.2003, pp. 24-27)

16 Likewise, for the sphere of the European Union, these indirect effects of the earlier sentences are covered in one of the areas of action of the White Paper on the exchange of information on sentences in criminal matters and their effects in the European Union, which gave rise to *Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.*

17 Basically, all the Member States of the Council of Europe, with the exception of Monaco.

18 ***Article 68.****- 1. The Contracting Party in whose territory a sentence of deprivation of liberty or a detention order has been imposed in a judgment which has obtained the force of res judicata in respect of a national of another Contracting Party who, by escaping to his own country, has avoided the execution of that sentence or detention order, may request the latter Contracting Party, if the escaped person is in its territory, to take over the execution of the sentence or of the detention order.*
2. The requested Contracting Party may, at the request of the requesting Contracting Party, prior to the arrival of the documents supporting the request that the execution of the sentence or of the detention order or part of the sentence be taken over, and prior to the decision on that request, take the convicted person into police custody or take

other measures to ensure that he remains in the territory of the requested Contracting Party.

***Article 69**.- The transfer of execution under Article 68 shall not require the consent of the person on whom the sentence or the detention order has been imposed. The other provisions of the Council of Europe Convention of 21 March 1983 on the Transfer of Sentenced Persons shall apply by analogy.*

LEVEL III: REFERENCE DOCUMENTATION

WEB LINKS

CONVENTION	CETS	WEB LINK*
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990	141	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CM=7&DF=3/16/2009&CL=ENG
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005	198	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=198&CM=7&DF=3/16/2009&CL=ENG
Convention on Cybercrime of 2001	185	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=185&CM=7&DF=3/16/2009&CL=ENG
European Convention on the Transfer of Proceedings in Criminal Matters of 1972	73	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=073&CM=7&DF=3/16/2009&CL=ENG
European Convention on the International Validity of Criminal Judgments of 1970	70	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=070&CM=7&DF=3/16/2009&CL=ENG
Convention on the Transfer of Sentenced Persons of 1983	112	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=112&CM=7&DF=3/16/2009&CL=ENG
Additional Protocol to the Convention on the Transfer of Sentenced Persons of 1983, of 1997	167	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=167&CM=7&DF=3/16/2009&CL=ENG
European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 1964	51	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=051&CM=7&DF=3/16/2009&CL=ENG
Additional Protocol to the European Convention on Information on Foreign Law of 1978	97	http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=097&CM=7&DF=3/16/2009&CL=ENG

***** Link to the English text, explanatory report, chart of signatures and ratifications and reservations. For the French version, click the "Français" tab on the screen.

Each link leads to a webpage with further links to:

- The updated chart of signatures and ratifications
- List of declarations, reservations and other communications
- Full text in Html format
- Full text in Word format
- A summary of the convention
- An explanatory report to the convention