CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

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Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ

MODULE III

UNIT 8

The 2000 Convention

5th Edition

2013

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Con el apoyo financiero del Programa de Justicia Penal de la Unión Europea
With the financial support from the Criminal Justice Programme of The European Union
Avec le soutien financier du Programme de Justice Pénale de l'Union Européenne

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1. Scope of application

1.1. Subjective and temporal scope

On 29 May 2000, the Council of the European Union approved a new convention on mutual assistance in criminal matters, in force since 23-8-05, after having reached the minimum number of ratifications necessary, and currently valid in all the Member States of the EU, with the exception of Greece, Ireland and Italy.

Status of ratification: Convention of 29 May 2000

Party	Signature (*)	Notification	Entry into force(*)	Decl/Res	Observations
Austria		04/04/2005	23/08/2005	D	
Belgium		25/05/2005	23/08/2005	D	
Bulgaria		08/11/2007	01/12/2007	D	Obs
Cyprus		03/11/2005	01/02/2006	D	Obs
Czech Republic		14/03/2006	12/06/2006	D	Obs
Germany		04/11/2005	02/02/2006	D	
Denmark		24/12/2002	23/08/2005	D	
Estonia		28/07/2004	23/08/2005	D	Obs
Spain		27/01/2003	23/08/2005	D	
France		10/05/2005	23/08/2005	D	
United Kingdom		22/09/2005	21/12/2005	D	
Greece					
Hungary		25/08/2005	23/11/2005	D	Obs
Italy					
Ireland					
Lithuania		28/05/2004	23/08/2005	D	Obs
Luxembourg				D	
Latvia		14/06/2004	23/08/2005	D	Obs
Malta		04/04/2008	03/07/2008	D	Obs
Netherlands		02/04/2004	23/08/2005	D	
Portugal		05/11/2001	23/08/2005	D	
Poland		28/07/2005	26/10/2005	D/R	Obs
Romania		08/11/2007	01/12/2007	D	Obs
Sweden		07/07/2005	05/10/2005	D	
Finland		27/02/2004	23/08/2005	D	

Slovenia	28/06/2005	26/09/2005	D	Obs
Slovakia	03/07/2006	01/10/2006	D	Obs

The convention also includes a Protocol dated 16 October 2001, comprising a single regulatory instrument, which is aimed essentially at extending the rules of the convention to investigations of bank accounts, and its provisions, as its explanatory report clarifies, are annexed and form an integral part of the 2000 Convention, so that the provisions of the latter apply to the Protocol and vice versa. Currently, and since 5-10-05, the Protocol is valid in the same States as the Convention, with the exception of Estonia, which has yet to notify the Council.

Status of ratification: Protocol of 16 October 2001

Party	Signature (*)	Notification	Entry into force(*)	Decl/Res	Observations
Austria		04/04/2005	05/10/2005	D	
Belgium		25/05/2005	05/10/2005	D	
Bulgaria		08/11/2007	01/12/2007		Obs
Cyprus		03/11/2005	01/02/2006		Obs
Czech Republic		14/03/2006	12/06/2006	D	Obs
Germany		04/11/2005	02/02/2006		
Denmark		01/03/2005	05/10/2005	D	
Estonia					
Spain		05/01/2005	05/10/2005	D	
France		10/05/2005	05/10/2005	D	
United Kingdom		15/03/2006	13/06/2006		
Greece					
Hungary		25/08/2005	23/11/2005		Obs
Italy					
Ireland					
Lithuania		28/05/2004	05/10/2005		Obs
Luxembourg					
Latvia		14/06/2004	05/10/2005	D	Obs
Malta		04/04/2008	03/07/2008		Obs
Netherlands		02/04/2004	05/10/2005	D	
Portugal		12/12/2006	12/03/2007		

Poland	28/07/2005	26/10/2005		Obs
Romania	08/11/2007	01/12/2007	D	Obs
Sweden	07/07/2005	05/10/2005	D	
Finland	21/02/2005	05/10/2005	D	
Slovenia	28/06/2005	05/10/2005		Obs
Slovakia	03/07/2006	01/10/2006		Obs

The Convention will enter into force in Gibraltar as soon as the scope of the 1959 Convention is extended to the territory. Once the 1959 Convention is extended to include the territories of the Isle of Man and Guernsey, with the objection of Ireland, the United Kingdom must notify the President of the Council in writing of the moment as of which it wishes to apply the 2000 Convention to said territories and the Council will approve the measure by unanimity. Once the 1959 Convention is extended to other Channel Islands, the same procedure as for the application of the 2000 Convention must be followed.

The 2000 Convention is valid in all the States of the EU except:

- Greece
- Ireland
- Italy

Like any international public law instrument on classic intergovernmental cooperation, and unlike what happens with the Schengen *acquis*, "communitised" by the Protocol annexed to the Treaty of Amsterdam and with the Framework Decisions, whose transposition is obligatory, the Convention is subject to adoption by the states, and this possibility is limited to the members of the European Union, unlike certain conventions entered into in the context of the Council of Europe, such as the 1959 Convention, which is open to signing by third states that do not form part of the structure of the Council of Europe, and as such is broader than the European Union[1]. For this reason, the Convention only entered into force in the states that joined the EU, by accession, once they had deposited the corresponding instrument and ninety days

[1] This is the case of Israel, which ratified the 1959 Convention on the 27/9/67, and Chile and Korea, which ratified on the 30/05/2011 and the 29/09/2011, respectively.

had passed since said deposit. Therefore, as we have also seen, the Convention is not in force in all the Member States of the EU. As such, finally, the Convention cannot be signed by third states, with the exception of the special status acknowledged in the case of Iceland and Norway, regarding certain provisions of the Convention and its Protocol, as States associated with the execution, application and development of the Schengen Agreement (the "Association Agreement"), insofar as the 2000 is complementary to the latter. In addition to the limitations derived from its legal nature, after the entry into force of the Lisbon Treaty of 1 December 2009, we have the expectations generated by the inclusion of the subject matter it deals with, judicial cooperation in criminal matters, in the ordinary legislative procedure, whose regulatory instruments are regulations, directives, decisions, recommendations and opinions.

1.2. Objective scope

Due, among other things, to the fact that it complements other instruments, a point that is developed in the following section, the 2000 Convention was not born of a desire to provide an exhaustive regulation of mutual assistance between Member States, as it started out from "*solid foundations which had largely demonstrated their effectiveness*"[2]. Its **aims**, according to the Explanatory Report, are:

- To improve judicial cooperation, so that it is quicker, more flexible and more effective, promoting the direct transfer of requests, the use of email for the service and transmission of documents or the application of the law of the requesting state in execution.
- To modernise mutual assistance, adapting it to:
  - Political and social developments (removal of border controls, globalisation). In this regard, special methods of assistance such as controlled deliveries, joint investigation teams and covert investigations are regulated.
  - Technological development, an aim that is behind the broad regulation of the intervention of communications and hearings via videoconference.

The **structure** of the Convention is coherent with this declaration of intent:

- Title I: General provisions, regarding relations with other conventions, points on its scope of application, sending and service of procedural documents,

[2] See, on Level 3, the Explanatory Report of the Convention approved by the Council on 30-11-00, OJ C 379, 29-XII-2002, page 7.

transmission of requests for assistance and the spontaneous exchange of information (Articles 1 to 7).

- Title II: Requests for certain specific forms of mutual assistance, such as the restitution of objects, the temporary transfer of persons held in custody for the purposes of investigation, controlled deliveries, joint investigation teams, covert investigations or videoconference, as a special means of hearing witnesses and experts (Articles 8 to 16).
- Title III: Intervention of telecommunications (Articles 17 to 22).
- Title IV: Personal data protection (Article 23).
- Final provisions, regarding statements, reservations, territorial application, entry into force, accession of new Member States, entry into force for Iceland and Norway and appointment of the Secretary General of the Council of the European Union as depositary (Articles 24 to 30).

It is precisely due to its supplementary nature, and as can be seen from a first reading of its contents, that basic questions in relation to mutual assistance are not specifically regulated, such as the statements of accused persons, witnesses or experts (aside from the option of hearing via videoconference or by telephone), the minimum content or language of the request for assistance. For this reason, the Convention cannot by itself be used as the sole basis for a request for assistance. On the other hand, the majority of the forms of specific assistance developed in the Convention were already envisaged in other instruments or had been provided, with greater or lesser frequency and ease, under the general declarations of affording "the widest measure of mutual assistance[3]" that the multilateral or bilateral treaties in this field tend to contain.

The Convention essentially deals with the **notification and transmission of judicial acts and documents** and **mutual assistance in the strict sense of the term** (acts of investigation and obtaining evidence). It leaves aside the surrender and transfer of the subjects of proceedings, with the exception of the transfer of persons in custody for the purposes of investigation and in relation to other forms of judicial cooperation which are not expressly regulated either, such as those regarding actual interim measures or the enforcement of judgments; the Convention is only applicable, for example, in relation to the channels for transmitting requests, insofar as it is

[3] See, on level 3, Article 1.1 of the European Convention on Mutual Assistance in criminal matters of 20 April 1959.

complementary to other instruments.

Thus, this is the case regarding **actual interim measures**, insofar as they are regulated in the 1959 Convention, in which they are subject to a generous scope of reservation by the States, taken advantage of by Germany, Spain and Portugal amongst others. The States could reserve the possibility of subjecting the request for search and seizure of property to one or more of the following conditions[4]:

a) Dual criminality.

b) Offence eligible for extradition in the requested state.

c) Enforcement compatible with the law of the requested state.

Under Schengen, there are similar, albeit not identical, possibilities of reservation, leaving assistance subject to the conditions of:

1- A minimum penalty of six months of deprivation of liberty in both states or a similar sanction in one of them, provided that in the other state it represents an offence punished by the administrative authorities whose decision can be appealed before the corresponding jurisdiction, particularly in criminal matters.

2- Enforcement compatible with the law of the requested state.

Therefore, under the scope of application of the Convention implementing the Schengen Agreement, it will be obligatory to comply with the letters rogatory requesting seizure, if they originate from an offence punished by a term of over six months in the requested party, even if in the requesting state it is merely a case of an *Ordnungswidrigkeit* (an administrative infringement whose appeal is heard by a criminal judge).

However, in this area there is already an instrument on mutual recognition, Council Framework Decision 2003/577/JHA, of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, which, as the term for transposition has concluded, represents a uniform legal system (at least as far as its intentions are concerned) and a higher level of cooperation, which will be dealt with in Subject 11.

As for the stage of **enforcement of the judgment**, despite the fact that the 2000 Convention fails to mention the matter and the 1959 Convention excluded arrests and the enforcement of sentences from its scope of application, as repeated in its Second Protocol, the fact is that there is not an absolute veto on cooperation during

[4] For example, countries such as Germany and Portugal require conditions (a) and (c); Poland and Spain require all three; Romania reserved the right to require (b) and (c) and Hungary only the last of the three.

this phase, nor on the complementary application of the 2000 Convention, except in relation to the actual enforcement of sentences and measures; cooperation is permitted, as the Additional Protocol of 1978 states, in relation to:

a) The service of documents related to the enforcement of a sentence, the recovery of a fine or the payment of procedural expenses.
b) The alternative measures to the suspension of the pronouncement of a sentence or its enforcement, conditional release, deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement.

Meanwhile, the Convention implementing the Schengen Agreement (Article 49), after citing the above, adds the possibility of its application in other situations:

c) proceedings for compensation in respect of unjustified prosecution or conviction.
d) proceedings in non-contentious matters.
e) civil proceedings joined to criminal proceedings, as long as the criminal court has not yet given a final ruling in the criminal proceedings[5].

In what seems to be an extension of the objective scope of other treaties, the 2000 Convention states that mutual assistance will also be provided:

- In **proceedings brought by administrative authorities** in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters[6] (Article 3.1). This provision was already contained, with hardly any substantive variations, in Article 49 (a) of the Convention implementing the Schengen Agreement, a precept which is derogated by the 2000 Convention.
- In connection with criminal proceedings and administrative proceedings as

[5] The enforcement of civil liability derived from the crime is subject, in principle, to Council Regulation 44/2001, dated 22 December 2000, belonging to the First Pillar, and to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, amended by Regulation 1496/2002, of 21 August 2002.

[6] As set out in the Explanatory Report, the inclusion of the expression “in particular” at the end of said section clarifies that it is not necessary for the jurisdictional body hearing the case to deal exclusively with criminal matters.

referred to in the foregoing point which relate to offences or infringements for which a **legal person** may be held liable in the requesting Member State**,** even if the requested state does not envisage this possibility.

- In criminal proceedings and in the administrative proceedings referred to in the first point, regarding **fiscal offences**, pursuant to Article 8 of its Protocol.

The 2000 Convention is also applicable to:

- Certain administrative proceedings;
- Criminal and administrative proceedings brought against legal persons;
- Fiscal offences.

1.3. Supplementary nature in relation to other conventions

The Convention's vocation is an expressly supplementary one in relation to earlier European instruments in the area of cooperation and contains hardly any rules derogating other provisions. The relationship between the 2000 Convention and its Protocol is not of a supplementary nature, but one of integration, as indicated earlier, and for that reason the points made in this section are applicable to both, as if they were a single instrument.

The texts mentioned in Article 1 of the Convention as "supplemented" norms are the following:

- the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and its Additional Protocol of 17 March 1978;
- the provisions on mutual assistance in criminal matters of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders; and
- Chapter 2 of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, as amended by the Protocol of 11 May 1974 in the context of relations between the Member States of the Benelux Economic Union.

In the event of conflict with the above conventions, the 2000 Convention will prevail, notwithstanding the application of more favourable rules of multilateral or bilateral

conventions entered into between the Member States.

If we leave the relationship with the Benelux Treaty to one side, as it is of less interest to the participants on the course, we must now look at those between the Convention we are studying and the 1959 Convention and also the Convention implementing the Schengen Agreement, as well as other multilateral or bilateral treaties, which can offer greater levels of cooperation.

The 2000 Convention includes its Protocol and supplements the 1959 Convention and the Convention implementing the Schengen Agreement of 1990.

1.3.1. European Convention on Mutual Assistance in Criminal Matters of 20 April 1959

By express admission, the 2000 Convention does not derogate any of the provisions of the 1959 Convention, but supplements it, meaning that:

- It has supplementary validity in relation to matters not envisaged in the new Convention:
    - In general matters:
        - Minimum content of requests for assistance (Article 14 of the 1959 Convention):
            - Requesting authority, with all the data that facilitate complete identification and contact.
            - Object or motive of the request.
            - Identity, nationality and, if applicable, address of the person to which the request refers.
            - Accusation.
            - Summary of the facts.
        - Language of the requests: Article 16 of the 1959 Convention does not require a translation of the request or of the annexed documents, although it is a provision that is subject to reservation, and most of the contracting states have taken advantage of this option.
        - Expenses of execution (Articles 10 and 20).
    - The actual forms of assistance are not expressly regulated, such as statements given by accused persons, witnesses and experts in person.
- It is a point of reference for interpreting the rules of the 2000 Convention.

- It is applicable to requests for assistance sent to states to which the 2000 Convention does not apply:
    - Member States of the European Union in which the 2000 Convention is not in force.
    - European states that do not belong to the European Union.
    - Israel, Chile or Korea.

The supplementary nature and status as interpretative element apply to the 1959 Convention, its Additional Protocol of 1978 and the Second Protocol to the 1959 Convention, dated 8 November 2001, in force since 1 February 2004. As a result, the reservations to the 1959 Convention and its Protocols, in relation to all matters not expressly regulated in the 2000 Convention, remain valid for all states that have made them and that are party to one or the other convention.

1.3.2. Convention implementing the Schengen Agreement of 19 June 1990

Article 1 c) of the 2000 Convention states that it is supplementary in relation to **"the provisions on mutual assistance in criminal matters**" of the Convention of 19 June 1990, implementing the Schengen Agreement of 14 June 1985 regarding the gradual abolition of border checks at common borders (CASA). Reference should not be limited to Articles 48 to 53 of the Convention on the Application, which comprise Chapter II, under the title "Mutual assistance in criminal matters", but to all those rules that materially affect this kind of assistance.

As has already been pointed out when examining the objective scope of application of the 2000 Convention, the Convention implementing the Schengen Agreement introduces **supplementary rules** to the earlier instruments, such as the 1959 Convention, which:

- Widen the sphere of assistance to:
    - *Ordnungswidrigkeiten*.
    - proceedings for compensation in respect of unjustified prosecution or conviction.
    - amnesty or pardon proceedings.
    - civil proceedings joined to criminal proceedings.
    - notifications in relation to enforcement.
    - alternatives to the deprivation of liberty[7].

[7] Some of these "widening" measures had, however, already been assumed by the Additional Protocol to the 1959 Convention in 1978.

- Facilitate assistance with formulas such as:
    - The possibility of notifications by post.
    - The option of sending letters rogatory directly from one judicial authority to another[8].
    - Limitation of reservations regarding assistance for the search or seizure of property.

Moreover, the CASA widely regulates the principle of *non bis in idem* in Chapter III, the interpretation of which by the Court of Justice has generated important doctrine in the area, and introduces specific rules regarding extradition and the transfer of the enforcement of criminal judgments.

The Convention implementing the Schengen Agreement was, as we mentioned earlier, "communitised" by a Protocol to the Treaty of Amsterdam, insofar as it comprised a selection of elements made by the Council identifying the elements of the text belonging to the ***acquis communitaire*** that the states acceding subsequently or in the future must include in their domestic legislation.

The **United Kingdom and Ireland** constitute a special case. In accordance with the provisions contained in the above-mentioned Protocol, the Council approved the request by the United Kingdom to participate in certain aspects of cooperation based on Schengen (police and judicial cooperation in criminal matters, the fight on drug-trafficking and the information system (SIS)). As for Ireland, it participates in all aspects of the Schengen *acquis*, except for those corresponding to border controls, surveillance and cross-border pursuit. Meanwhile, **Iceland and Norway** acceded to Schengen on 19 December 1996 and by virtue of an Agreement dated 18 May 1999, they participate in the drafting of new legal instruments related to the development of the Schengen *acquis*, although formally they are only adopted by the Member States. **Denmark**, although a signatory of Schengen, maintains a special status, as it will be able to choose, in the context of the EU, whether or not to apply any new Decision taken on the basis of its *acquis* in relation to cooperation in both civil and criminal matters. Finally, there are association agreements regarding the Schengen Agreement between the EU and **Switzerland and Liechtenstein,** which are not, and cannot be unless they join the EU, signatories of the 2000 Convention and in relation to which, unlike the case of Iceland and Norway, the Convention contains no provisions.

This integration into the *acquis communitaire* required a clarification of the

[8] A formula that was only envisaged in the 1959 Convention for urgent cases (Article 15.2).

relations between the two conventions, as Article 2.2 of the 2000 Convention included an **express derogation of certain provisions** of the Convention implementing the Schengen Agreement, related to:

- Application to certain administrative proceedings (Article 49 a) CASA), insofar as it is the subject of a new wording in Article 3.1 of the 2000 Convention.
- Service and transmission of documents (Article 52 CASA), subject to new regulation, in particular in relation to its obligatory nature, in Article 5 of the 2000 Convention.
- Transmission of requests for mutual assistance (Article 53 CASA), now regulated in Article 6 of the 2000 Convention.
- Controlled deliveries (Article 73 CASA), subject to broader regulation in Article 12 of the 2000 Convention.

1.3.3. Other conventions

In addition to the relations of a supplementary nature expressly regulated and as set out in Article 1.2, the Convention will not affect the application of:

- More favourable provisions of bilateral or multilateral agreements between Member States.
- Provisions regarding mutual assistance in criminal matters established on the basis of uniform legislation, such as in the case of the seizure of property or information on criminal records.
- A special regime that establishes reciprocal application of measures of mutual assistance in their respective territories.

2. International judicial assistance in general

2.1. Law applicable to execution

Article 4 of the Convention envisages the **application of the law of the requesting state** by the requested state, at the request of the former, in relation to formalities and procedures, unless the Convention states otherwise and provided such formalities and procedures are not contrary to the basic principles of the law of the requested Member State.

This provision **is not precisely novel**: the 1959 Convention already contained the possibility to request that witnesses or experts give evidence under oath and is frequent in the more modern bilateral conventions.

The **requirements** for the application of the *forum regit actum* rule are:

- Express request from the requesting state.
- Statement of the formalities and procedures whose observance is requested of the requested state, with the possibility to request clarification if the information supplied is insufficient or confusing.
- Compatibility with the provisions of the Convention itself, meaning that Article 4 will not be applicable when the Convention expressly states that the law of the requested state will apply to the request.
- Compatibility with the basic principles of the law of the requested state. This is a key requirement on which the extension of the provisions of Article 4 depends. The following clarifications should be made on this point:
    - As the Explanatory Report reveals, declarations made pursuant to Article 5 of the 1959 Convention (reservations regarding the requests for the search and seizure of property, to which we referred in section 1.2) are not affected by Article 4 of the 2000 Convention, although they are affected by the Convention implementing the Schengen Agreement.
    - The term “formalities and procedures” should be interpreted in a broad sense, including, for example, the possibility of assistance of parties or judicial authorities in the requested state, already contemplated in Article 4 of the 1959 Convention and in many bilateral conventions.
    - At the same time, the requesting authority should make an effort to refine matters, avoiding requests for the observance of non-essential formalities with a view to ensuring the effectiveness of the process sought in the state of origin.
    - Meanwhile, in judging compatibility, the executing judicial authority will:
        - Observe the principle of proportionality referred to in the Convention itself in the prior Declaration;
        - Avoid confusion between incompatibility with the basic principles of law and mere differences in ordinary legislation;
        - Seek, while waiting for pronouncements in this regard from the ECJ, to identify such basic principles with those that govern due process, using Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, referred to by Article 6 of the Treaty on European Union, as a point of reference;
        - Inform the authority of the requesting state without delay in the

event that a specific incompatibility is finally discovered, in what terms and pursuant to what procedures it will be possible to execute the request for assistance (Article 4.3).

The requesting authority may ask that execution of the request observe:

- the *forum regit actum* principle
- certain deadlines

As a complement to the provision implementing the law of the requesting state, albeit with a more limited purpose, Article 4 envisages the possibility for the latter to ask the requested authority to observe the **procedural deadlines** that it establishes, explaining the reasons for said deadlines. In any event, the requested Member State undertakes to execute the request for assistance as soon as possible, taking into account the deadlines established "to the extent possible".

If it is envisaged that the request will not be complied with by the deadline set and the reasons set out by the requesting authority specifically indicate that any delay will represent a serious impediment for its proceedings, the requested authority will inform without delay of the time it considers necessary to execute the request and, on its part and also without delay, the requesting authority will state whether it wishes to maintain its request regardless, and the two parties may subsequently agree on how to proceed with the request.

The above provisions, contained in Articles 3 and 4 show:

- The validity of the principle of "negotiation between authorities" in the scope of application of the 2000 Convention.
- The importance of including all contact details of the requesting state (postal address, email, telephone, fax) in requests for assistance.
- The need to observe the "good practice" of sending a "cover note" or acknowledgement of receipt by the requesting authority to facilitate the return of the corresponding part of the form by the requested authority.
- The advisability of using the resources offered by the European Judicial Network and its respective national support structures.

2.2. Sending and service of procedural documents

Following the precedent established in the CASA (Article 52, derogated by the new Convention), which is now mandatory rather than optional, Article 5 of the 2000 Convention sets use of post as a general rule in order to communicate with individuals

in the territory of another Member State (even if not resident there), for the purposes of the service of procedural documents (including summons and judicial decisions) addressed to them.

The mediation of the competent authorities of the requested state is reserved for exceptional cases such as:

- the address of the person for whom the document is intended is unknown or uncertain;
- the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post,
- it has not been possible to serve the document by post; or
- the requesting Member State has justified reasons for considering that dispatch by post will be ineffective or is inappropriate.

In these exceptional cases the channels for transmission examined in the following section (Article 6) will be used. In order to avoid the failure of the service or sending by post, the requesting authority will provide all information that may be relevant in collaborating to locate the addressee.

As for the language, it is only necessary to translate the document, or at least the most important passages, into the language or one of the languages of the Member State in whose territory the addressee is situated or the only one that the sender authority knows the latter understands, if there are reasons to believe that the addressee does not understand the language in which the document is drafted.

The service and sending of documents,
except in exceptional cases, will be made by post,
sent directly to the addressee,
with the essential parts translated into a language that he/she understands.

In these cases, it is not necessary to draft a formal request for mutual assistance, it being sufficient to simply attach a note to the procedural document indicating that the addressee may ask the authority that issued the document or other authorities of that Member State for information on his/her rights and obligations regarding the document, with the same translation requirements as those established for the documents themselves, thus contributing to guaranteeing the right to defence and effective judicial protection. Even if it is not specified, the note will indicate the consequences of a failure

to comply with the provisions of the attached document pursuant to the legislation of the requesting state, the circumstances in which the addressee may be assisted by a lawyer, the rights to indemnification for travel and lodging, etc.

The Convention finally declares that the provisions of the 1959 Convention and the Benelux Treaty are applicable in relation to the prohibition of demands in the summoning of witnesses and experts and the indemnifications and immunities applicable to them.

2.3. Methods of transmission

2.3.1. General rule

Among the many novelties introduced in the 2000 Convention, some of which were already applicable in urgent cases under the 1959 Convention and the Convention implementing the Schengen Agreement, which it supplements, it is worth highlighting the imposition of direct communication between judicial authorities as a general rule in requests for mutual assistance, including the transmission of complaints under Article 21 of the 1959 Convention and spontaneous exchanges of information regulated in Article 7 of the 2000 Convention.

The request will be transmitted and responded to in writing or by any other means that leaves written record in such a way that the recipient state can establish its authenticity, i.e. fax, email or other means of telecommunication, although this does not mean that verbal requests are ruled out, particularly in urgent cases and where immediately confirmed in writing[9].

In drafting the request, as the Convention is silent in this regard, the specifications of Article 14 of the 1959 Convention will apply, as mentioned earlier, with the added requirements derived from the 2000 Convention, when appropriate (request for the law of the requesting state to be observed, establishing deadlines). In order to help with the drafting, the EJN has designed the “Compendium Wizard” tool.

The reference to “judicial authorities” goes back to what the Conventions of 1959 and the Benelux Treaty considered as such, although direct communication between a judicial or authority of one state and the competent police or customs authority of another state is possible in requests regarding controlled deliveries, joint investigation teams and covert investigations, or between a judicial or central authority of a state and the competent administrative authority in another state, in the case of cooperation

[9] The suggestion of the acceptance of verbal requests comes from the Explanatory Report of the Convention itself.

related to administrative procedures; although the possibility of "mixed" direct communication between the a judicial or central authority and customs, police or administrative authorities may be subject to reservations, in which the state in question specifies which authorities will be competent in that case.

In urgent cases, transmission may be via INTERPOL or any competent body according to the provisions adopted by virtue of the Treaty on European Union, such as Europol.

In order to ascertain what judicial authority is responsible in the requested state, the Judicial Atlas can be consulted, at present only in French and English, on the EJN's website.

The general rule for requests for assistance
is direct transmission
between the corresponding judicial authorities.

2.3.2. Alternatives

The above general direct communication rule is not incompatible with the option of sending requests for assistance or replies between central authorities or from a judicial authority to a central authority. This provision was maintained due to the advisability, in certain circumstances, of processing by a central authority, for example in complex cases or in those where different authorities in the requested state are involved[10].

2.3.3. Exceptions

Together with the general rule and optional alternative set out in the foregoing sections, the Convention maintains exceptions in which the communication between central authorities is imposed or where the right of certain states to make a reservation to the general rule on direct communication is recognised.

- Temporary transfer or transit of detained persons for the purposes of investigation: requests with this object will be processed via the central authorities of the Member States.
- Communications regarding information on judicial sentences, not regulated in the 2000 Convention, but in the 1959 Convention and the Benelux Treaty:

[10] Cases in which the appropriateness of requesting the assistance of the contact points of the EJN or Eurojust should also be assessed.

requests with this object will be processed via the central authorities of the Member States. The justification, as in the earlier case, is in the object of the assistance itself, for which the Ministries of Justice of the different states tend to be responsible. As an exception to the exception, direct communication between the corresponding authorities is permitted when the object is a request for copies of sentences and derived measures that affect nationals of the other party and which are contained in the criminal record[11].

- Interception of telecommunications: in this regard, a "competent authority" for processing or executing a request of this nature, is the judicial authority or, when the judicial authorities are not competent in this sphere of assistance, an equivalent competent authority, acting as a central authority and appointed by the state when making the notification to the Secretary General of the Council.
- The Convention acknowledges the right of the United Kingdom and Ireland to declare that requests for assistance or spontaneous exchanges of information will be sent to their respective central authorities, with the necessary restriction of the scope of this declaration when the provisions of the CASA enter into force for these states. Any Member State may apply the principle of reciprocity in relation to such declarations. The United Kingdom made the envisaged declaration when making the corresponding notification.

3. Specific forms of judicial assistance

3.1. Restitution of objects

The requested state, notwithstanding the *bona fide* rights of third parties, may place objects obtained by criminal means at the disposal of the requesting state for the purposes of restitution to their rightful owners. The requested state is not obliged to process this request. In fact, it may refuse to do so in the event the seized property may be used as evidence in proceedings before the authorities of the requested state and, naturally, the disposal will only be applicable in the event there is no doubt whatsoever regarding who the rightful owner is.

The requested state may waive the return of objects, before or after they have been handed over, if this facilitates restitution to the rightful owner. If the waiver is prior to handover, the requested state will not invoke security rights or other rights of recourse by virtue of fiscal or customs provisions in relation to said objects. Nevertheless, the

[11] In this regard, however, we should consult the section regarding the "Criminal record" in Subject 9.

waiver will be notwithstanding the right of the requested state to claim rights or duties from the rightful owner.

In all other regards, the request for handover will be governed by the general rules applicable to any request for assistance.

3.2. Temporary transfer of persons held in custody for purposes of investigation

Article 9 of the 2000 Convention supplements Article 11 of the 1959 Convention, (which authorised the transfer of any persons held in custody in the requested state and whose appearance in person as a witness or for a confrontation had been requested by the requesting state), authorising the Member States to establish temporary transfer agreements for a person held in custody to another Member State, in connection with an investigation underway in the latter. The agreement should establish the means in which the transfer is being carried out and the term for "return" of the transferred person.

The states may request the consent of the person sought, in general or in certain circumstances, declaring as much in the notification to the Council, and specifying the circumstances, as the case may be. In such cases, the requested state will be given an original or copy of the declaration of the person in that regard[12].

The time held in custody in the requested state will be deducted from the period of detention the person concerned is or will be obliged to undergo in the territory of the requesting State.

The transfer of detained persons for the purposes of investigation is different to the case of extradition and different to the transfer of sentenced persons in the strict sense of the term.

[12] The provisions of the 1959 Convention are applicable to the transfer in transit, deprivation of liberty in the requesting state and in the transit state as a general rule, except for consent of the requested state and transfer expenses (Articles 11. 2 and 3 and 20).

3.3. Hearing of witnesses or experts by videoconference or telephone conference

One major new development is the regulation of videoconferences, which provides regulatory cover for this area which over the course of the last decade has gradually been incorporated into internal European legislations. In addition to specific uses, such as the protection of victims who are minors, this medium has a clear potential in terms of the application and cost reduction of national and international legal assistance, without substantially affecting safeguards and without detracting from basic principles such as procedural immediacy.

The Convention uses the open clause of authorising this system "**where it is not desirable or possible for the person to be heard to appear in person**" in the territory of the requested state. The clause is clarified in the Council's Explanatory Report, according to which "not desirable" could for example apply in cases where the witness is very young, very old, or in bad health; "not possible" could for instance cover cases where the witness would be exposed to serious danger by appearing in the requesting Member State. The Convention establishes that the requested state must be notified of the reason why it is not desirable or possible for the witness or expert to be heard in person, although the Explanatory Report recognises that "*it is entirely up to [the requesting state] to assess the relevant circumstances"*.

In principle, the system is only applicable to **witnesses and experts**, although this option can also be applied to hearings of **accused persons** if the Member States so agree. In this case, the decision and means of execution will be subject to the terms of the agreement, pursuant to their domestic law and the corresponding international instruments, including the ECHR. Unlike in the case of witnesses and experts, it is necessary to have the consent of the accused person. Any Member State may declare that it does not intend to apply this provision, although it can withdraw this declaration at any time. Countries such as Denmark, France, the Netherlands, Poland and the United Kingdom object to hearings of accused persons by videoconference and have made the corresponding declaration. Hungary requires the written consent of the accused person.

Hearing by international videoconference of witnesses, experts and, exceptionally, accused persons is possible.
Only the accused persons must consent to the use of this option.

Developing the Convention, Article 11 of the Council Framework Decision of 15 March 2001, on the standing of victims in criminal proceedings, recommends "*to have recourse as far as possible to the provisions on video conferencing and telephone conference […] for the purpose of hearing victims resident abroad*" as envisaged in the 2000 Convention.

A witness or expert that fails to appear on the date and at the time and place set for the videoconference may be sanctioned pursuant to the legislation of the requested state, in the same terms that would apply in the event the hearing had been arranged in domestic proceedings. The exemption from declaring at a hearing must be envisaged in the legislation of both states in question. The consequences of the refusal to declare and false testimony will be governed by the law of the requested state; should difficulties arise in this regard, the requested state will notify the requesting state so that it can take the necessary steps.

The system of hearing by videoconference is possible **even if the legislation of the requested state does not envisage it**, provided it is not contrary to the fundamental principles of national law. Even if the state does not have the **technical means** necessary to establish the connection, this may be remedied by the requesting state. On occasion, it may be useful to contact the Embassy or use alternative technical systems, such as a webcam.

The use of videoconference pursuant to the provisions of the Convention presents the following **peculiarities**:

- The requested state is responsible for summoning the person sought.
- The judicial authority of the requested state must be present during the hearing and identify the person making the declaration, as well as ensure his/her rights are respected, in particular:
    - Providing an interpreter if necessary.
    - Adopting protective measures, in accordance with the requesting authorities.
    - Suspending the hearing when it considers the fundamental rights of internal law are being infringed, and resuming it, for example, when the person declaring has been provided with technical defence.
    - Taking minutes of the procedure, which will not include the actual content of the declaration, which is the responsibility of the requesting state, although it will record the date and venue of the hearing, the identity of the person declaring and the identity of any other persons

participating as well as the capacity in which they do so, the giving of an oath or promise, if applicable, and the technical conditions under which the hearing took place.

In view of the significant **costs** that may be accrued, the requesting Member State will reimburse the requested Member State for the expenses caused by holding the videoconference. Nevertheless, the requested Member State may waive all or part of said refund.

In the case of “routine” declarations, such as, for example, those held to offer civil action to the injured party, **hearings by telephone conference** may be used with the intervention of the judicial authorities of both states and with the express consent of the witness or expert, which is different from direct telephone contact with the individual without the intervention of the judicial authorities of the state in which the expert or witness is located, for which consulates are often used.

The Second Additional Protocol to the 1959 Convention, dated 8 November 2001, has extended some of the provisions of the 2000 Convention to the scope of the Council of Europe (and the other countries to whom signing of the Protocol is open), including hearings by videoconference and telephone conference.

3.4. Controlled deliveries

The scope of application of this means of investigation, set out in Article 12 of the Convention, is broader than in Article 73 of the Convention implementing the Schengen Agreement, which also dealt with controlled deliveries, as it is not limited to controlled deliveries in the case of crimes related to drug trafficking.

The Convention does not specifically define the term "controlled delivery", which should be interpreted pursuant to national laws and practices. This provision will apply, for example, if the illicit consignment, with the consent of the Member States concerned, has been intercepted and allowed to continue with the initial contents intact or removed or replaced in whole or in part.

Each Member State will be obliged to adopt measures to ensure that, at the request of another Member State, it can allow controlled deliveries to take place in its territory in the context of criminal investigations regarding offences that may give rise to extradition. The concept of what constitutes an offence of this kind in the context of the European Union was dealt with in the Convention on extradition between Member States of the European Union of 1996. According to Article 2 of said Convention, extradition is possible for those offences punished by the law of the requesting Member

State with a sentence involving deprivation of liberty or a detention order with deprivation of liberty whose maximum duration is at least twelve months and by the law of the requested Member State with deprivation of liberty or a detention order with deprivation of liberty whose maximum term is at least six months.

The decision on controlled deliveries taking place on its territory will correspond to the requested state. The decisions will be adopted taking into account each specific case and within the context of the corresponding rules in the requested Member State.

Although the practical modalities that must be adopted in order to carry out controlled deliveries require close consultation and cooperation between the corresponding bodies and authorities in the Member States in question, section 3 clearly states, as an exception to section 1 of Article 4, that said deliveries must be carried out pursuant to the procedures in force in the requested Member State. Moreover, it is for the competent authorities of said Member State to carry out any action and direct any operations that are necessary.

3.5. Joint investigation teams

Experience has shown that when a state is investigating criminal offences of a cross-border nature, in particular related to organised crime, the investigation can benefit from the participation of the police forces and other competent personnel of another Member State in which there are links to the criminal offences in question. Article 30 of the Treaty on European Union specifically acknowledges the special importance of **operational cooperation between law enforcement services.** One of the obstacles that arose in relation to the joint teams was the lack of a specific framework in which said teams could be created and become operational. In order to overcome this problem, it was decided that the Convention would deal with the corresponding subject matter in this sphere. In this regard, it sets the conditions for creating the joint teams and specifies how they should perform their tasks.

In order to create a team of this kind, there must be an **agreement between the competent authorities** of the Member States in question. No limit has been set for the number of Member States that can participate. According to the Framework Decision of 28 February 2002, amended by Council Decision 2009/426/JHA, Eurojust may ask the competent authorities in the Member States to create a joint investigation team, which the corresponding national members of Eurojust can join.

Based on the agreement indicated above, the investigation team will be given a **specific task** consisting of carrying out criminal investigations in one or more of the

participant Member States. Meanwhile, the joint teams will act for a **limited period** that may be extended with the consent of all parties involved. When an agreement is reached to create a team, it will usually establish a particular Member State in which the main part of the investigation will supposedly take place. The Member States will also take into account the matter of costs, including the daily allowances for the members of the team.

The agreement adopted will indicate the **persons who will form part of each team**. Although it is highly possible that the majority of such persons will come from the police forces, they will on many occasions include public prosecutors and judges or even other persons. The judges can intervene in their capacity as such, exercising jurisdictional functions, in which case the requirements for the legal appointment of the judge or advisors or experts will have to be observed.

The Convention allows persons who are not representatives of the competent authorities to participate in the team's activities. The idea that guided the drafters was that a joint team can receive additional assistance and technical knowledge from competent persons from other states and international organisations. In this context it should be pointed out that specific reference is made to the officials of bodies created pursuant to the Treaty on European Union. This could mean a body such as Europol, Eurojust[13], or OLAF, in their capacity as "persons other than representatives of the competent authorities of the Member States setting up the joint investigation team". Persons authorised to participate in the investigation team in this way will act mainly in a supporting or advisory capacity, and they will not be allowed to exercise the functions attributed to the members of the team or seconded members or use the information referred to in section 10 of Article 13, unless authorised by the corresponding agreement between the Member States in question.

The joint investigation team will act under the **leadership** of a representative of the competent authority participating in the criminal investigation in the Member State where the team is acting. This means, in particular, that the leadership of the team will change, for the specific purposes in question, if the investigation is carried out in more than one Member State. The leader of the team will act within the limits of his or her competence under national law. Moreover, the team will fully respect the law of the

[13] Council Decision of the 28/02/02, creating Eurojust, envisages, in Articles 6 and 7, that this body, either via a national member or acting as a collective, may request the creation of a team or participation in a team, as a competent national authority or on behalf of Eurojust (art. 9.7 of Decision 009 /426/JHA).

Member State of operation. The leader of the team will occasionally give instructions to the other members of the team, who will follow them taking into account the conditions established when the team in question was set up.

The actions of the members of the team may take different forms:

- **Presence in investigative measures**: The members of a joint team who are not acting in their own Member State (members seconded to the team) may be present when investigative measures are taken in the Member State of operation, and the secrecy of investigations will not be invoked against them, in principle. Nevertheless, for specific reasons and pursuant to the legislation of the Member State in which the team works, the leader of the team may decide otherwise. In this context what exactly is meant by "specific reasons" has not been defined, although it could be considered to include situations in which statements are taken in relation to sexual offences, particularly when the victims are children, for example. Nevertheless, the decisions for excluding the presence of the members seconded to the team will not be based on the mere fact that the member is a foreigner. In certain cases decisions of this kind may be taken for operational reasons.
- **Performance of investigations**: Seconded members will be allowed to perform investigations in the Member State of operation, pursuant to the legislation of said Member State. This will also be done following the instructions of the leader of the team and with the approval of the competent authorities in the Member State of operation and the Member State that has sent those persons. This approval must be included in the agreement establishing the team, although it may also be granted at a later stage. It may be given in general terms or refer to specific cases or circumstances.
- **Request for his/her own national authorities to take measures**: One of the most innovative aspects refers to the possibility for seconded members to ask their own national members to adopt the measures requested by the team. In said case, it will not be necessary for the Member State of operation to present a request for assistance, and the corresponding measures will be considered in the Member State in question in the same conditions as if the request had been made in the context of a domestic investigation.
- **Request for assistance from a Member State not involved in establishing the team**: This covers the situation in which the help of a Member State that did not participate in the creation of the team or that of a third state is required. In

this case, the assistance will be requested by the Member State of operation, pursuant to the usual rules.

The Convention specially regulates the rules governing **information shared** by the members of the team. Paragraph 9 of Article 13 facilitates the work of teams by opening the way for a seconded member to share the information available in his/her Member State with the joint investigation team, where it is relevant to the investigation being carried out by the team in question. Nevertheless, this will only be possible when it can be done pursuant to the national law of the state that sent said member and within the limits of his/her competence.

Meanwhile, paragraph 10 refers to the conditions for use of the information obtained legally by a member of a joint team or by a seconded member when the information in question is not otherwise accessible to the competent authorities of the Member States in question. In the course of the drafting of the paragraph the point was made by the Irish delegation that, where the information in question relates to a voluntary statement provided by a witness solely for the purposes for which the team was set up, the consent of the witness should be required for its use for other purposes unless the requirements of subparagraph (c) involving an immediate and serious threat to public security are satisfied. While the text does not provide direct guidance on this point, it would be in keeping with the spirit of the Article that such matters should be the subject of consultation between the Member States establishing the team and that, as appropriate, the consent of the witness should be sought.

It must be borne in mind that, in accordance with article 13 of Council Decision 2009/426/JHA of the 16th of December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up **Eurojust** with a view to reinforcing the fight against serious crime, Member States are obliged to ensure that their national members are informed of the **creation** of a joint investigation team (in accordance with the 2000 Convention or Framework Decision 2002/465/JHA) and of the **results** produced by its efforts.

The provisions of the Convention will not affect **other existing provisions or agreements** on the creation or operation of joint investigation teams. These include:

- Council Framework Decision of 13 June 2002, which will cease to have effect when the Convention has been ratified by all the Member States (Article 5) and which has traditionally developed this form of investigation, the use of which is particularly recommended, according to Article 1 of the same:
    - When the investigation in one Member State requires difficult

investigations that imply mobilising considerable means and affect other Member States.

- When several Member States are investigating the same offence.

- The UN Convention on Transnational Organised Crime, done in New York on 15 November 2000, which also contemplates the possibility of creating joint investigation teams.

In relation to the effectiveness of this kind of investigation, the conclusions of the Third Meeting of National Experts in Joint Investigation Teams, held in The Hague, in November 2007, despite describing the use of the 35 teams created at that stage as a success, recognised the limits imposed by the failure of certain countries to ratify the 2000 Convention and the delayed and often defective implementation of the 2002 Framework Decision. A **Network of Experts** on Joint Investigation Teams has been established and a **Manual** has been created, which is periodically updated.

3.6. Covert investigations

While a covert investigation into a criminal offence may take different forms, this Article is only concerned with criminal investigations by officers acting under a covert or false identity. They are usually referred to as "undercover agents". They should be specially trained and can be used in particular to penetrate a criminal network in order to obtain information or to help with the identification and arrest of the members of the network.

Assistance may be requested to enable an undercover agent to operate in the requested Member State or, alternatively, for the requested Member State to be able to send an agent to the requesting Member State. In addition, the requested Member State could be asked to provide an undercover agent to carry out a covert investigation on its own territory.

In flexible terms, it is clearly established that both the requesting and the requested Member State must agree in order for an undercover agent to be deployed in a particular case.

The decision in respect of a request relating to a covert investigation is to be taken by the competent authorities of the requested Member State, who will agree with the requesting state on a number of matters, including the duration of the investigation and its detailed conditions.

Covert investigations will be performed in accordance with national law and the procedures of the Member State in whose territory they are carried out, which

constitutes an exception to the provisions of paragraph 1 of Article 4.

4. Special reference to the interception of telecommunications

Prior to the entry into force of the Convention in question, cooperation in relation to the interception of telecommunications took place via the instruments of the Council of Europe, such as the 1959 Convention, which contained no specific provisions in that regard and was “supplemented” by Recommendation R(85)10 from the Committee of Ministers of the Council of Europe which set five non-binding rules regarding letters rogatory aimed at the intervention of telecommunications. Many states, however, did not recognise the general terms of Article 1 of the Convention as sufficient grounds for providing this kind of assistance.

Finally, the 2000 Convention is a response to the longstanding need for regulation covering interception of telecommunications, opting for **immediate transmission** to the requesting state as the standard system, as opposed to the usual recording in the requested state and subsequent transmission of the recording.

The Convention does not define what should be understood by **“telecommunications**”, thus giving rise to a broad interpretation of the term which includes the Internet, for example. The use of the term “interception”, on the other hand, may unnecessarily restrict the object of the assistance, by ruling out possibilities such as locating or merely identifying.

The provisions of the Convention are applicable to applications sent in accordance with the internal law of the requesting state to the competent authority of the requested state, regarding:

a) the interception and immediate transmission to the requesting Member State of telecommunications, which is the general rule.

b) the interception, recording and subsequent transmission to the requesting Member State of the recording of telecommunications, which represents the exception.

The regulation of the interception of communications constitutes one of the fundamental new developments in assistance included in the 2000 Convention.

- The general rule is interception with direct transmission.
- The judicial assistance of the authorities of another state is not always necessary.

In the 2000 Convention, **"Competent authority"**, for the purposes of this procedure, as indicated in section 2.3.3, is understood to refer to a "judicial authority" or, when it does not have the competence in the sphere to which the procedure refers, an equivalent authority, appointed by declaration from each contracting state, which acts in criminal investigations. The discrepancies among Member States on this point are notable, particularly in the case of the United Kingdom, where the Executive has to authorise the interceptions.

The Convention differentiates between the interception of telecommunications:

- **With the need for the technical assistance of another state**, in relation to the use of means of telecommunications by the person to which the interception refers, provided said person is (Article 18):

  a) in the requesting state itself, when the technical assistance of the requested state is necessary.

  b) in the requested state, provided that it can intercept the communications of said person.

  c) in a third Member State, in relation to the provisions of Article 20.2 a), when the requesting state requires the technical assistance of the requested state.

  The requests will include details of:

  - the authority making the request;
  - confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;
  - information for the purposes of identifying the subject of this interception;
  - an indication of the criminal conduct under investigation;
  - the desired duration of the interception; and
  - if possible, the provision of sufficient technical data, in particular the relevant network connection number, to ensure that the

request can be met.

- In the case of a request in relation to a person located in the territory of the requested state, the request shall also include a summary of the facts. The requested Member State may require any further information to enable it to decide whether the requested measure would be taken by it in a similar national case.
- A copy of the ruling ordering the interception.

a) Subject in the territory of the requesting state or a third state: for example, if the Spanish authorities wish to intercept the telecommunications of a subject located in Spain, however the land station is not in Spain, but in Italy, making it technically incapable of proceeding with the intervention and needful of the assistance of the Italian authorities; this case is indeed alien to the classical cooperation mechanisms and is also resolved in an innovative manner, doing away with unnecessary formalities: the requested Member State undertakes to agree to requests for the interception and immediate transmission to the requesting state, if the person to whom the interception refers is in the requesting state itself or in a third state, when the information indicated is supplied (with the exception of that specified in the event that the person is in the territory of the requested state), without further ado.

b) Subject in the territory of the requested state, whose assistance is also necessary to proceed with the interception, a possibility that conforms to the classical forms of cooperation: the requested Member State undertakes to agree to the requests for the intervention and immediate transfer if the person to whom the intervention refers is in the territory of the requested state, when the indicated information is supplied, including in this case the summary of the facts and provided the latter would have adopted the measure requested in a national case with similar characteristics. That is, when referring to a person who is in the territory of that state, the request must include a summary of the facts that makes it possible to confirm the legality of the interception pursuant to the legislation of the requested state, which will verify the possibility of ordering, in accordance with its internal law, a similar measure in an analogous situation. If, on the other hand, the person is in the territory of the requesting state or a third state, such control is not exercised, insofar as it is considered something for the requesting state itself, either directly or via the information it must send

to the third state.

Confirmation of legality by the requested state is possible, however, when, in a departure from what we have described as standard practice, recording and subsequent transmission and not direct, real-time transmission is requested. The requested state is not obliged to accept this request unless immediate transmission is impossible. If immediate transmission is not possible and recording and subsequent transmission is requested, the requested Member State will undertake to agree to said request, when the information indicated has been sent, including the summary of the facts, and on the condition that it would have adopted the measure in a national case with similar characteristics, also being entitled to subject its consent to the conditions that would be observed in a similar national case being fulfilled. The Member States can declare that they will only assume this undertaking when it is impossible to offer immediate transmission and as a result the other states may apply the principle of reciprocity. The requesting state may also ask for a transcript of the recording, which the requested state will consider in accordance with its internal law and its national procedures.

- **Interception via service providers,** whose access to the telecommunication systems must be guaranteed and not represent, strictly speaking, mutual assistance by the authorities where its gateway is located. This is a system of "remote interception" that works via a "remote control" mechanism. Article 19 of the Convention guarantees that the telecommunications systems that operate via a gateway, if in the territory of one state, may be made directly accessible for lawful interception by another state that can do so by means of the mediation of a service provider situated in its territory, without the need for the intervention of the state where the gateway is located. However, the Convention contemplates the possibility of requesting the intervention with the same requirement as if it were a person located in the territory of said Member State –letter B) paragraph 2 of Article 18 of the Convention–, via the mediation of a designated service provider located in its territory, without the participation of the Member State where the gateway is located.
- **Interception of telecommunications without the technical assistance of another Member State**, for example, in the case of interception of telecommunications via satellite and there is a land station in the territory of the state interested in the interception or in the case of telecommunications what

use traditional national mobile telephony networks (such as GSM networks) which allow interception abroad in border areas, because their area of cover does not always coincide exactly with the borders between states. In these cases there is not a requested state and a requesting state as such and this peculiarity meant that in the negotiations prior to the signing of the Convention, states such as the United Kingdom considered the inclusion of this kind of interception in the text unnecessary, as they questioned whether it was necessary to obtain the consent of the state where the subject is located.

When the competent authority of a Member State (the state making the interception) authorises the interception of telecommunications and uses the telecommunications address of the person that appears in the interception order in the territory of another member state (the notified Member State), whose technical assistance is not necessary to carry out such interception, the Member State performing the interception will inform the (notified) state accordingly:

- prior to the interception in cases where it knows when ordering the interception that the subject is on the territory of the notified Member State.
- immediately after it becomes aware that the subject of the interception is on the territory of the notified Member State.

The information to be notified is the same as for requesting the interception of telecommunications. Once it has received the notification, the notified Member State will, within a term of 96 hours:

- allow the interception to go ahead, or
- require the interception not to be carried out or to cease, if contrary to its internal law, if the request refers to a political offence or affects its sovereignty, security, public policy or another essential interest of the state. In this case, the use of the intercepted material must be specified.
- request an extension of a maximum of eight days to the initial term of 96 hours, justifying it, in order to comply with internal procedures in accordance to its national law.

During the term for the decision, the intercepting Member State may continue it, but not use the intercepted material, unless the states in question have agreed or in order to adopt urgent measures to avoid an immediate and serious threat to public security. The notified Member State may request a summary of the

facts or any other information that enables it to establish that the interception conforms to its national legislation. The costs incurred by telecommunications operators or service providers in dealing with the requests will be borne by the requesting state.

Essentially, in this kind of interception, information is sent, together with a description of the facts, with the sole purpose of allowing the authorities of the notified Member State to assess the legality of the interceptions carried out: it has 96 hours to either allow the intervention or ask that it cease if contrary to its internal law.

5. Reference to information on bank accounts and monitoring of banking transactions in the Protocol of 16 October 2001

This area is regulated in the Protocol to the Convention on mutual assistance in criminal matters between the Member States of the European Union, done in Luxembourg, on 16 October 2001. It sought to respond, acting on a French initiative, to a deficiency detected in the field of cooperation, where the generic requests for banking information regarding an accused person, which usually precede a request for seizure, were often rejected, being considered not sufficiently justified.

As indicated in section 1.1, the Protocol forms a **regulatory unit** with the Convention. This means, as the Explanatory Report clarifies, among other things, that the provisions of Article 24 of the European Convention on Mutual Assistance in relation to the definition of "judicial authority", Article 3 of the Convention itself, regarding the means of executing a request, Article 4 of the 2000 Convention regarding the formalities and procedures for the execution of requests for mutual assistance and Article 6 of the 2000 Convention which authorises requests via fax or email in such a way as it allows the recipient Member State to establish authenticity and which contemplates the direct transmission of requests between judicial authorities, also apply to the measures envisaged in the Protocol.

As in the case of the European Convention on Mutual Assistance and the 2000 Convention, the provisions of the Protocol are generally applicable with an important exception: the provisions of Article 1 only apply to certain infringements.

The requesting state may ask for:

- **Information on whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts**, of any kind, in a bank situated in the territory of the requested state and, if so, all the details of the accounts identified, including in relation to those for which the person under investigation has powers of attorney. During the negotiations it was agreed that the accounts controlled by the person that is the subject of proceedings includes the accounts of which said person is the actual economic beneficiary, and this applies regardless of whether the holder of said accounts is a natural or legal person or an entity acting in the manner of or as trustees or any other instruments for administering special purpose funds whose settlers or beneficiaries are unknown.

  Assistance is subject to specific limits such as a (very high[14]) punitive minimum and the nature of the offence, according to a system of lists of crimes, in particular the offences mentioned in the Europol Convention or the infringement contemplated in the instruments regarding the protection of the financial interests of the European Communities, insofar as they are not contemplated in the Europol Convention (Article 1.3).

  The obligation to provide assistance will apply wherever the bank in which the account is held is in possession of the information.

  In the request, the authority making it will indicate the reasons for which it considers that the information requested may be relevant for the investigation; on what it bases the supposition that the account is held in banks established in the requested state and, insofar as they are aware of them, the possible banks in question. According to the Explanatory Report, this provision does not however contemplate the requested state being able to question whether the information requested is of substantive value for the purposes of the investigation.

  The Member States may subject the execution of a request of this kind to the same conditions that they apply for search and seizure requests. This will allow them to require dual criminality (which will usually exist, given the serious nature to which the application of the rule is limited) and compatibility with their law, with a restrictive criterion that determines, for example, that a Member

[14] Specifically, a sentence of deprivation of liberty or a detention order of the same kind with a maximum duration of at least four years in the requesting state, and of at least two years in the requested state.

State cannot reject a request merely because its national law does not envisage the supply of information on the existence of bank accounts in criminal investigations or because its national provisions on search and seizure establish a higher limit than the one set. Meanwhile, this disposition allows judicial control in the requested state. In the absence of common rules in this regard, the type of control may be different in each Member State.

- **Information on banking transactions** carried out during a specific period in one or more accounts specified in the request, including the details of the issuer or recipient accounts. There is a link between this scenario and the previous one in the sense that the requesting state may have obtained the details of the account via information on the holders of the accounts and subsequently – taking recourse to the system of complementary measures– can request information on banking operations that have taken place in said account. Nevertheless, the measure is autonomous and may also be requested in relation to a bank account of which the investigative authorities in the requesting state have become aware by other means or channels.

  In the request, the authority will indicate the reasons for which it considers the information requested may be relevant for the investigation.

  The Member States may subject the execution of a request of this kind to the same conditions as those that apply to the requests for search and seizure.
- **Monitoring of banking transactions**, regulated in a similar manner to the controlled deliveries. It is a new measure that did not appear in any of the earlier instruments on mutual assistance in criminal matters. This being the case, the article was drafted differently and only obliges the Member States to establish a mechanism, but leaves it up to each Member State to decide whether to grant assistance in a specific case and how to do so.

The 2000 Convention makes it possible to obtain:

- Information on the holders of bank accounts
- Information on banking transactions
- Monitoring of banking transactions

- **Additional requests**, in relation to an earlier request, subject to a simplified procedure, which does not require the information supplied with the first request to be repeated, provided that it is perfectly identified.

Articles 7 to 10 include provisions aimed at limiting or controlling the application of

grounds **for refusal**. These provisions are applied to requests for mutual assistance in criminal matters in general, and not only to the cases covered by Articles 1 to 4 of the Protocol. Thus:

- States may not invoke banking secrecy in order to refuse assistance.
- Assistance will not be refused simply because the request refers to offences that the requested state considers a fiscal offence, and no reservations may be entered in this regard.
- For the purposes of mutual legal assistance between Member States, no offence may be regarded by the requested Member State as a political offence, an offence connected with a political offence or an offence inspired by political motives although a partial reservation may be entered in order to exclude terrorist offences.

As additional guarantees of effectiveness, the Protocol establishes:

- The obligation, in certain situations, for a Member State to reject a request for mutual assistance, to forward a reasoned decision of refusal to the Council for due consideration and subsequent assessment.
- The possibility of notifying Eurojust of the existence of difficulties in the execution of the assistance requested, in order to seek a possible practical solution.

María Poza Cisneros

1st of September 2012

LEVEL II: TO LEARN MORE

7. Scope of application

7.1. Subjective and temporal scope

- The affirmation that the 2000 Convention is another International Public Law instrument can only be made with some provisos: a) the Convention is one of the instruments envisaged in Article 34.2 d) of the Treaty on European Union, which allowed the Council to unanimously adopt, at the proposal of any Member State or of the Commission, among other things, conventions, recommending that Member States adopt them according to their respective constitutional rules; b) as an instrument under the, now defunct, Third Pillar, which required that the Parliament be consulted during its drafting (Article 39 of the Treaty); c) as a Union convention, it followed the rule of entry into force after adoptions by half of the Member States; and d) it is subject to the competence of the Court of Justice for the interpretation of its provisions, via the preliminary judgment question, as well as in relation to the validity and interpretation of its means of application.
- Article 29 of the Convention envisaged the possible entry into force, for Iceland and Norway, of Articles 3 (objective scope of assistance under the Convention), 5 (sending and service of procedural documents), 6 (transmission of requests for mutual assistance), 7 (spontaneous exchange of information), 12 (controlled deliveries) and 23 (protection of personal data) and, to the extent it is relevant for the purposes of the articles in question, those of Articles 15 and 16 (criminal and civil liability regarding officials). In order for this to occur, ninety days must elapse after the Council and the Commission receive the information envisaged in the Association Agreement of 18-5-99, in force since 26-6-00, and regarding the fulfilment of all their constitutional rules. As of that moment, the Convention will be in force in the relations between Iceland and/or Norway and any Member State for which the Convention is already in force. Finally, it is guaranteed that the above-mentioned provisions will enter into force in Iceland and Norway, at the latest, on the date on which the Convention enters into force for the fifteen Member States who were members of the Union at the time the Council adopted the text the Convention (29-5-00), a situation which has not yet arisen. Meanwhile, Article 16 of the Protocol establishes a similar provision, albeit

referring only to Article 8 of the Protocol (extension of assistance to fiscal offences).

7.2. Objective Scope

- In application of the 1959 Convention, infringements such as the German "*Ordnungswidrigkeit"* and its equivalents in other legal systems, such as the Dutch one, had created problems because assistance was only admitted in relation to such infringements at the judicial stage. The 1959 Convention excluded fiscal infringements from its scope of application, although in the 1978 Protocol the parties undertook not to refuse to provide assistance for this reason, with restrictions on the use of seizures which are very similar to those contained in the Protocol to the 2000 Convention, albeit expressed with greater clarity: "*In the case where a Contracting Party has made the execution of letters rogatory for search or seizure of property dependent on the condition that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party, this condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party*". Meanwhile, the Convention implementing the Schengen Agreement refers expressly, in Article 50, to assistance for infringement in relation to taxes on specific consumption, which may not be refused alleging that the requested country does not collect taxes on specific consumption regarding the goods to which the request refers, indicating, nonetheless, certain minimum amounts and extending cooperation both to offences punished solely with a fine due to infringement of regulations punished by the administrative authorities, as well as to requests coming from a judicial authority.

7.3. Supplementary nature in relation to other conventions

- **the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959**

In order to understand the supplementary relationship between the 2000 Convention and the 1959 Convention, it should be recalled that it is also applicable to Albania, Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Croatia, Georgia, Iceland, the Former Yugoslav Republic of Macedonia, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, Turkey, Ukraine, Israel, Korea and South Africa. In order to obtain up-to-date information on the status of ratification of this Convention and its Protocols, see the Treaty page of the Council of Europe: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=12&CL=ENG.

The page is only available in English, French, German, Italian and Russian. Select the treaty in question from the list offered on the page and, on the following screen, choose "Chart of signatures and ratifications" (if looking for the English version).

- The 1978 Additional Protocol has been ratified by all the contracting states to the 1959 Convention, except for Andorra, Bosnia-Herzegovina, Israel, Liechtenstein, Monaco, San Marino and Switzerland.
- Meanwhile, the Second Protocol to the 1959 Convention, dated 8 November 2001, has to date been ratified by Albania, Armenia, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, the Czech Republic, Denmark, Estonia, France, Holland, Ireland, Latvia, Lithuania, Malta, Montenegro, Poland, Portugal, Romania, Serbia, Slovakia, the United Kingdom, Switzerland, Ukraine, Chile and Israel.

7.3.1. Convention on the application of the Schengen Agreement, 19 June 1990

- In order to learn about ECHR doctrine in relation to *ne bis in idem*, see the Judgments of 11-2-03, in the Hüseyin Gozütök and Klaus Brügge cases; the Miraglia case of 10-3-05; the Van Esbroek case of 9-3-06; the Gasparini case of 28-8-06; the Van Straaten case of 28-9-06; the Kretzinger case of 8-7-07; and the Kraaijenbrink case of 18-7-07. In the Zolotukhin case of 10-2-2009, the doctrine outlined in the latter of the two cited cases is reiterated and stress is placed on the concept of actual identity, as opposed to legal identity, beyond the sphere of cooperation in criminal matters, in terms of the interpretation of article 4 of Protocol 7.
- As for the specialities that the application of the Schengen *acquis* represents in

relation to certain countries, the following should be taken into account:

- For the United Kingdom and Ireland, the Council Decisions of 29-5-00 and of the Council JHA of 28-2-02, respectively (2000/365/EC and 2002/192/EC).
- For other states, on 1-12-00 the Council adopted a Decision (2000/777/EC) regarding the application of the Schengen *acquis* in Denmark, Finland, Sweden, Iceland and Norway (DO L 176 of 9-12-2000). In relation to the application of the 2000 Convention to Iceland and Norway, see section 1.1.
- Denmark does not participate in the measures corresponding to Title IV of the Treaty establishing the European Union, except in order to determine the nationals of third countries that must be in possession of a visa in order to cross the borders of the Member States, as well as those regarding the introduction of a uniform visa. As for the development of the Schengen *acquis*, when the Council adopts a decision in that regard, Denmark will have a term of six months to decide on whether or not to include said decision in its national legal system.
- Once the internal constitutional procedures were complete, the incorporation of Switzerland was scheduled for 1-11-08. The Council approved, via Decisions 2008/149/JHA and 2008/146/JHA (OJEU L of the 27th of February 2008), the Agreement between the European Union, the European Community and the Swiss Confederation on the accession of the latter to the enforcement, application and development of the Schengen *acquis*. As for the development of the Schengen *acquis* that falls within the scope of Title VI of the Treaty on European Union, the provisions of Council Decision 1999/437/EC, of 17 May 1999, regarding certain rules implementing the Agreement entered into between the Council of the European Union and the Republic of Iceland and the Kingdom of Norway on the accession of these two states to the enforcement, application and development of the Schengen *acquis* apply *mutatis mutandis* to relations with Switzerland, which means that the provisions of Articles 29 of the 2000 Convention and 16 of its Protocol will also apply to Switzerland.
- With regards to Liechtenstein, the Union signed a Protocol on the 28-2-

2008.

7.3.2. Other conventions

- On a multilateral level, we can highlight the following multilateral conventions which, as they have more favourable provisions, will not be affected by the 2000 Convention:
    - European convention on transfer of proceedings in criminal matters, done in Strasbourg on 15 May 1972, ratified by 25 European countries (despite the fact that it is open to signing by countries that are not members of the Council of Europe), including Spain and Romania. It has not been ratified, for example, by Andorra, France, Germany, Hungary or Portugal.
    - Convention on Cybercrime, done in Budapest, on 23 November 2001, which completes the regulations contained in the 2000 Convention regarding the interception of telecommunications with specific measures affecting electronic and computer means and obtaining data from such systems, which has been augmented by Additional Protocol of 28 January 2003. The 37 states that have ratified the Convention on Cybercrime to date are as follows: Albania, Germany, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Hungary, Iceland, Italy, Latvia, Lithuania, Malta, Moldava, Montenegro, Holland, Norway, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Switzerland, Macedonia, Ukraine and the United Kingdom. Amongst non-European countries, attention should be drawn to ratification on the part of the United States and Japan. With regards the Protocol, amongst the cited countries, it has not been ratified by Austria, Azerbaijan, Belgium, Bulgaria, Estonia, Georgia, Hungary, Iceland, Italy, Malta, Moldova, Slovakia, Spain, Switzerland, the United Kingdom, the United States and Japan.
    - European Convention on the international validity of criminal judgments, done in The Hague on 28 May 1970, which allows any contracting state to enforce, at the request of another contracting state, a penalty imposed by the latter, subject to the principle of dual criminality and whose effectiveness has been limited by the reduced number of

ratifications. Among the 22 countries that have ratified it are Spain and Romania, although Portugal, like another six countries, signed the Convention but has thus far failed to ratify it.

- Convention on the transfer of sentenced persons, done at Strasbourg on 21 March 1983, ratified by the majority of European states and by a good number of states that do not belong to the Council of Europe (Australia, the Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Honduras, Israel, Japan, Korea, Mauritius, Mexico, Panama, Tonga, Trinidad and Tobago, United States and Venezuela) and which, as we have mentioned, is complemented by Articles 67 to 69 of the Convention implementing the Schengen Agreement (regarding escaped persons subject to a detention order, aspects that were later included in the Additional Protocol to the Strasbourg Convention of 18 December 1997 and in which the consent of the affected party is not required) and in the Agreement regarding the application of the Convention on the transfer of sentenced persons among the Member States of the European Communities, done in Brussels on 25 May 1987.
- European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, done in Strasbourg on 30 November 1964, only ratified by 19 countries, all European ones, including Belgium, France, Italy and Portugal, but not Germany or Spain, for example.
- Together with the others, studied in Topic 6, adopted in the context of the Council of Europe, in the ambit of the European Union we should mention the Convention on Driving Disqualifications, done in Luxembourg on 17 June 1998, not yet in force.

- Among the provisions on judicial assistance in criminal matters agreed on the basis of uniform legislation, the following should be taken into account:
  - Regarding the seizure of property, Council Framework Decision 2003/577/JHA, dated 22 July 2003, on the execution in the European Union of orders freezing property or evidence, covered in topic 11.
  - In relation to information on criminal records, Council Decision 2005/876/JHA, of 21 November 2005, on the exchange of information extracted from the criminal record, derogated by Council Framework Decision 2009/315/JHA dated 26 February 2009, covered in Topic 9.

- As for the enforcement of sentences, Council Framework Decisions 2005/214/JHA of 24 February 2005, on the application of the principle of mutual recognition to financial penalties and 2006/783/JHA of 6 October 2006, on the application of the principle of mutual recognition to seizure decisions, studied in Topics 11 and 12.

8. International Judicial Assistance in general

8.1. Applicable law for execution

- On this point, NIETO MARTÍN, A. points out in *Fundamentos constitucionales del sistema europeo de Derecho Penal*, in "El fenómeno de la internacionalización de la delincuencia económica", Estudios de Derecho Judicial 61, Madrid, 2004, that "*the principle of* forum regit actum *and the principle of mutual recognition imply different strategies in judicial cooperation. By applying the logic of mutual recognition to judicial assistance, the principle to be followed should be the law of the land. Whoever requests assistance should rely on the regulations of the requested state being sufficient and satisfying the standards of protection of basic rights in carrying out procedural investigation steps. The export of its law is based, at least in part, on a principle of mistrust of the requested state. However, if the solution is measured in terms of the effectiveness of the basic rights, the principle of the forum is more appropriate and causing, as it does, fewer procedural problems, is more in line with "proper administration of justice". On the one hand, it allows the requesting state to export its greatest guarantees in obtaining evidence, while at the same time enabling the requested state to maintain its highest level of guarantees based on the public policy clause".*

8.2. Service and sending of procedural documents

- Certain rules of the 1959 Convention are still applicable, such as the one contained in Article 8, regarding the prohibition of claims in the case of a witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless he/she subsequently voluntarily enters the territory of the requesting Party and is there again duly summoned.
- Likewise, in relation to indemnification, Article 9 of the 1959 Convention applies,

according to which, allowances to be paid, including subsistence, and the travelling expenses to be refunded to a witness or expert by the requesting Party shall be calculated as from his/her place of residence and shall be at rates at least equal to those provided for in the scales and rules in force in the country where the hearing is intended to take place.

8.3. Methods of transfer

- As for the methods of transfer, some of the novelties introduced by the 2000 Convention were already envisaged in the conventions it supplements. Specifically, the 1959 Convention establishes, exceptionally and in a supplementary manner to direct communication between the Justice Ministries of the Member States, direct communication between judicial authorities for reasons of urgency, always sending a duplicate to the Justice Ministry for it to be processed normally. The Schengen *acquis* establishes direct communication between judicial authorities of the contracting states as a rule, without the intervention of governmental or diplomatic authorities, and it envisages documents regarding the procedure being sent to persons on the territory of the other contracting state directly by post, without the intervention of any governmental, diplomatic or judicial authority.
- The United Kingdom has designated two central authorities (formerly three, but the ones corresponding to England/Wales and Northern Ireland have recently been unified) for the purposes of Article 6: the Home Office (England, Wales and Northern Ireland) and the Crown Office (Scotland). In the case of controlled deliveries, covert investigations and investigation teams, the following also come into play: the Scottish Drugs Enforcement Agency (SDEA), for Scotland; the Chief Officers of Police, for England and Wales and the Chief Constable of the Police Service, for Northern Ireland.

9. Specific forms of mutual assistance

9.1. Restitution

- Section 2 of Article 6 of the 1959 Convention and section 2 of Article 29 of the Benelux Treaty contain provisions related to the return of objects that have been handed over in the context of execution of a letter rogatory and that, in principle, should be returned by the requesting party to the requested party as soon as possible. The 1959 Convention only contemplated the possibility for the requested state that had handed over the objects under the letter rogatory,

under the obligation for the requesting state to return them as soon as possible, to waive said return, without referring to returning them to individuals. The Second Protocol to the 1959 Convention contains the wording of the 2000 Convention.

9.2. Temporary transfer of persons held in custody for the purposes of investigation

- The 1959 Convention, complemented by Article 9 of the 2000 Convention, allows us to conclude that a "person held in custody for the purposes of investigation", should be understood as referring to a person detained in the requested state, whose appearance in person as a witness or for a confrontation has been requested by the requesting party, where the questioning is to take place, on the condition that the person in question will be returned to his/her place of origin within the term established by the requested party and subject to the provisions of Article 12, to the extent it is applicable. These limitations are as follows:
    - A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions prior to his departure from the territory of the requested Party.
    - A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions prior to his departure from the territory of the requested Party and not specified in the summons.
    - The immunity provided for in this article shall cease when the witness or expert or prosecuted person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned.
- Except for the generic possibilities for refusing assistance envisaged in Article 2 of the 1959 Convention, temporary transfer for the purposes of investigation

may imply the transit of the person in custody through the territory of a third state, party to this Convention, when the appropriate request is made, including all the necessary documents and sent from the Justice Ministry of the requesting state to the Justice Ministry of the requested state of transit. Any contracting party may refuse permission for the transit of their own nationals.

- Also according to Article 11, paragraph 3 of the 1959 Convention, applicable by express referral of Article 9 of the 2000 Convention, the transferred person shall remain in custody in the territory of the requesting Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party from whom transfer is requested applies for his release.
- Finally, also by express referral, as an exception to the general rule according to which requests for assistance will not give rise to the refund of expenses of any kind, expenses accruing from the transfer of persons in custody in application of the provisions of Article 11 will be reimbursed.
- The Second Protocol extends the possibility for such transfer in relation to any part of the investigation, but specifies that this does not include appearing in the trial.

9.3. Hearing of witnesses or experts by videoconference or teleconference

- The 2000 Convention, by admitting the hearing of accused persons via videoconference, is more flexible than the UN Conventions against Organised Crime and Corruption.
- Boasting subjective application that is much more extensive, given that it entails 147 signatories, including Ireland, Italy and Greece, which did not sign the 2000 Convention, although limited to the field of organised crime, defined in broad terms, the Palermo Convention (United Nations Convention against Transnational Organised Crime, done in New York on the 15th of November 2000, signed in Palermo and signed by Spain – Official State Gazette 29-9-03), does not expressly envisage the hearing of the accused via videoconference, although it does address the hearing of witnesses and experts via this medium, with special reference to its potential as an instrument for the protection of witnesses, as outlined in its article 24, or, of greater concern, of victims, who are expressly mentioned, without alluding to videoconferencing, in its article 25.
- Featuring the same wording, the UN Convention against Corruption, done in

New York on the 31st of October 2003 (Official State Gazette 19-7-06), which has been ratified by 140 countries, also envisages statements by witnesses and experts via videoconference.

- Whilst prior to the cited texts and frequently referred to as a precursor in the admission of statements from the accused via videoconference, the Rome Statute of the International Criminal Court, done in Rome on the 17th of July 1998 (Official State Gazette 27-5-2002), having reaffirmed the principle that the accused be present during the trial, only refers, generically, in its article 63, to the possibility of making use of "communications technology" in the highly specific case of enabling the an expelled accused to follow the trial, as a last, temporary and exceptional measure to be adopted where the accused continually disrupts the trial. The main focus of this provision, above and beyond legal assistance, entails the link between virtual presence and the guarantee that the "absent" accused will be able to provide instructions to his or her defence.
- The Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, subjected to successive reforms, include numerous references to the use of videconferencing. On a general level, Rule 81 bis enables the Judge or Chamber to order, proprio motu or at the behest of a party, in the interests of Justice, proceedings to be conducted via videoconference. Prior to this, references are made to the preliminary hearing that, with the written consent of the accused and subsequent to any legal advice from his or her Defence, may be celebrated with the participation of the accused and/or his or her lawyer via videoconference, admitting the depositions afforded via this medium. Specifically, in terms of legal assistance, Rule 75 bis establishes that, where another judicial authority requests assistance from the International Tribunal to hear the accused or a convicted party, a prisoner under the authority of the Tribunal, the hearing will take place via videoconference, under the direction of the requesting authority and according to its internal laws. Spain engaged in cooperation with the International Tribunal in order to try the alleged perpetrators of serious violations of International Humanitarian Law committed in former Yugoslavia, via Organic Law 15/1994, of the 1st of June, supplemented via Organic Law 4/1998, of the 1st of July, for Cooperation with the International Tribunal for Rwanda and Organic Law 18/2003, of the 10th of December, for Cooperation with the International Criminal Court.

- (The Second Additional Protocol to the 1959 Convention, dated 8 November 2001, has extended some of the provisions of the 2000 Convention to the sphere of the Council of Europe (and the other countries which have the option of signing the Protocol), including, hearing by videoconference and telephone. To see the status of ratification:

  EN:

  http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=182&CM=8&DF=20/09/2010&CL=ENG

  FR:

  http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=182&CM=8&DF=20/09/2010&CL=FRE

- Whilst the terms of article 9 of this Second Protocol coincide, almost exactly, with the stipulations of article 10 of the 2000 Convention, attention can be drawn to differences in the wording. In this sense, we might highlight the use of the term accused as opposed to suspect. There is no official version in Spanish; however, in the English, French and German, the two terms are employed ("accused" and "suspect", "personne poursuivie pénalment" and "suspect" and "Beschuldigten" and "Verdächtigenpersonne"), in contrast to article 10 of the 2000 Convention. The Explanatory Report considers this difference to represent a clarification, in view of the terminological disparity of certain systems, indicating that there is no attempt to exclude the suspect from this possibility. The mere existence of this clarification and the grounds provided for it confirm that, effectively, in certain countries article 10 of the 2000 Convention is interpreted in a restrictive sense, excluding statements from the suspect. This interpretation may also entail highly disparate consequences. On the one hand, the absolute exclusion of the hearing of the suspect via videoconference, despite admitting declarations from the accused via this medium, represents an exclusion that, from the point of view of procedural principles and guarantees, obviously much less controversial in the case of hearings in the preliminary phases of the oral trial, proves unreasonable. On the other hand, the exclusion could be interpreted, in this case entailing an inadmissible reduction in guarantees, as submitting the statement of the suspect to the system that article 10 envisages for witnesses and experts, In short, without the need for the clarification, the reference made in article 10 should be extended to the

equivalent of “suspect”, rather than merely entailing those who are technically “accused”.

- According to VALBUENA GONZÁLEZ, the legal regulation of the use of videoconference in criminal proceedings in Italy “*can be found, basically, in Articles 146 bis and 147 bis of the “norme de attuazione, coordinamento e transitorie del Codice di Procedura Penale”, according to the wording approved by Decree-Law 341/2000, which entered into force on 31 December 2000. Said regulation distinguishes between the participation of the accused person on a remote basis, on the one hand and the intervention of collaborators subject to a programme or measure of protection, on the other; both cases apply to oral proceedings:*

  a) Participation of the accused party in the oral proceedings: as can be seen from the legal wording of Article 146 bis, the first requirements for holding oral proceedings with the remote intervention of the accused party is that the trial be conducted for one of the crimes envisaged in Article 51. c 3 bis) of the Codice Penale. This restriction does not allow exceptions of any kind; therefore, the cases in which the remote participation of the accused party in oral proceedings are specified, depending on the crime in question. Article 51. c 3 bis) refers to four kinds of proceedings: 1) Proceedings regarding actual or attempted crimes, set out in Articles 416-bis and 630 of the Criminal Code; 2) Proceedings regarding crimes committed under the conditions envisaged in Article 416 bis of the Criminal Code or with a view to facilitating the activity of the associations envisaged in the same article; 3) Proceedings regarding crimes envisaged in Article 74 of the sole text approved by Decree of the President of the Republic on 9 October 1990, no. 309; 4) Proceedings regarding crimes envisaged in Article 291-quater of the sole text approved by Decree of the President of the Republic on 23 January 1973, no. 43. Thus, the scope of application of the use of videoconference in Italy for the intervention of the accused party in oral proceedings is strictly limited to criminal proceedings regarding: 1) criminal association related to the mafia (Article 416-bis Criminal Code) and kidnapping with a view to extortion (Article 630 Criminal Code), actual or attempted; 2) crimes committed by taking advantage of association related to the mafia or in order to facilitate it; 3) criminal association for the purposes of the illegal trafficking of drugs and psychotropic substances; 4) crimes of contraband. The part of Article 146 bis that limits the participation of

an accused person in oral proceedings to the above cases was the subject of a questione de legittimità costituzionale, *brought by the Milan Court, which was rejected by the* Corte Costituzionale *in ruling no. 88/2004. The Italian Constitutional Court gave the objection on the grounds of unconstitutionality leave to proceed, based on previous decisions from said court (judgment no. 342/1999 and court order no. 234/2000), recalling that the use of videoconference is limited by law to crimes that are "*diretta espressione delle più gravi manifestazioni di criminalità di stampo Mafioso*". A second essential requirement for using the system of videoconference is that the accused person be in a correctional facility, although it is not important whether the deprivation of liberty is due to an interim measure (provisional arrest) or because he/she is serving time for another reason. If these requirements are fulfilled –a mafia-related crime and accused person in prison– the judge must assess whether either of the two conditions envisaged for ordering the participation of the accused party in the oral proceedings on a remote basis are fulfilled: either for serious reasons of security or public policy or because the complexity of the oral proceedings makes the adoption of this measure advisable in order to avoid delays. The requirement of avoiding delays in the proceedings will also be assessed in the event that the same accused party is also subject to other proceedings in different courts. Apart from these two conditions, participation in the proceedings will also be on a remote basis when the proceedings are brought against a detained person against whom the measure envisaged in Article 41 of the Prison Regulations have been applied. This measure entails the suspension by the Minister of Justice, at the request of the Minister of the Interior, of some or all of the prison rights for a certain period due to serious reasons of security or public policy in order to prevent the detained person coming into contact with criminal, terrorist or subversive organisations. In the opinion of DENTE GATOLA, this hypothesis is an attempt to avoid what is known as "*turismo giudiziario*" as well as the possibility of the detained person, returning to the places where he/she committed the crimes, maintaining or renewing contact with criminal circles. The technical conditions for holding the videoconference or "*collegamento audiovisivo*" should ensure the contextual, effective and reciprocal viewing of the persons present in both places and the possibility to hear what is said in both venues. If it is held in more than two places because the accused persons are inmates of different centres, each one*

must be able to see and hear the other. The decision ordering intervention of the accused person on a remote basis is generally in the form of a reasoned ruling, handed down prior to the start of the hearing and notified to the parties at least ten days in advance. This term is in order to allow the defence time to get organised and decide whether they will be present only in the courtroom or also at the remote venue, either in person or by sending a substitute. Exceptionally, once the sessions of the hearing begin, the use of videoconference may be instituted by means of a simple court order. In order to duly guarantee that the questioning is carried out in the most proper manner possible, it is envisaged that an assistant authorised to aid the judge will be present where the accused person is, in order to confirm his/her identity and attest to the fact that he/she is not being hindered or prevented from exercising the rights and powers that correspond to him/her. Nevertheless, when the accused person is not questioned, the assistant may be replaced by an officer of the judicial police who was not involved in activities of investigation or protection related to the accused party or the facts of the case in question. Minutes will be taken in both cases. The legislator has taken care to guarantee the free flow of information between the accused person and his/her defence, establishing, on the one hand, that the lawyer for the defence or a substitute can be present in the same place as the accused person and, on the other, that the lawyer for the defence or a substitute can communicate privately with the accused person when in a hearing venue using appropriate technical means. Finally, the possibility is envisaged that even if the remote intervention of the accused person has been ordered, he/she may attend the hearing in order for certain evidence to be examined. Thus, it is established that if during the oral proceedings there is to be a confrontation or identification of the accused person or any other act that entails the observation of his/her persona, the judge, when he/she considers it necessary, after hearing the parties, will order the presence of the accused person in the courtroom for the time necessary for the act to take place.

b) Intervention in the hearing of protected subjects: As mentioned earlier, the legal regime governing use of videoconference in criminal proceedings in Italy is completed with the provision set out in Article 147 bis of the "norme de attuazione, coordinamento e transitorie del Codice di Procedura Penale", which envisages remote questioning of persons collaborating with the justice system under a programme or measure of protection. In order to avoid

the risk that the presence of such a person in the courtroom would entail, it has been envisaged that the person subject to a programme of protection can declare in the proceedings via videoconference, in two ways: on an optional basis for the judge or by obligation. For example, if it is difficult to ensure that the person subjected to questioning will appear, this hypothesis would fall under the optional admission. In this case, if the judge considers it appropriate to take recourse to remote hearing he/she can decide to do so, after hearing the parties. Meanwhile, there are three hypotheses of obligatory admission, namely: 1) when the person in the protection programme is questioned in the context of a trial for any of the crimes indicated in Article 51. c 3 bis of the Criminal Code, already referred to in our examination of Article 146 bis; 2) when the protected witness has been given a new identity; in this case, appropriate measures will also have to be taken to avoid the face of the person in question being seen; 3) when in the context of a trial for any of the crimes indicated in Article 51. c 3 bis of the Criminal Code, a person accused of a connected crime is to be questioned and if the two proceedings have been declared separate. From the above some conclusions can be reached in relation to the intervention of subjects on a remote basis in Italian criminal procedure. Thus, in relation to the accused persons, the scope of application is reduced considerably because, first of all, it is contemplated for intervention in oral proceedings excluding summary proceedings; secondly, it is strictly limited to proceedings regarding certain types of crimes related to the actions of criminal organisations and, thirdly, it is only envisaged if the accused person is detained in a correctional establishment either due to a personal interim measure or as a prisoner for another reason. In relation to subjects other than the accused person, their intervention via videoconference is also subject to significant restrictions, as it is limited to persons admitted to a programme or measure of protection who are declaring in oral proceedings regarding trials for crimes related to the activity of criminal organisations".

- Furthermore, attention should be drawn to the express envisagement of offences against the Judicial Administration committed within the context of international legal assistance afforded via videoconference, which are sanctioned, in accordance with Italian law, as if they had been committed within the territory of the Italian State.
- According to the same author, "*the legal regime for the remote intervention of*

subjects in criminal proceedings in France is contained in Article 706-71 of the Code de Procédure Pénale*, approved by law on 15 November 2001. One of the most noteworthy aspects of said precept is that the Gallic legislator omits any express reference to the term "visioconférence" –the French translation of the term videoconference– opting instead to allude generically to means of telecommunications that guarantee the confidentiality of the transmission, thus leaving the door open for other alternative systems. It also seems to differentiate between the use of means of telecommunications –for example, the telephone– reserved for taking action at the investigation stage, and the use of means of audiovisual telecommunication –i.e., videoconference– applicable before the courts for hearing witnesses, civil parties and experts, as well as for the purposes of extending judicial detention. In both cases, use of the same is on the basis of necessity. Thus, when the circumstances of the case so justify, they can be used in the case for the questioning of a person or a confrontation between several who are in different locations. Moreover, it can also be used for the examining magistrate to hear the detained person, for the purposes of the hearing envisaged for the adoption or extension of the provisional imprisonment or the questioning of the accused person before the* Tribunal de Police*. Finally, it has been envisaged that it can be used to facilitate the assistance of an interpreter during a hearing, questioning or confrontation. Thus, the scope of application of the means of communication in French criminal procedure can be extended to a significant number of cases; nevertheless, use of the same is significantly restricted for the intervention of the accused person in the oral proceedings, envisaged exclusively for judging less serious offences –known as "*contraventions*"– heard by the* Tribunal de Police*. In order to judge other infringements, no provision is made for the accused party to be heard by means of audiovisual means of telecommunications, which is why we must assume that their presence in the courtroom is obligatory. Finally, two guarantees are expressly contemplated in order to ensure the validity of investigations performed via videoconference, referring to the documentation of the steps taken and the right to a defence, respectively. Thus, on the one hand, the need to take minutes of the steps taken in each of the locations is envisaged; this provision makes it necessary for authorised officials to be present and legally attest to matters at all the locations involved in each process from which the transmission of sound and*

image takes place. Moreover, an audiovisual or audio recording of events may be made. Meanwhile, the detained person may be assisted by a lawyer either in situ *or remotely, i.e., at the corresponding court or in the presence of the interested party. In the first case, in order to secure the right of the detained person to hold an interview with his/her lawyer before declaring before the judge, the lawyer and the client are allowed to hold an interview via confidential videoconference"*.

- In England and Wales, the Second Part of the *Youth and Criminal Evidence Act* of 1999, section one, Article 24, on the special measures in the case of vulnerable witnesses or those subject to intimidation, regulates evidence via videoconference (*live link*), which may be ordered *ex officio* or at the request of a party, both in a Crown Court and in a Magistrates' Court, in relation to witnesses that, not present in the Court or in any other place where the proceedings are to take place, can be seen and heard by the Judge and/or members of the Jury, the accused person or the other accused persons, if applicable, the professionals representing them and the interpreter or any other person appointed to assist the accused person and, in turn, see and hear via this mechanism. The 2006 Police and Justice Act reformed the above-mentioned law of 1999, in order to allow the use of videoconference in relation to accused persons, only at the request of the latter, with different conditions for minors and over-18s. In the case of those over 18, the conditions in which this hearing option can be used, in the interests of Justice, are limited to disability due to mental illness or another significant mental or social disability, that prevent the accused person participating in the proceedings effectively, verbally declaring as a witness (Common law allows this), when the use of this technique allows a more effective participation in the trial as a witness, improving the quality of his/her statement. The judicial decision authorising this option can be rendered null *ex officio* or at the request of a party and, in any event, must be public and reasoned. The measure can also be ordered at the appeal stage, in relation to the appellant deprived of liberty with the right to be present at the appeal proceedings which he/she has been authorised to attend.
- In Scotland, the 1993 Prisoners and Criminal Proceedings Act and the Criminal Procedure Act of 1995, regulate evidence heard abroad via conference, both at the High Court and the Sheriff Court, excluding the declaration of the accused party when the witness is outside the United Kingdom, requested as a result of

a letter rogatory and thus ordered by the Court. Meanwhile, the provisions for application of this technique on an internal level were extended to cases other than minors via a reform of the Criminal Procedure Act of 1995 by the Vulnerable Witnesses Act of 2004. At present, there is videoconference equipment in all the High Courts and in many judicial buildings where the most important Sheriff's Courts are located.

- The Crime (International Co-operation) Act 2003 adapted British legislation to the provisions of the 2000 Convention, including the hearing of witnesses via videoconference and teleconference. The sanctions envisaged for contempt or perjury are the same as if the witness were physically present before the British court, in cases in which the United Kingdom is the requesting state. Requests are sent to the Secretary of State and in Scotland to the Lord Advocate, who will designate the court where the hearing will take place.

9.4. Controlled deliveries

- As early as 20 December 1998, Article 11 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done in Vienna, established: "1*. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them. 2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned. 3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part."*.
- Also restricted to drug trafficking, Article 73 of the Convention on the Application (19 June 1990) of the Schengen Agreement (14 June 1985), envisaged: "*1. The Contracting Parties undertake, in accordance with their constitutions and their national legal systems, to adopt measures to allow controlled deliveries to be made in the context of the illicit trafficking in narcotic drugs and psychotropic*

substances. 2. In each individual case, a decision to allow controlled deliveries will be taken on the basis of prior authorisation from each Contracting Party concerned. 3. Each Contracting Party shall retain responsibility for and control over any operation carried out in its own territory and shall be entitled to intervene."

- Article 20 of the United Nations Convention against Translational Organised Crime, done in New York, on 15 November 2000, envisaged identical steps: **"***1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime. 2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements. 3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned. 4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part."*.
- In the United Nations Convention against Corruption, done in New York, on 31 October 2003, Article 50, in the chapter dedicated to international cooperation, regulates different special investigation techniques, including controlled deliveries, in the following terms: "*1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its*

domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom. 2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements. 3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned. 4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.".

9.5. Joint Investigation Teams

- In November 2009, the Stockholm Program encouraged the competent authorities in Member States to appeal where they are able to do so and proves suitable for the investigative tool consisting of the joint investigation teams. Europol and Eurojust are obliged to systematically inform one another of the creation of these teams and participate in important trans-border operations. The agreement model should be updated for the creation of joint investigation teams.
- It is possible to find a new model agreement for setting up a joint investigation team, approved by a Council Recommendation of 26 February 2010 (2010/C 70/01) as well as a manual for such joint teams, in different languages, at the following address:

- As for the role of Eurojust in the creation of a joint investigation team, according to Article 6 of the Framework Decision of 28 February 2002, which created Eurojust, the national members may ask the competent authorities to assess the possibility of setting up a joint team. According to Article 7 of the same Decision, the Eurojust College may ask the competent authorities to create a team, setting out the reasons for it and, in turn, should the authorities refuse, they will provide the College with the reasons for their refusal. In particular, Article 9 septies of Council Decision 2009/426/JHA of 16 December 2008, enhancing Eurojust, envisages the participation of the national members in joint investigation teams, although the Member States may subject the participation of the national member to the approval of the corresponding national authority. Each Member State will define whether the national member is participating in the joint investigation team as the corresponding national authority or on behalf of Eurojust.
- The main advantages of joint investigation teams include the following:
    - The possibility of sharing information directly among the members of the team without the need for official requests.
    - The possibility of requesting investigative measures from the members of the team directly, which avoids the need for letters rogatory. This point also applies to requests for coercive measures.
    - The possibility for members to be present at searches, interviews, etc. in all jurisdictions in question, which helps overcome language barriers at interviews, etc.
    - The possibility of coordinating efforts *in situ*, as well as the exchange of specialist information.
    - The possibility of establishing a climate of mutual trust between professionals from different jurisdictions, who work together and decide on investigation and accusation strategies.
    - The possibility of participation by Europol and Eurojust, providing direct aid and assistance.
    - The possibility of gaining access to any available financing.
- In July 2005, a Network of National Experts in Joint Investigation Teams was created. The Network consists of at least one national expert per Member State and is responsible for promoting the use of these teams, facilitating their creation and supporting the pooling of experience, good practice and dealing

with legal matters. The Network, from January 2011 onwards, boasts a Secretariat, integrated into the Eurojust personnel and coordinated by this body (article 25 bis of Council Decision 2009/426/JHA. The document creating the network can be seen at the following address:
http://register.consilium.europa.eu/pdf/en/05/st11/st11037.en05.pdf

- Furthermore, the Joint Investigation Team **Manual** is periodically updated. The Manual was drawn up within the framework of the Joint Investigation Teams project, which, in turn, complements the Guide to the regulations of Member States in the sphere of joint investigation teams. As is the case with the agreement model, the manual can be consulted on the following web site:
EN:https://www.europol.europa.eu/sites/default/files/st15790-re01.en11.pdf

9.6. Covert investigations

- Covert investigations, included within what are known as “special investigation techniques”, have been the object both of promotion by several international bodies, in the context of the fight against serious forms of crime and in particular terrorism, and of criticism by legal scholars. An example of such “promotion”, can be seen in the Recommendation Rec (2005) of the Committee of Ministers of the Council of Europe, on “special investigation techniques” in relation to serious crimes, including terrorist acts in which, nevertheless, limits are established, such as the existence of “reasonable grounds” regarding the actual commission or preparation of a serious crime, by one or more particular persons or an as-yet-unidentified individual or group of individuals, or the necessary proportionality between the seriousness of the crime and the “intrusive” nature of the specific investigations technique, choosing the less intrusive of the options for effective investigation.
- An example of critique by legal scholars, albeit an old one, was provided by W. HASSEMER in “Limits to the Rule of Law in the fight against organised crime; Thesis and reasons”, who cites, among other limits which he believes must not be transgressed, the submission of covert agents to “virginity tests”, in order to show that they are not suspicious in the eyes of the criminal group or organisation that they intend to infiltrate, as a criminal method that the state cannot allow, not even for the purposes of the investigation of the most serious crimes. The article can be seen at the following address:
http://www.cienciaspenales.org/REVISTA%2014/hassem14.htm

- In Germany, the figure of the covert agent is regulated in paragraph 110 of the Procedural Law, in accordance with the special legislation on the fight against the illegal trafficking of narcotics and other forms of organised crime, dated 15 July 1992.
- In general, the national legislations tend to have the same common features:
    - Use is limited to specific investigations.
    - Covert agent status can only be assumed by members of the police forces.
    - Covert investigation is subject to jurisdictional control.
    - It should be used on a subsidiary level in relation to other less “intrusive” investigation techniques.
- The exemption of the covert agent from criminal responsibility is due to the fact that it involves actions that are a necessary consequence of the development of the investigation and that are duly proportionate while never constituting an incitement to crime. Therefore, there are three formal requirements in order for the conduct of the covert agent to be considered not punishable:
    - The immediate purpose of the conduct of the covert agent is for the perpetrator to be prosecuted for that offence
    - The covert agent has no intention to commit a crime, and acts solely and exclusively in the interests of the law and in the performance of his/her duties and functions; and
    - Absence of any intention to commit a crime, which is manifested externally by the adoption of the necessary measures to neutralise the action.
- The covert agent, therefore, is not an informer, associated with the typical confidant of the criminal prosecution authorities, essentially the Police, whose activity is usually rewarded with material benefits, or procedural ones if he/she is on trial, although not necessarily for the same crime. A covert agent proper is a police agent infiltrated in a criminal organisation who performs tasks aimed at preventing or suppressing crime.
- The criminal responsibility derived from possible criminal acts committed or damage caused during the covert investigations will be assessed, where applicable, in line with the respective internal law and national procedures, i.e. treating a covert agent from another state as one belonging to the state in which he/she is acting in this regard (Article 15 of the Convention).

- In relation to the civil liability derived from covert investigations, Article 16 of the Convention states that in the case of agents from one Member State acting in another Member State, the first Member State, from where the agent comes, will be liable for losses and damages caused by its agents in the performance of their duties, in accordance with the law of the Member State in whose territory they are acting. However, the Member State in whose territory such losses and damages are caused will assume the repair of the same in the conditions applicable to losses and damages caused by its own civil servants, being subsequently reimbursed by the other Member State whose agent caused the damage; this reimbursement must be paid in full both in relation to the Member State and the victims or other parties entitled to it, although in any event, according to section 4 of Article 16 of the Convention, a Member State may waive repayment of the amount of losses and damages suffered due to the action of a covert agent from another Member State on its territory.

10. Special reference to the interception of telecommunications

- Recommendation R (85)10 of the Council of Europe, dated 28-6-85, referred to the information that requests for the interception of telecommunications should contain the duration of the surveillance measures, the conditions that the Member State may establish for the execution of letters rogatory and the possibility of sending a judicial notification to the requested party.

11. Reference of information on bank accounts and the control of transactions in the Protocol of 16 October 2001

- The concept of the economic beneficiary will be interpreted in accordance with section 7 of Article 3 of Council Directive 91/308/EEC, dated 10 June 1991, regarding the use of the financial system for money laundering, amended by Directive 2001/97/EC of the European Parliament and the Council, of 4 December 2001. As a result, when there are doubts as to whether or not the clients to which the information refers are acting on their own behalf or if it is certain that they are not doing so, reasonable measures will be adopted in order

to obtain information on the true identity of the persons on behalf of whom the clients are acting.

- As PALOMO DEL ARCO points out, the Protocol, "*despite its limitations, not managing to establish the obligation to provide assistance, even though the requirement of dual criminality does not apply, nor remove the existing restrictions when the crime investigated is of a fiscal nature, it is an instrument that is absolutely necessary*", and this need is particularly relevant "*for the purposes of implementing effective cooperation mechanisms with the offshore jurisdictions within European territory*": Gibraltar or Jersey, Guernsey and the Isle of Man "*have shown to be reluctant to collaborate in this regard*".
- As a supplement or alternative to this subject matter, we should keep in mind the existence, in the context of the Council of Europe, of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, done in Warsaw on 16 May 2005, which contains extensive regulation of banking investigation, covering:
    - Requests for information on bank accounts.
        - Assistance refers to determining 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 its territory and, if so, provide the particulars of the identified accounts.
        - The obligation set out in this article shall apply only to the extent that the information is in the possession of the bank keeping the account.
        - The requested Party may make the execution of such a request dependant on the same conditions as it applies in respect of requests for search and seizure. Each State or the European Community may declare that this article applies only to the categories of offences specified in the list contained in the appendix to this Convention.
        - Parties may extend this provision to accounts held in non-bank financial institutions. Such extension may be made subject to the principle of reciprocity.
    - Requests for information on banking transactions.
        - Particulars of specified bank accounts and of banking operations

which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.

- The obligation set out in this article shall apply only to the extent that the information is in the possession of the bank holding the account.
- The requested Party may make the execution of such a request dependant on the same conditions as it applies in respect of requests for search and seizure.
- Parties may extend this provision to accounts held in non-bank financial institutions. Such extension may be made subject to the principle of reciprocity.

- Requests for the monitoring of banking transactions.
  - Monitoring, during a specified period, of the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Party.
  - The decision to monitor shall be taken in each individual case by the competent authorities of the requested Party, with due regard for the national law of that Party.
  - Parties may extend this provision to accounts held in non-bank financial institutions.

LEVEL III: REFERENCE DOCUMENTATION

12. Scope of application

12.1. Subjective and temporal scope

- To obtain an up-to-date list of notifications, dates of entry into force and declarations for the different states, in relation to the 2000 Convention, see the following address:
  http://www.consilium.europa.eu/App/accords/Default.aspx?command=details&id=297&lang=EN&aid=2000023&doclang=EN
- The database of the Council of the European Union can be consulted in order to obtain an up-to-date list of notifications, dates of entry into force, reservations and declarations for the different states in relation to the Protocol of 16 October 2001:
  http://www.consilium.europa.eu/App/accords/Default.aspx?command=details&id=297&lang=EN&aid=2001090&doclang=EN

12.2. Objective scope

- Explanatory Report of the Convention approved by the Council on 30-11-00, OJ C 379, dated 29-XII-2002:
  ES:
  http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:379:0007:0029:ES:PDF
  EN:
  http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:379:0007:0029:EN:PDF
  FR:
  http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:379:0007:0029:FR:PDF

12.3. Supplementary nature in relation to other conventions

12.3.1. European Convention on Mutual Assistance in Criminal Matters of 20 April 1959

- European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

ES:
http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=iberlex&id=1982/23564
EN:
http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm
FR:
http://conventions.coe.int/Treaty/FR/Treaties/Html/030.htm

- Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on good practice in mutual legal assistance in criminal matters contains recommendations on the minimum content of requests for assistance:
  ES:
  http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:191:0001:0003:ES:PDF
  EN:
  http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:191:0001:0003:EN:PDF
  FR:
  http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:191:0001:0003:FR:PDF

12.3.2. Convention implementing the Schengen Agreement of 19 June 1990

Text of the Convention:

ES:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):ES:HTML
EN:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML
FR:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):FR:HTML

- On establishing the contents that comprise the community *acquis* that the states must incorporate into their legislation, see Council Decisions: 1999/435/EC and 1999/436/EC, dated 20 May 1999, with amendments in OJ L 9 dated 13 January 2000:

ES:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:176:0001:0016:ES:PDF
http://eurlex.europa.eu/Notice.do?val=329820:cs&lang=es&list=347127:cs,347126:cs,329770:cs,329822:cs,329821:cs,329820:cs,329819:cs,&pos=6&page=1&nbl=7&pgs=10&hwords=&checktexte=checkbox&visu=#texte
EN:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:176:0001:0016:EN:PDF
http://eurlex.europa.eu/Notice.do?val=329820:cs&lang=en&list=347127:cs,347126:cs,329770:cs,329822:cs,329821:cs,329820:cs,329819:cs,&pos=6&page=1&nbl=7&pgs=10&hwords=&checktexte=checkbox&visu=#texte
FR:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:176:0001:0016:FR:PDF
http://eurlex.europa.eu/Notice.do?val=329820:cs&lang=fr&list=347127:cs,347126:cs,329770:cs,329822:cs,329821:cs,329820:cs,329819:cs,&pos=6&page=1&nbl=7&pgs=10&hwords=&checktexte=checkbox&visu=#texte

12.3.3. Other conventions

- European Convention on the Transfer of Proceedings in Criminal Matters, done in Strasbourg 15 May 1972:

  ES:

  http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=iberlex&id=1988/25806

  EN:

  http://conventions.coe.int/Treaty/en/Treaties/Html/073.htm

  FR:

  http://conventions.coe.int/Treaty/FR/Treaties/Html/073.htm

- Convention on Cybercrime, done in Budapest, dated 23 November 2001:

  EN:

  http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm

  FR:

  http://conventions.coe.int/Treaty/FR/Treaties/Html/185.htm

Additional Protocol dated 28 January 2003:

EN:

http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm

FR:

http://conventions.coe.int/Treaty/FR/Treaties/Html/189.htm

- European Convention on the International Validity of Criminal Judgments, done in The Hague on 28 May 1970:

  ES:

  http://www.boe.es/boe/dias/1996/03/30/pdfs/A12228-12244.pdf

  EN:

  http://conventions.coe.int/Treaty/en/Treaties/Html/070.htm

  FR:

  http://conventions.coe.int/Treaty/FR/Treaties/Html/070.htm

- Convention on the Transfer of Sentenced Persons, done in Strasbourg dated 21 March 1983:

  ES:

  http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=iberlex&id=1985/10554

  EN:

  http://conventions.coe.int/Treaty/en/Treaties/Html/112.htm

  FR:

  http://conventions.coe.int/Treaty/FR/Treaties/Html/112.htm

- European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, done at Strasbourg on 30 November 1964:

  EN:

  http://conventions.coe.int/Treaty/en/Treaties/Html/051.htm

  FR:

  http://conventions.coe.int/Treaty/FR/Treaties/Html/051.htm

- Together with the above, studied in Topic 6, as an instrument adapted to the context of the Council of Europe, in the scope of the European Union, we should mention the Convention on Driving Disqualifications, done in Luxembourg in 17 June 1998, not yet in force.

13 International judicial assistance in general

13.1 Applicable law to execution

- The EJN prepared the model of the "cover note", following the indications contained in the Council Joint Action of 29 June 1998 adopted on the basis of Article K.3 of the Treaty on European Union, on good practice in mutual legal assistance in criminal matters (98/427/JHA). Currently, one of the fields of the Compendium tool refers, precisely, to acknowledgment of receipt.

13.1 Sending and service of procedural documents

13.2 Methods of transmission

- Under normal circumstances, the "Compendium" tool, which assists the user in the drafting and translation of a letter rogatory, is available at the following address: http://www.ejn-crimjust.europa.eu/compendium.aspx.
- The Judicial Atlas can be consulted at the following address: http://www.ejn-crimjust.europa.eu/atlas_advanced.aspx
- In order to ascertain the declarations of the different states in relation to the appointment of competent authorities, see the following website:

  EN:

  http://www.consilium.europa.eu/App/accords/Default.aspx?command=details&id=297&lang=ES&aid=2000023&doclang=EN

14 Specific forms of judicial assistance

14.1 Restitution of objects

14.2 Temporary transfer of persons held in custody for the purposes of investigation

14.3 Hearing of witnesses and experts by videoconference and by telephone conference

14.4 Controlled deliveries

14.5 Joint investigation teams

14.6 Covert investigations

15 Special reference to the interception of telecommunications

16 Reference to information on bank accounts and monitoring of banking transactions in the Protocol of 16 October 2001

17 Documentation and bibliography

Apart from the availability of this information in the “Virtual stroll” resource and the references contained in the text, we consider it essential to consult the regulatory instruments to which this topic refers and their respective explanatory reports.

Convention Text:

ES: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:ES:PDF

EN: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF

FR: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:FR:PDF

Explanatory Report of the Convention:

ES:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:379:0007:0029:ES:PDF

EN:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:379:0007:0029:EN:PDF

FR:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:379:0007:0029:FR:PDF

Protocol Text:

ES:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42001A1121(01):ES:HTML

EN:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42001A1121(01):EN:HTML

FR:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42001A1121(01):FR:HTML

Explanatory Report of the Protocol:

ES:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:257:0001:0009:ES:PDF

EN:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:257:0001:0009:EN:PDF

FR:http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:257:0001:0009:FR:PDF

Other documentation available in Spanish (the documentation that is only available in Spanish is cited in the corresponding annex)

- House of Lords report on the 2000 Convention:
http://www.publications.parliament.uk/pa/ld199900/ldselect/ldeucom/93/9301.htm

-McCLEAN, D. *International Co-operation in civil and criminal matters*, Oxford University Press, 2002
http://books.google.es/books?id=9WPLwaQ7YjUC&pg=PA232&lpg=PA232&dq=cov ert+investigations+Europol&source=bl&ots=Xinv9n-v-i&sig=mVmAt8NdHUJA0B0W-7ZzV8JQIdw&hl=es&ei=wIKSd2PDuDDjAe lsmNCA&sa=X&oi=book result&resnu m=7&ct=result#PPA224,M1