International Co-operation against Tax Crimes and Other Financial Crimes

A CATALOGUE OF THE MAIN INSTRUMENTS

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Introduction

Financial crimes are growing in sophistication and often operate across international boundaries. Criminals accumulate significant sums of money by committing crimes such as drug trafficking, investment fraud, extortion, corruption, embezzlement and tax fraud. Tax administrators are increasingly recognising that they can play an important role in detecting and deterring crimes such as corruption and money laundering, and at the same time tackle tax crimes. Tax administrations are well placed to play a greater role in uncovering the financial traces left behind by criminals through co-operation with their international counterparts as well as domestic and foreign law enforcement agencies.

In order to strengthen international co-operation, the OECD has advocated greater co-operation and better information exchange between tax and law enforcement agencies involved in the fight against financial crimes, both domestically and internationally. The OECD Council approved a "Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions" in 2009[1], and a "Recommendation to Facilitate Cooperation between Tax and Other Law Enforcement Authorities to Combat Serious Crimes" in October 2010.[2] Along with other OECD bodies, the Task Force on Tax Crimes and Other Crimes (TFTC) monitors and promotes both Recommendations.

Improving the flow of information between agencies within a country, including the tax administration, anti-money laundering authorities, and other law enforcement agencies, is a current issue for many countries and is a topic currently being addressed by the TFTC. At the same time, removing the barriers to cross-border information exchange is critical for dealing with international criminal activity. Tax administrators and law enforcement agencies are reviewing and improving their strategies, structures and processes for enhancing co-operation in tackling all serious crimes including tax evasion, corruption, organised crime, and money laundering.

This note aims to catalogue the main international co-operation instruments which are available to tax authorities, anti-money laundering authorities and other law enforcement authorities. It looks at international agreements permitting the exchange of information and other forms of international co-operation. After describing the different agencies involved in the fight against financial crimes, it provides an overview of the instruments available and summarises current initiatives to improve domestic inter-agency co-operation and international co-operation between counterpart agencies.

The note contains a catalogue describing the features of different instruments for international co-operation in combating financial crimes. The catalogue contains general

1. See the OECD "Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions" (2009).

2. See the OECD "Recommendation to Facilitate Cooperation between Tax Authorities and Other Law Enforcement Authorities to Combat Serious Crimes" (2010).

information in relation to each instrument, including the Parties to the instrument, its scope, the forms of co-operation it provides for, the authorities that can use the instrument, the conditions for requesting assistance and the grounds for denying assistance. It also contains details in relation to the use that the authorities can make of the information received, whether they can share such information with other local authorities or with foreign authorities, and the relationship between the instrument concerned and other instruments.

Chapter 1

Agencies involved in the fight against tax crimes and other financial crimes

Financial crime covers a broad range of offences, including tax evasion and tax fraud, money laundering, corruption, insider trading, bankruptcy fraud and terrorist financing. Several different government agencies may be involved in the different stages of tackling financial crimes. These stages include the prevention, detection, investigation and prosecution of these crimes, as well as the recovery of the proceeds of crime. Several agencies which may be involved at these different stages include police forces and prosecution authorities, which have a visible role in law enforcement. They also include agencies such as tax administrations and financial supervisory bodies, which have access to significant information about individuals, corporations and financial transactions. There is no single approach to how countries structure these agencies and allocate competences among them. Activities which are the responsibility of a particular agency in one country may be the responsibility of a different agency in a second country. Similarly, some countries may establish independent agencies to carry out activities which in other countries are the responsibility of a larger body.

Understanding these differences is important in appreciating the implications of similarities and differences between different countries' arrangements for inter-agency co-operation. Which agency has responsibility for a particular activity will directly impact on the availability of instruments for international co-operation. For example, whether responsibility for investigating tax fraud lies with the tax administration or rather with the police will directly influence the co-operative arrangements required to facilitate these investigations. In general terms, there are a number of key agencies in the fight against tax crimes and other financial crimes and their roles are briefly described below.

A. Tax Administration

A country's tax administration is generally responsible for the assessment and collection of taxes on behalf of the government. This involves gathering and processing information on individuals and corporations subject to tax, including personal details, property, investments, financial transactions and business operations. A tax administration often employs large numbers of trained specialists and investigators with experience in auditing and analysing financial data and investigating suspicious or anomalous transactions. Tax administrations may have extensive powers to access information. In most countries, the tax administration plays a central role in deterring and detecting tax crime. Once a suspected tax crime has been identified, the extent to which the tax administration is involved in the investigation and prosecution varies.

B. Customs Administration

Customs administrations are responsible for the assessment and collection of customs duties. In many countries they also have responsibility for other taxes and duties, including excise duties and indirect taxes, such as sales taxes and VAT. Customs

administrations hold information about cross-border flows of money and goods, as well as details of individual businesses. Customs administrations may be established as separate agencies, or as part of a joint tax and customs administration.

C. Financial Intelligence Unit

Since the early 1990s, Financial Intelligence Units (FIUs) have been central to national strategies to combat money laundering and terrorist financing. FIUs are typically the central agencies responsible for receiving (and as permitted requesting), analysing and disseminating (*core functions* of a FIU) to the competent authorities, disclosures of financial information (i) concerning suspected proceeds of crime and potential financing of terrorism or (ii) required by national legislation or regulation, in order to combat money laundering and terrorism financing. FIUs may have further responsibilities regarding the gathering and analysis of information on movements of funds and other suspicious activities (*e.g.* cash transaction reports, wire transfer reports and other threshold based declarations/disclosures). Beyond its core functions and based on national legislation, the FIU may also be responsible for regulating and/or supervising certain financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) to ensure compliance with anti-money laundering/combating the financing of terrorism (AML/CFT) legislation.

D. Police

The police force is typically the primary agency in a country with responsibility to enforce criminal law, protect property and prevent civil unrest in civilian matters. Due to the specialist nature of the different categories of financial crime, some police forces have set up specific teams to deal with this type of offence. Other countries may have several distinct police forces with responsibility for different types of criminal activity.

E. Prosecution authorities

In the majority of countries there is a single national prosecution authority which is responsible for prosecuting most criminal offences, including tax crimes and other financial crimes. Within the national prosecution authority, in some instances there are specialist divisions or prosecutors dealing with tax crimes, money laundering and other financial offences. In a small number of countries, offences may be prosecuted directly by investigative agencies.

F. Financial Supervisors

Financial supervisors, including central banks, are typically responsible for the proper and effective regulation and supervision of specified categories of financial institutions. This promotes monetary and financial stability and is aimed to ensure efficient functioning in the financial sector. Financial supervisors may achieve these goals through regulation, supervision and enforcement, including the investigation of potential legislative or regulatory breaches.

G. Specialist law enforcement agencies

Many countries have specialist law enforcement agencies with responsibility for investigating and, in some cases, prosecuting specific types of criminal offence.

Chapter 2

Instruments available for international co-operation on tax crimes and other financial crimes

Reflecting the wide range of agencies involved in the fight against financial crimes, there are a range of different instruments available for international co-operation in this area. Typical legal instruments include (i) international treaties, which may be bilateral or multilateral in form, (ii) EU instruments (for its member countries), (iii) domestic laws, and (iv) memoranda of understanding (these latter being not legally binding). These instruments are briefly described below where they have been grouped depending on the area within which they have been developed, namely (A) taxation (including customs), (B) money laundering, (C) corruption, (D) regulation and supervision, and (E) other areas of mutual legal assistance (MLA).

A. Tax related instruments

Bilateral Tax Treaties

There are currently around 3,500 double tax treaties in force around the world. These treaties are generally based on the **OECD Model Tax Convention** which, together with the United Nations Model Tax Convention, often constitutes the basis for negotiation between countries. A double tax treaty is an agreement between two States to co-ordinate the exercise of their taxing rights, with a view to reducing or eliminating double taxation. Bilateral tax treaties reduce or eliminate double taxation by either (i) allocating exclusive taxing rights to one of the contracting States (residence or source state) or (ii) where both States retain taxing rights, obliging one State to grant double taxation relief. Double tax treaties also constitute the legal basis for co-operation between the competent authorities of the Contracting States in relation to any taxes, whether or not they are within the scope of the treaty. Some double tax treaties also provide for assistance in the collection of taxes. Further details on bilateral tax treaties are included in Chapter 4, Section A.

Tax Information Exchange Agreements

Tax Information Exchange Agreements (TIEAs) are bilateral agreements between two jurisdictions providing a legal basis for administrative co-operation in tax matters. They are often negotiated on the basis of the Model issued by the OECD in 2002 and their number is growing exponentially. They provide for exchange of information on request and subject to certain conditions for the presence of foreign officials in relation to a specific tax investigation. Further details on TIEAs are included in Chapter 4, Section A.

Multilateral Tax Treaties

There are a number of multilateral tax treaties which provide for international co-operation, the most relevant of which is the **Convention on Mutual Administrative Assistance in Tax Matters** as amended in 2010. The Convention expressly provides for all possible forms of administrative co-operation between States in the assessment and collection of taxes. This co-operation ranges from exchange of information (including spontaneous and automatic exchange of information, the presence of foreign officials and simultaneous examinations) to the service of documents and the recovery of foreign tax claims. The number of Parties to the Convention continues to increase.

Other relevant instruments provide for international co-operation on customs matters. These are the **International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences**, issued by the World Customs Organization, which provides for mutual assistance with a view to preventing, investigating and repressing customs offences, and the **Convention A/P5/5/82 for Mutual Administrative Assistance in Customs Matters issued by the Economic Community of West African States**. Further details on this multilateral convention are included in Chapter 4, Section A.

EU Directives and Regulations

Within the European Union (EU), there are a number of Directives and Regulations which provide for international co-operation in the tax area. **Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the field of Taxation** (which repealed Directive 77/799/EEC) establishes rules and procedures for co-operation between EU countries with a view to exchanging information that is relevant to the administration and enforcement of national laws in the field of taxation. It applies to all taxes except value added tax (VAT), customs duties and excise duties covered by other EU legislation on administrative co-operation between EU countries. Specifically, **Council Regulation (EC) No 2073/2004 of 16 November 2004 on Administrative Cooperation in the field of Excise Duties** strengthens co-operation between tax authorities in the matter of excise duties. It lays down rules and procedures enabling the competent authorities of the Member States to co-operate and to exchange with each other, notably by electronic means, any information that may help them to assess excise duties correctly. On the other hand, **EU Council Regulation No 904/2010 of 7 October 2010 on Administrative Cooperation and Combating Fraud in the field of Value Added Tax** sets out rules and procedures for co-operation and exchanges of information between EU countries' competent authorities responsible for applying VAT. Further, the **Convention on Mutual Assistance and Co-operation between Customs Administrations** *(Naples II Convention)* provides for mutual assistance and co-operation among customs administrations, with a view to preventing and detecting infringements of national customs provisions, and prosecuting and punishing infringements of Community and national customs provisions. Mutual assistance among customs administrations of EU countries could be also based on the **Council Regulation (EEC) No 515/97 of 13 March 1997** as amended by **Regulation (EC) No 776/2008** which assists in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation. Further details on these instruments are included in Chapter 4, Section A.

Domestic laws

Some jurisdictions have enacted domestic legislation which allows their tax authorities to exchange information with certain countries on a unilateral basis. This type of legislation generally specifies details such as the overseas countries to which it relates the applicable procedures, any conditions or limitations, and safeguards to prevent abuse. Provisions for unilateral exchange of information under domestic legislation can be a valuable tool, but they are not a replacement for a negotiated bilateral or multilateral treaty. International agreements clearly reflect the intent to be legally bound and generally contain express, mutually-agreed provisions allowing their amendment, modification and termination. In addition, a well-established body of international law governs their interpretation, application and enforcement. On the other hand, unilateral provisions contained in domestic legislation may not always reflect the concerns of other countries to which they relate. As there is no reciprocal assumption of obligations between countries, unilateral provisions may be modified or repealed at short notice. In the absence of a signed treaty, it may be difficult for another country to rely on, or enforce, provisions that are wholly contained in a country's domestic law. For all these reasons, the weight of a bilateral or multilateral commitment through an international agreement (such as a TIEA or bilateral tax treaties) exceeds that of a unilateral commitment through domestic legislation. Domestic legislation may however constitute a viable option to fill gaps in a jurisdiction's treaty network and therefore provide for measures that would otherwise not be available.

B. Anti-money laundering and anti-terrorism financing related instruments

Multilateral Treaties

There are a number of multilateral treaties which provide for international co-operation against money laundering and terrorism financing. These include for example the **United Nations Convention against Transnational Organized Crime** (*Palermo Convention*), which provides for a number of measures that shall apply to the prevention, investigation and prosecution of certain offences (including the laundering of proceeds of crime) and serious crimes which are transnational in nature and involve an organised criminal group. In addition, the **United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances** (*Vienna Convention*) covers a number of forms of international co-operation, including confiscation, extradition and mutual legal assistance. Other relevant instruments in this area include the **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime** (*Strasbourg Convention)* and the **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism** (*Warsaw Convention*). Both Conventions aim at facilitating international co-operation in investigating crime and tracking down, seizing and confiscating the proceeds thereof through measures such as freezing of bank accounts, investigative assistance and confiscation. In the area of combating the financing of terrorism, it is important to mention the **International Convention for the Suppression of the Financing of Terrorism** (*FT Convention*) and the **European Convention on the Suppression of Terrorism**.[3] Further details on the mentioned instruments are included in Chapter 4, Section B.

[3] The revised FATF Standards adopted on 16 February 2012 now also require countries to become a party to and implement fully the UN Convention against Corruption (*UNCAC – Merida*

Memoranda of Understanding

In some cases international co-operation for the purpose of combating money laundering is granted on the basis of a memorandum of understanding (MoU) between the competent authorities involved. The **Model MoU released by the Egmont Group** provides a basis for building such kind of MoUs. It contains the basic rules for the exchange of information between FIUs for the purpose of facilitating the investigation and prosecution of persons suspected of money laundering and criminal activity related to money-laundering. It should be noted that this model MoU is not mandatory but faithfully reflects the rules governing the FIU to FIU information exchange within the Egmont Group. Further details on the Egmont Group Model MoU are included in Chapter 4, Section B.

EU Directives and Regulations

Within the European Union, there are a number of Directives and Regulations which provide for international co-operation in the anti-money laundering area. The most recent directive dealing with money laundering, repealing the previous Directive 91/308/EEC, is Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, also known as the **Third Anti-Money Laundering Directive** (3rd AML Directive). It dates back to 2005 and applies to financial and credit institutions, as well as to certain legal and natural persons working in the financial sector. Under this Directive, these entities and persons have to apply customer due diligence (CDD), taking into account the risk of money laundering and terrorist financing. The directive also states that national FIUs shall be set up to deal with suspicious transaction reports (STRs).

Another relevant EU instrument which focuses on international co-operation components is the **Council Decision of 17 October 2000 (2000/642/JHA)** concerning arrangements for co-operation between financial intelligence units of the Member States in respect of exchanging information. This Council Decision also formed the basis for setting up a protected channel of information for the information exchange between EU FIUs, the FIU.Net. Further details on these instruments are included in Chapter 4, Section B.

Domestic laws

Co-operation in the anti-money laundering and combating the financing of terrorism area is often based on domestic legislation. A number of international institutions have undertaken work to assist States and jurisdictions in preparing or upgrading their own legislative framework in conformity with international standards and best practices in the implementation of anti-money laundering measures. For instance, a joint effort of the United Nations Office on Drugs and Crime (UNODC) and the International Monetary

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Convention), as referred to in the anti-corruption related instruments (see ***C.*** below). In addition, where applicable, countries are also encouraged to ratify and implement other relevant conventions, such as the Council of Europe Convention on Cybercrime (*Budapest Convention*), which sets a framework for efficient international co-operation and identifies tools for efficient investigations, including improved investigative techniques; and the Inter-American Convention against Terrorism, which improves regional co-operation in the fight against terrorism and enhances co-operation in a number of areas, including exchange of information on border control measures, law enforcement actions and mutual legal assistance.

Fund (IMF) resulted in the issuing of **Model Legislation on Money Laundering and Financing of Terrorism** in 2005, replacing the initial model law on money laundering for civil law countries that was issued by the UNODC in 1999. This updated model legislation, which is largely based on the relevant international instruments concerning money laundering and the financing of terrorism and incorporates the pre-2012 FATF Recommendations, is a tool designed to facilitate the drafting of specially adapted legislative provisions by countries intending to enact a law against money laundering and the financing of terrorism or to upgrade their legislation in those areas. It also proposes innovative optional provisions aimed at strengthening the effectiveness of their AML/CFT regimes and offers States appropriate legal mechanisms to engage in international co-operation.

As part of an effort to assist common law jurisdictions prepare or upgrade their legislative framework to conform with international standards and best practices to implement AML/CFT measures, in 2009 the UNODC issued the **Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems)**. The current Model Provisions replace the 2003 Model and also incorporate relevant international instruments concerning money laundering and the financing of terrorism such as the pre-2012 FATF Recommendations. Further, model regulations concerning laundering offences connected to illicit drug trafficking and other serious offences were issued by the **Inter-American Drug Abuse Control Commission (CICAD) Experts Group on Money Laundering Control** to provide a legal framework to member states. Further details on the mentioned instruments are included in Chapter 4, Section B.

C. Anti-corruption related instruments

Multilateral Treaties

There exist a number of multilateral treaties covering the mutual exchange of information in anti-corruption matters (which in some cases also extend beyond corruption offenses). These include, for example, the **United Nations Convention against Corruption (UNCAC)** which provides for a number of international co-operation measures for mutual assistance in investigations of, and proceedings in, civil and administrative matters relating to corruption. The UNCAC also sets forth standards applicable to freezing, seizure, confiscation and return of the proceeds of certain criminal offences. Another key international instrument is the **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**, which requires State Parties to criminalise bribery of foreign public officials in international business transactions and sets forth standards for related co-operative measures, such as consultation, mutual legal assistance and extradition. Further, the **Inter-American Convention against Corruption (IACAC)** – the outcome of the regional effort of the Organization of American States to promote and strengthen the development of mechanisms needed to tackle corruption – not only obliges parties to provide mutual legal assistance to other parties, but also requires them to provide "mutual technical co-operation" on ways to prevent, detect, investigate and punish corruption. Finally, the **Criminal Law Convention on Corruption** issued by the Council of Europe is an instrument that obliges State Parties to criminalise a large number of corrupt practices and sets forth standards for mutual legal assistance, extradition and other types of

international co-operation (such as spontaneously providing information).[4] Further details on the mentioned instruments are included in Chapter 4, Section C.[5]

D. Regulation and supervision related instruments

There are also a number of instruments providing for international co-operation in the area of banking and financial system regulation and supervision. From the financial system regulators' point of view, it is worth referring to the **International Organisation of Securities Commissions' (IOSCO) Multilateral Memorandum of Understanding** (MMoU) concerning consultation and co-operation and the exchange of information between regulators. This provides for specific procedures for mutual assistance and the exchange of information between regulators and defines the scope of the assistance that can be provided. A certain number of bilateral treaties have been concluded between securities regulatory agencies to ensure compliance with, and enforcement of, their securities and derivatives laws and regulations. Some of these agreements are based on the MMoU developed by IOSCO.[6]

A framework of minimum standards that are needed for a supervisory system to be effective in the fight against financial crimes, including money laundering, was also developed by the Basel Committee on Banking Supervision in its **Core Principles for Effective Banking Supervision** and **Core Principles Methodology**. The current version of these standards, which is under revision process, reflects a review carried out in 2006. Further details on the mentioned instruments are included in Chapter 4, Section D.

E. Other mutual legal assistance instruments

Multilateral Legal Assistance Treaties

There are a number of multilateral treaties which provide for mutual legal assistance. The **European Convention on Mutual Assistance in Criminal Matters** sets out rules for the enforcement of letters rogatory by the authorities of a Party which aim to procure evidence in criminal proceedings undertaken by the judicial authorities of another Party. The Convention involves different forms of co-operation such as search or seizure of property, service of writs and records of judicial verdicts or audition of witnesses, experts and persons in custody. The **European Convention on Extradition** provides for the extradition between Parties of persons wanted for criminal proceedings or for the carrying out of a sentence. It provides for further forms of international co-operation including provisional arrest and handing over of property. The UN adopted a **Model Treaty on Mutual Assistance in Criminal Matters** for Member States to take it into account when

4. The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe so as to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure.

5. There are also a number of regional anti-corruption instruments which provide for mutual legal assistance, such as the African Union Convention on Combating and Preventing Corruption (2003), the Economic Community of West African States Protocol on the Fight against Corruption (2001) and the South African Development Community Protocol against Corruption (2001).

6. IOSCO is an international organisation consisting of most security regulators in the world. It seeks to provide an open forum for members and to establish a general framework for worldwide securities regulation, while also respecting the right of each country to regulate its own markets.

negotiating treaties at the bilateral, regional or multilateral level. It is also worth mentioning the **Convention Implementing the Schengen Agreement,** which introduces measures designed to create, following the abolition of internal border checks, a common area of security and justice. It is concerned with harmonising provisions relating to entry into and short stays in the Schengen area by non-EU citizens, asylum matters and measures to combat cross-border drugs-related crime. It importantly introduces police co-operation and mutual assistance in criminal matters.

There are also several regional conventions aimed at facilitating international co-operation. These include the **ASEAN Treaty on Mutual Legal Assistance in Criminal Matters**, the **Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters, the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme)** and the **Inter-American Convention on Mutual Assistance in Criminal Matters**.[7] Further details on these instruments are included in Chapter 4, Section E.

Bilateral Mutual Legal Assistance Treaties

There are a number of bilateral mutual legal assistance treaties currently in force. These bilateral treaties are the prime tool for international co-operation to gather evidence for use in the investigation and prosecution of criminal cases. Forms of assistance covered by mutual legal assistance (MLA) typically include the power to summon witnesses, to compel the production of evidence and other relevant documents, to issue search warrants and to serve process. Some of these bilateral mutual legal assistance treaties are based directly on the **Model Treaty on Mutual Assistance in Criminal Matters** adopted by the UN. This model provides for different forms of co-operation such as service of judicial documents, search and seizure, transfer of persons in custody to serve sentences and transfer of proceedings in criminal matters.

In order to provide its member countries with the legal tools they need to facilitate bilateral co-operation, Interpol has developed a **Model [bilateral] Police Cooperation Agreement,** aimed at creating a privileged police co-operation space and setting up machinery to facilitate co-operation and to create specific operational structures for that purpose. Further details on the model agreements above described are included in Chapter 4, Section E.

EU instruments

There are a number of EU instruments aimed at improving mutual legal assistance between Member States. For example, the **Convention established by the Council in accordance with Article 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union** aims at encouraging and modernising co-operation between judicial, police and customs authorities by supplementing the provisions and facilitating the application of the European Convention on Mutual Assistance in Criminal Matters. The Convention involves different forms of co-operation such as sending and service of procedural documents, spontaneous exchange of information, placement of articles obtained by criminal means or joint investigation teams. Further, it is worth mentioning **Council Framework Decision 2006/960/JHA of 18 December 2006** which aims at simplifying

[7]. Another relevant instrument is the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters (1992).

the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. Further details on these instruments are included in Chapter 4, Section E.

Interpol, Europol and Eurojust

In parallel to the mentioned instruments, organisations such as **Interpol** and **Europol** have been established so as to improve police co-operation between Member States in order to combat serious forms of transnational crime. As part of police co-operation between Member States, these organisations aim to facilitate the exchange of information between Member States and collate and analyse information and intelligence.[8] **Eurojust**[9] is an agency of the European Union (EU) dealing with judicial co-operation in criminal matters. Its task is to stimulate and improve the co-ordination of investigations and prosecutions among the competent judicial authorities of the EU Member States when they deal with serious cross-border and organised crime. Interpol, Europol and Eurojust co-operate with each other. For instance, an agreement has been concluded between Interpol and Europol to increase their effectiveness in combating serious forms of organised international crime. The agreement provides for the exchange of operational, strategic and technical information as well as for the co-ordination of activities. A similar agreement has been concluded between Eurojust and Europol. Further details on these agreements are included in Chapter 4, Section E.

Domestic laws

In many countries, domestic legislation may complement treaty-based tools for providing mutual legal assistance. For example, through domestic legislation a country could set forth requirements for providing MLA to countries with which it has no treaty relations or may designate certain foreign countries as eligible for MLA. Importantly, in some countries domestic legislation may be required before an international MLA agreement, whether bilateral or multi-lateral, is effective and enforceable. When a requesting country must rely solely on the recipient country's domestic law for the provision of MLA, it is truly relying on the recipient country's good will as domestic law does not create any legally enforceable obligation to provide MLA. Traditionally, MLA was provided directly between courts. This generally occurred through the use of the

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8. While Interpol and Europol have been established specifically for law enforcement co-operation, there are also other networks which aim at bringing a broader group of people into contact with each other. For example, IberRed (*Red Iberoamericana de Cooperación Jurídica Internacional* - **Ibero-american network for international legal co-operation**) allows direct, rapid and secure contacts to be established between (i) IberRed Contact Points (that is, public officers, such as judges, prosecutors and other judicial authorities appointed by supreme courts, prosecution offices and ministers of justice of Iberoamerican countries); (ii) between Liaison Officers of IberRed Central Authorities; (iii) between Contact Points and Liaison Officers; and (iv) between Contact Points or Liaison Officers and Eurojust National Members. **Eurojust** has a similar network, as does the **World Bank/UNODC's Stolen Asset Recovery (StAR) Initiative**. These networks allow countries to quickly get into contact with appropriate authorities in another country, whether in the context of a formal exchange of MLA or for more informal purposes.

9. Based on the decision of the 1999 Tampere European Council, Eurojust was set up in 2002 by the Council of the European Union. The original Eurojust decision was amended in 2003 and went through a significant revision in 2009. The National Members are senior and experienced judges, prosecutors, or police officers of equivalent competence, who are seconded in accordance with their respective legal systems and hold permanent seats in The Hague.

letter rogatory, which is a formal request from a court where an action is pending to a court in the foreign country where evidence is sought. Letters rogatory are still used in criminal matters today, mostly as a tool of last resort, in the absence of a treaty mechanism for seeking MLA. A letter rogatory must comply with strict requirements regarding form and substance and is customarily transmitted through the countries' diplomatic channels, thus making the process longer.

Chapter 3

Current work in the area of domestic and international co-operation

Work is ongoing in a number of fora to improve international co-operation between counterpart agencies, with a view to make it more efficient and effective while respecting relevant safeguards, in particular regarding confidentiality and protection of personal data. Several initiatives have been launched to improve domestic inter-agency co-operation. These initiatives are also relevant to improve international inter-agency co-operation and are briefly summarised below.

A. Improving domestic inter-agency co-operation

Work is currently underway through the TFTC to improve domestic co-operation among different law enforcement agencies and implement an effective whole-of-government approach to fighting tax crimes and other financial crimes. The different forms of domestic inter-agency co-operation currently in place have been identified and analysed, starting with the countries which participate in the TFTC, and are the subject of a comprehensive report. This report looks in detail at key organisational and operational models for fighting financial crime, identifies differences in legal frameworks and provides a comparison of country specific information. Importantly, it identifies successful practices which can be used by other countries willing to implement a whole-of-government approach in fighting tax crimes and other financial crimes and contains a number of conclusions and recommendations on how to improve the situation in the countries covered in the report. The report will be updated periodically to show progress made over time and cover a wider range of countries.

B. Improving international co-operation between counterpart agencies

Initiatives to improve international co-operation in the tax area include, for example, the work done at the level of the OECD, on both the legal and practical aspects of co-operation in tax matters. The OECD has published a Manual on Information Exchange which provides practical assistance to officials dealing with exchange of information for tax purposes and may also be useful in designing or revising national or regional manuals. Systems and procedures are continuously being developed to improve the quality of information sharing and to facilitate the exchange of tax information between countries, taking into account the latest technological developments. A key aspect of this work is to ensure that existing standards of data integrity and security are not compromised when information is exchanged electronically. Further, the Global Forum on Transparency and Exchange of Information for Tax Purposes is mandated to ensure that all jurisdictions adhere to the same high standard of international co-operation in tax matters through a process of peer reviews of the legal and administrative framework within which exchange

of information takes place. The EU is also playing a key role to make international co-operation in tax matters more efficient.

Initiatives to improve international co-operation in the AML/CFT area include, for example, the work being done by the FATF and the Egmont Group. The Egmont Operational Working Group (OpWG) Information Exchange and International Cooperation Enhancement Project provides a snapshot of international FIU to FIU information exchange, first by providing quantitative and descriptive data on the exchanged information between FIUs, second by analysing the practice of information exchange in terms of its perceived quality, and third by highlighting some issues – both of technical and substantive nature – for further consideration to inform the Egmont Group of where it might consider initiatives to improve the overall effectiveness of the global network of FIUs.

The 2012 revision of the FATF Recommendations includes tax crimes into the list of designated predicate offenses[10] and this may result in increased co-operation between tax and anti-money laundering authorities. The addition of tax crimes as a predicate offence for money laundering implies that requirements on international co-operation now also apply to tax crimes. Further, the 2012 revisions in relation to the Recommendation on International Cooperation are intended to clarify and expand its scope. This would include requirements for: (i) countries to render mutual legal assistance notwithstanding the absence of dual criminality if the assistance does not involve coercive measures; (ii) countries to ensure that a broad range of powers and investigative techniques, available to their law enforcement are also available in response to requests for mutual legal assistance, when this is consistent with the domestic framework; (iii) countries to respond to requests made on the basis of non-conviction based confiscation proceedings and related measures, unless this is inconsistent with fundamental principles of law. The scope for other forms of international co-operation between competent authorities have been expanded and clarified to facilitate co-operation between counterparts performing similar responsibilities functions and regardless of their respective nature or status. Countries should also permit their competent authorities to exchange information indirectly with non-counterparts (diagonal co-operation between non-counterpart competent authorities), subject to adequate safeguards of confidentiality.

For several years, members of the OECD Working Group on Bribery, which includes prosecutors and law enforcement officials, have discussed the fact that serious problems hinder MLA in foreign bribery. The results of these problems have a direct impact on enforcement, causing investigations to halt and be declined, thus forcing investigations up against statute of limitations deadlines. This may result in settlements in which prosecutors must negotiate at an evidentiary disadvantage and cause law enforcement and prosecution officials to use charging statutes that do not encapsulate the entire crime that was committed. For these reasons, the Working Group on Bribery has undertaken to study some of the most common MLA challenges in foreign bribery cases. The study offers potential solutions to specific problems and discusses some best practices that might help to avoid such problems in the future, taking into account the fact that many of

[10]. When deciding on the range of offences to be covered as predicate offences under each of the categories of designated predicate offences for money laundering, each country may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements of those offences that make them serious offences.

the challenges and solutions identified are applicable to MLA generally and are not specific to foreign bribery investigations.

In parallel to the international process leading to the revision of the FATF Recommendations, the European Commission has been undertaking its own review of the European framework around the protection the financial system's soundness and integrity, as set out by the 3rd AML Directive. Indeed, in April 2012 the Commission issued a report on the application of the 3rd AML Directive with the purpose to consider the need for possible changes to the framework in light of both the Commission's own findings as well as the newly adopted FATF standards. Specifically, the Commission is considering whether the existing "all serious crimes" approach adopted by the current Directive when defining criminal activities remains sufficient to cover tax crimes or whether tax crimes should be included as a specific category of "serious crimes". The Commission report mentions that consideration could be also given as to whether further definition of tax crimes is required and underlines the need of reinforcing FIU co-operation beyond the international standards and harmonising powers available to FIUs at national level in order to reduce the shortcomings in FIU co-operation revealed by practical experience.

Chapter 4

Catalogue of main instruments

The catalogue contained in the following pages describes the features of several instruments which can be used for international co-operation on tax crimes and other financial crimes. These instruments are briefly described below where they have been grouped depending on the area within which they have been developed, namely (A) taxation (including customs), (B) money laundering, (C) corruption, (D) regulation and supervision, and (E) other areas of mutual legal assistance.

The catalogue is based on a common template and contains the following information in relation to each instrument: the Parties to the instrument, its scope, the forms of co-operation it provides for, the authorities that can use the instrument, the conditions for requesting assistance, and the grounds for denying assistance. The catalogue also contains details in relation to the use that the authorities can make of the information received, whether they can share such information with other local authorities or with foreign authorities, and the relationship between the instrument concerned and other instruments.

A. Tax related instruments

1. OECD Model Tax Convention on Income and on Capital

Key points

- The OECD Model Tax Convention deals with the allocation of taxing rights as well as with international co-operation in tax matters between contracting States. It provides for two forms of international co-operation, namely exchange of information (Art. 26) and assistance in collection of taxes (Art. 27).
- Any information exchanged under the Convention shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to taxes of every kind and description imposed on behalf of Contracting States, or the oversight of the above.
- Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. If the information obtained under the Convention appears to be of value to the receiving State for other purposes, that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes, unless there is a specific provision in the actual treaty allowing for such use of the information (which is contained in the OECD commentary and increasingly included in actual treaties).
- The information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the treaty between the Contracting States allowing such disclosure. Assistance in collection of taxes applies to any amount owed in respect of all taxes that are imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, but only insofar as the imposition of such taxes is not contrary to the Convention.
- The Convention enables each Contracting State to designate one or more authorities as being competent for the purposes of international co-operation in tax matters. Generally, the Contracting States designate as competent authority the Minister of Finance, the Minister of Treasury or the Commissioner of Revenue, or its authorised representative.

I. Parties

The origins of the OECD Model Tax Convention on Income and on Capital (hereinafter referred as to the Convention) date back to 1963, when the OECD’s Fiscal Committee (replaced in 1971 by the Committee on Fiscal Affairs) published the Draft Double Taxation Convention on Income and on Capital as a bilateral convention addressing the avoidance of double taxation.[1]

Since then, the first Draft convention has been subject to several updates which resulted in the publication of the current version of the Model Tax Convention on Income and on Capital in July 2010. Close to 3500 treaties worldwide are based on the Model.

[1] Draft Double Taxation Convention on Income and on Capital, OECD, Paris, 1963.

II. Scope (Art. 26 and Art. 27)

The Convention reflects the work carried out by the OECD to eliminate international double taxation. The main purpose of the Convention is to clarify, standardise, and confirm the fiscal situation of taxpayers through the application by all countries of common solutions to identical cases of double taxation. The Convention also addresses other issues, such as the prevention of tax evasion through exchange of information and assistance in collection of taxes.[2]

The scope of the Convention is contained in Articles 1 and 2. It applies to persons who are residents of one or both of the Contracting States (Art. 1) and deals with taxes on income and on capital, which are described in a general way in Article 2. Notwithstanding this, it is expressly stated that provisions included in Articles 1 and 2 do not restrict the exchange of information allowed under the Convention (under Art. 26), so that the information exchanged may include particulars about non-residents and relate to taxes not covered by the Convention.

Exchange of information under the Convention covers information that is foreseeably relevant for carrying out the provisions of the Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation under the domestic taxation laws concerned is not contrary to the Convention (Art. 26, para 1). The standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer (Comm. on Art. 26, n.5). It is made clear that the information covered by paragraph 1 of Article 26 is not limited to taxpayer-specific information: the competent authorities may also exchange other sensitive information related to tax administration and compliance improvement, for example risk analysis techniques or tax avoidance or evasion schemes (Comm. to Art. 26, n. 5.1).

Assistance in collection of taxes (under Art. 27) is not restricted to taxes to which the Convention generally applies pursuant to Article 2. Such assistance indeed applies to “revenue claims” defined as any amount owed in respect of all taxes that are imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, but only insofar as the imposition of such taxes is not contrary to the Convention or other instrument in force between the Contracting States. It also applies to the interest, administrative penalties and costs of collection or conservancy that are related to such an amount (Comm. to Art. 27, para 2, n. 10).[3]

III. Forms of co-operation (Art. 26 and Art. 27)

The Convention provides for two forms of international co-operation: exchange of information (Art. 26) and assistance in collection of taxes (Art. 27).

2. See Chapter VI, Special Provisions, OECD Model Tax Convention on Income and on Capital, OECD, Paris, 2010.

3. Contracting States that may prefer to limit the application of assistance in collection of taxes to only certain types of taxes should amend the text of the provision accordingly (Comm. to Art. 27, para 2, n. 11 and n. 12).

Exchange of Information (Art. 26)

The Convention allows information to be exchanged in different ways (Comm. to Art. 26, n. 9):

a) on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;

b) automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State;

c) spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.

These three forms of exchange may also be combined. It should also be stressed that the Convention does not restrict the possibilities of exchanging information to these methods and that the Contracting States may use other techniques to obtain information which may be relevant to both Contracting States such as simultaneous examinations, tax examinations abroad and industry-wide exchange of information (Comm. to Art. 26, n. 9.1).

Assistance in Collection of Taxes (Art. 27)[4]

The Contracting States shall lend assistance to each other in the collection of revenue claims.[5] This assistance must be provided as regards a revenue claim owed to a Contracting State by any person, whether or not a resident of a Contracting State (Art. 27, para 1). It is made clear that Article 26 applies to the exchange of information for purposes of assistance in collection of taxes. The confidentiality of information exchanged for purposes of assistance in collection is thus ensured (Comm. to Art. 27, para 1, n. 5).

The assistance in the collection of taxes under this provision will take two forms, described below:

a) When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State (Art. 27, para 3);

4. In some countries, national law, policy or administrative considerations may not allow or justify the type of assistance envisaged under this Article or may require that this type of assistance be restricted, *e.g.* to countries that have similar tax systems or tax administrations or as to the taxes covered. For that reason, the Article should only be included in the Convention where each State concludes that, based on the factors described in paragraph 1 of the Commentary on the Article, they can agree to provide assistance in the collection of taxes levied by the other State (Art. 27).

5. The term "revenue claim" means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount (Art. 27, para 2).

b) A Contracting State may request the other Contracting State to take measures of conservancy even where it cannot yet ask for assistance in collection, *e.g.* when the revenue claim is not yet enforceable or when the debtor still has the right to prevent its collection (Art. 27, para 4).

Art. 27 provides that the competent authorities of the Contracting States may, by mutual agreement, decide the details of the practical application of the provisions of the Article (Art. 27, para 1). Such agreement should, in particular, deal with the documentation that should accompany a request of assistance made under Art. 27 and with the issue of the costs that will be incurred by the requested State in satisfying the request (Comm. to Art. 27, para 1, n. 6-9).

Article 27 ensures that proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State (Art. 27, para 6). Thus, no legal or administrative proceedings, such as a request for judicial review, shall be undertaken in the requested State with respect to these matters (Comm. to Art. 27, para 6, n. 28).

The Article then contains certain limitations to the obligations imposed in the State which receives a request for assistance (for further details see Art. 27, para 8 and the related Commentary).

IV. Authorities that can use the instrument (Art. 3, para 1)

The definition of the term "competent authority" provided by the Convention (Art. 3, para 1, let f and related Commentary) recognises that in some countries the execution of double taxation conventions does not exclusively fall within the competence of the highest tax authorities; some matters are reserved or may be delegated to other authorities. Thus, the present definition enables each Contracting State to designate one or more authorities as being competent. Generally, the Contracting States designate as competent authority the Minister of Finance, the Minister of Treasury or the Commissioner of Revenue, or its authorised representative.

V. Conditions for requesting assistance (Art. 26)

The Convention does not impose any particular conditions upon the request of information under the provisions of Article 26. The Commentary makes it clear that the manner in which the exchange of information will finally be affected can be decided upon by the competent authorities of the Contracting States. For example, Contracting States may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Contracting States which are required, according to their law, to observe data protection laws, may wish to include provisions in their bilateral conventions concerning the protection of personal data exchanged (Comm. to Art. 26, para 1, n. 10).

VI. Grounds for denying/postponing assistance (Art. 26, para 3 and Art. 27, para 8)

The Convention also states that if information is requested by a Contracting State in accordance with Article 26, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. This obligation is subject to the limitations of

paragraph 3 above mentioned, but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information (Art. 26, para 4). Further, a Contracting State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution (Art. 26, para 5). Thus, this provision overrides the limitations provided under paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of bank secrecy.

Article 26 paragraph 3 lists certain circumstances where the requested State may decline assistance. It states that in no case shall the provisions providing for exchange of information be construed so as to impose on Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State (Art. 26, para 3, let a). It is made clear that the principle of reciprocity has no application where the legal system or administrative practice of only one country provides for a specific procedure (Comm. to Art. 26, para 3, n. 15.1);

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State (Art. 26, para 3, let b)[6];

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*) (Art. 26, para 3, let c). It is clarified that a requested State may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under domestic law (Comm. to Art. 26, para 3, n. 19.3).

Also Article 27 on assistance on collection of taxes contains certain limitations to the obligations imposed on a Contracting State which receives a request for assistance, stating that the Contracting State (Art. 27, para 8):

a) is not bound to go beyond its own internal laws and administrative practice or those of the other State in fulfilling its obligations under Article 27;

b) is not obliged to carry out measures contrary to public policy (*ordre public*);

c) is not obliged to satisfy the request if the other State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;

d) may also reject the request for practical considerations, for instance if the costs that it would incur in collecting a revenue claim of the requesting State would exceed the amount of the revenue claim.

6. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes (Comm. to Art. 26, para 3, n, 16).

VII. Use of information received (Art. 26, para 2)

Any information exchanged under the provisions of Article 26 shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1 of Article 26, *i.e.* taxes of every kind and description imposed on behalf of Contracting States, or the oversight of the above. Such persons or authorities shall use the information only for such purposes (Art. 26, para 2). They may disclose the information in public court proceedings or in judicial decisions. These confidentiality rules apply to all types of information received under Article 26, including both information provided in a request and information transmitted in response to a request (Comm. to Art. 26, para 2, n. 11).

If the information is disclosed in public court proceedings or in judicial decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. If either or both of the Contracting States object to the information being made public by courts in this way, or, once the information has been made public in this way, to the information being used for other purposes, because this is not the normal procedure under their domestic laws, they should state this expressly in their convention (Comm. to Art. 26, para 2, n. 13).

VIII. Sharing of information received with other local authorities (Art. 26)

If the information obtained under the Convention appears to be of value to the receiving State for purposes other than those mentioned by Article 26, paragraph 2 (*i.e.* assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes of every kind and description imposed on behalf of Contracting States, or the oversight of the above), that State may not use the information for such other purposes but it must resort to means specifically designed for those purposes (*e.g.* in case of a non-fiscal crime, to a treaty concerning judicial assistance). However, Contracting States wishing to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (*e.g.* to combat money laundering, corruption, terrorism financing) may broaden the purposes for which they may use information exchanged by amending the actual treaty. Under the alternative provision contained in the Convention information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use (Comm. to Art. 26, para 12.3).

IX. Sharing of information received with foreign authorities (Art. 26)

The information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure (Comm. to Art. 26, para 2, n. 12.2).

X. Relationship with other instruments (Art. 26)

The possibilities of assistance provided by Article 26 of the Convention (*i.e.* exchange of information) do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting States which relate to co-operation in tax matters. Since the exchange of information concerning the application of custom duties has a legal basis in other international instruments, the

provisions of these more specialised instruments will generally prevail and the exchange of information concerning custom duties will not, in practice, be governed by Article 26 (Comm. to Art. 26, para 1, n. 5.2).

2. Model Agreement on Exchange of Information on Tax Matters

Key points

- The Model TIEA provides for international co-operation through exchange of information upon request and tax examinations abroad.
- Information that can be exchanged is that which is relevant for the determination, assessment and collection of taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters.
- Contracting Parties can designate one or more authorities as being competent to execute the TIEA. It is customary practice to have only one competent authority per Contracting Party, namely the Minister of Finance/Taxation or its authorised representative.
- Information obtained under the TIEA may be disclosed in public court proceedings or in judicial decisions only for the purposes of assessing or collecting the taxes covered by the TIEA, enforcing or prosecuting in respect of such taxes and determining appeals in relation to such taxes.
- The information may not be disclosed to any other person, entity or authority without the express written consent of the competent authority of the Contracting Party that supplied the information.

I. Parties (Art. 4)

A Model Tax Information Exchange Agreement (TIEA) was released by the OECD in 2002. At the moment there are more than 600 bilateral TIEAs based on this model, although variations are sometimes inserted into the actual agreements. Details indicated below refer to the bilateral version of the Model TIEA, unless otherwise indicated.

II. Scope (Art. 1)

The Model TIEA provides for assistance in exchange of information that is foreseeably relevant to the administration and enforcement of domestic laws of the Contracting Parties concerning taxes covered by the TIEA. Information exchanged shall include that information which is relevant for the determination, assessment and collection of taxes covered by the TIEA, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Therefore, the agreement applies to both civil and criminal tax matters.

The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. The Agreement also uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information (Comm. n. 4).[1]

[1] The standard of foreseeable relevance is also used in the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters.

III. Forms of co-operation (Art. 5 and Art. 6)

The Model TIEA provides for exchange of information upon request (Art. 5) and tax examinations abroad (Art. 6). Contracting Parties may wish to consider expanding their co-operation in matters of information exchange for tax purposes by covering automatic and spontaneous exchanges and simultaneous tax examinations (Comm. n. 39).

Exchange of Information Upon Request (Art 5)

The Model TIEA provides the general rule that the competent authority of the requested Party must provide information upon request for the specific purposes identified by the Model TIEA in Article 1, *i.e.* for both civil and criminal tax matters.[2] In connection with the latter, information shall be exchanged upon request without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

The Model TIEA includes a provision intended to require the provision of information in a format specifically requested by a Contracting Party to satisfy its evidentiary or other legal requirements to the extent allowable under the laws of the requested Party. Such forms may include depositions of witnesses and authenticated copies of original records. Under this provision, the requested Party may decline to provide the information in the specific form requested if such form is not allowable under its laws. A refusal to provide the information in the format requested does not affect the obligation to provide the information (Art. 5, para 3 and Comm. n. 44).

Tax Examinations Abroad (Art. 6)

A Contracting Party may allow representatives of the other Party to enter the territory of the first-mentioned Party to interview individuals and to examine records but only with the written consent of the persons concerned. The decision of whether to allow such examinations and, if so, on what terms lies exclusively in the hands of the requested Party (Comm. n. 66). At the request of the competent authority of one Contracting Party, the competent authority of the other Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party.

IV. Authorities that can use the instrument (Art. 1 and Art. 4, para 1, let. b)

The term "competent authority" means the authorities designated by a Contracting Party in its instrument of acceptance, ratification or approval (Art. 4, para 1, let. b). In some Contracting Parties the execution of the TIEA may not fall exclusively within the competence of the highest tax authorities and some matters may be reserved or may be delegated to other authorities. The definition enables each Contracting Party to designate one or more authorities as being competent to execute the TIEA. While this is the case in

2. Art. 4 of the Model TIEA defines "criminal tax matters" as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the applicant Party. Criminal law provisions based on non-intentional conduct (*e.g.* provisions that involve strict or absolute liability) do not constitute criminal tax matters for purposes of the Model TIEA. A tax matter involves "intentional conduct" if the pertinent criminal law provision requires an element of intent.

principle[3] it is customary practice to have only one competent authority per Contracting Party, namely the Minister of Finance/Taxation or its authorised representative.

V. Conditions for requesting assistance (Art. 5)

TIEAs allow for exchange of information upon request provided that the competent authority of the applicant Party provides certain information when making a request for information, namely to demonstrate the foreseeable relevance of the information to the request (Art. 5, para 5):

a) the identity of the person under examination or investigation;

b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

c) the tax purpose for which the information is sought;

d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

e) to the extent known, the name and address of any person believed to be in possession of the requested information;

f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

VI. Grounds for denying assistance (Art. 7)

Under the TIEA, the requested Party is given the discretion to refuse to provide the information in the following situations:

a) the applicant Party would not be able to obtain the information requested under its own laws for purposes of the administration or enforcement of its own tax laws (Art. 7, para 1);

b) the request is not made in conformity with the Agreement (Art. 7, para 1);

c) the information requested would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 (*i.e.* (i) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees, and (ii) information regarding the ownership of companies, partnerships, trusts, foundations, “Anstalten” and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership

3. See, for example, TIEAs signed by Germany, where competent authorities for Germany are the Federal Ministry of Finance - or the agency to which it has delegated its power - and, in respect of criminal tax matters, the Federal Ministry of Justice - or the agency to which it has delegated its power.

chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. […]) shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph, *i.e.* because the information is held by one of the persons mentioned therein (Art. 7, para 2);

d) the information requested would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are: (i) produced for the purposes of seeking or providing legal advice or (ii) produced for the purposes of use in existing or contemplated legal proceedings (Art. 7, para 4);

e) the disclosure of the information would be contrary to public policy (*ordre public)* (Art. 7, para 5);

f) the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances (Art. 7, para 6).

A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed (Art. 7, para 5).

The Commentary to Article 7 makes clear that if the requested Party does provide the information in cases where it could deny it, the person concerned cannot allege an infraction of the rules on secrecy (Comm. n. 71).

VII. Use of information received (Art. 8)

The competent authorities of the requesting Party may use any information exchanged under the Model TIEA only for the following purposes: assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Model TIEA. They may disclose the information in public court proceedings or in judicial decisions (Art. 8).

VIII. Sharing of information received with other local authorities (Art. 8)

Any information received under the TIEA shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with: (i) the assessment or collection of the taxes covered by the TIEA; (ii) the enforcement or prosecution in respect of the taxes covered by the TIEA; (iii) the determination of appeals in relation to the taxes covered by the TIEA. Such persons or authorities shall use such information only for such purposes.

The information may be disclosed to any other person or entity or authority provided the competent authority of the Contracting Party that supplied the information expresses its consent in writing.

IX. Sharing of information received with foreign authorities (Art. 8)

The information may be disclosed to other jurisdictions provided the competent authority of the Contracting Party that supplied the information expresses its consent in writing.

X. Relationship with other instruments (Art. 12)

The possibilities of assistance provided by the TIEA do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting Parties which relate to co-operation in tax matters.

3. Convention on Mutual Administrative Assistance in Tax Matters

Key points

- The 1988 Convention was originally available to members of the Council of Europe and the OECD, but was amended by the 2010 Protocol which opened it to non member countries and amended the original provisions to reflect the international standards on transparency and exchange of information for tax purposes. Currently over 30 States have signed the Convention as amended by the Protocol.
- The Convention provides for administrative assistance through exchange of information, assistance in recovery including measures of conservancy, and service of documents. The Convention allows information to be exchanged upon request, automatically or spontaneously. It also provides for simultaneous tax examinations and tax examinations abroad.
- Any information obtained by a Party under the Convention may be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above.
- Only the persons or authorities mentioned above may use the information and then only for such purposes unless such information may be used for other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use. The prior authorisation of the supplying Party is also required when the requesting Party transmits the information obtained under the Convention to a third Party.
- Each Contracting State may designate one or more authorities as being competent for administrative assistance under the Convention. Most of the Parties designated as competent authority the Minister of Finance and the Tax Administration or its authorised representative.

I. Parties

The Convention on Mutual Administrative Assistance in Tax Matters (hereinafter referred to as the "Convention") was developed jointly by the OECD and the Council of Europe in 1988. It was amended by the 2010 Protocol which opened the Convention to all countries (and aligned it to the international standards on transparency and exchange of information for tax purposes). Currently more than 30 States have signed the Convention as amended by the Protocol.[1]

II. Scope (Chapter I, Art. 1 and Art. 2)

The Convention states that the Parties shall provide administrative assistance to each other in tax matters (Art. 1). It is intended to have very wide scope as it covers all forms of compulsory payments to general government with the sole exception of customs duties

[1] Status of ratifications as at April 2012: Argentina, Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Georgia, Germany, Greece, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea, Mexico, Moldova, Netherlands, Norway, Poland, Portugal, Russia, Slovenia, South Africa, Spain, Sweden, Turkey, Ukraine, United Kingdom, United States. Azerbaijan signed the original 1988 Convention and did not sign the 2010 Protocol.

and all other import-export duties and taxes which are covered by the international Convention on mutual administrative assistance for the prevention, investigation and repression of customs offences, prepared under the auspices of the Customs Co-operation Council (Comm. to Art. 2, n. 25).

III. Forms of co-operation (Chapter III, Art. 4-17)

The Convention provides for three forms of assistance: exchange of information (Chapter III, Section I, Art. 4-10), assistance in recovery (Chapter III, Section II, Art. 11-16) and service of documents (Chapter III, Section III, Art. 17).

Exchange of information (Chapter III, Section I, Art. 4-10)

The Parties shall exchange any information that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by the Convention. The Convention allows information to be exchanged upon request (Art. 5), automatically (Art. 6) or spontaneously (Art. 7). The Convention also provides for simultaneous tax examinations (Art. 8) and tax examinations abroad (Art. 9).

Exchange of information on request (Art. 5)

At the request of the applicant State, the requested State shall provide the applicant State with any information that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by the Convention which concerns particular persons or transactions (Art. 5, para 1). If the information available in the tax files of the requested State is not sufficient to enable it to comply with the request for information, that State shall take all relevant measures to provide the applicant State with the information requested (Art. 5, para 2).

Automatic exchange of information (Art. 6)

Two or more Parties shall automatically exchange information with respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement.

Spontaneous exchange of information (Art. 7)

A Party shall, without prior request, forward to another Party information of which it has knowledge in the following circumstances (Art. 7, para 1): (a) the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party; (b) a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Party which would give rise to an increase in tax or to liability to tax in the other Party; (c) business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both; (d) a Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; (e) information forwarded to the first-mentioned Party by the other Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Party.

Each Party shall take such measures and implement such procedures as are necessary to ensure that information described in paragraph 1 will be made available for transmission to another Party (Art. 7, para 2).

Simultaneous tax examinations (Art. 8)

A simultaneous tax examination is an arrangement between two or more Parties to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain (Art. 8, para 2). The Convention provides that cases and procedures for simultaneous tax examinations shall be determined by consultations between the Parties, at the request of one of them (Art. 8, para 1).

Tax examinations abroad (Art. 9)

At the request of the competent authority of the applicant State, the competent authority of the requested State may allow representatives of the competent authority of the applicant State to be present at the appropriate part of a tax examination in the requested State. All decisions with respect to the conduct of the tax examination shall be made by the requested State.

Assistance in recovery (Chapter III, Section II, Art. 11-16)

Under Article 11, para 1, at the request of the applicant State, the requested State shall take the necessary steps to recover tax claims of the first-mentioned State as if they were its own tax claims, except in relation to time-limits which are governed solely by the laws of the applicant State (Art. 14) and in relation to priority (Art. 15).[2] This shall apply only to tax claims which form the subject of an instrument permitting their enforcement in the applicant State and, unless otherwise agreed between the Parties concerned, which are not contested. However, where the claim is against a person who is not a resident of the applicant State, the assistance in recovery shall only apply, unless otherwise agreed between the Parties concerned, where the claim may no longer be contested (Art. 11, para 2).

At the request of the applicant State, the requested State shall, with a view to the recovery of an amount of tax, take measures of conservancy even if the claim is contested or is not yet the subject of an instrument permitting enforcement (Art. 12).

Service of documents (Chapter III, Section III, Art. 17)

At the request of the applicant State, the requested State shall serve upon the addressee documents, including those relating to judicial decisions, which emanate from the applicant State and which relate to a tax covered by this Convention. The requested State shall effect service of documents: a) by a method prescribed by its domestic laws for the service of documents of a substantially similar nature; b) to the extent possible, by a particular method requested by the applicant State or the closest to such method available under its own laws. A Party may effect service of documents directly through the post on a person within the territory of another Party.

IV. Authorities that can use the instrument (Art. 3)

The competent authorities designated by the Parties for the purposes of administrative assistance under the Convention are listed in Annex B to the Convention. Most of the

[2] Art. 15: The tax claim in the recovery of which assistance is provided shall not have in the requested State any priority specially accorded to the tax claims of that State even if the recovery procedure used is the one applicable to its own tax claims.

Parties designated as competent authority the Minister of Finance and the Tax Administration or its authorised representative.

V. Conditions for requesting assistance (Art. 18)

A request for administrative assistance made under the Convention shall indicate where appropriate (Art. 18, para 1):

a) the authority or agency which initiated the request made by the competent authority;

b) the name, address, or any other particulars assisting in the identification of the person in respect of whom the request is made;

c) in the case of a request for information, the form in which the applicant State wishes the information to be supplied in order to meet its needs;

d) in the case of a request for assistance in recovery or measures of conservancy, the nature of the tax claim, the components of the tax claim and the assets from which the tax claim may be recovered;

e) in the case of a request for service of documents, the nature and the subject of the document to be served;

f) whether it is in conformity with the law and administrative practice of the applicant State and whether it is justified in the light of the requirements of Article 21.2.g.[3]

As soon as any other information relevant to the request for assistance comes to its knowledge, the applicant State shall forward it to the requested State (Art. 18, para 2).

Specific provisions apply to any request for assistance in recovery under Section II of the Convention which shall be accompanied by: (a) a declaration that the tax claim concerns a tax covered by the Convention and, in the case of recovery that the tax claim is not or may not be contested, (b) an official copy of the instrument permitting enforcement in the applicant State, and (c) any other document required for recovery or measures of conservancy (Art. 13).

VI. Grounds for denying/postponing assistance (Art. 21)

The Convention contains a number of provisions, which depending on the case, may be relevant for all forms of assistance covered by the Convention (for example, sub-paragraphs 2.a, 2.b, 2.e, 2.f, and 2.g), only for assistance in recovery (for example, sub-paragraph 2.h) or only for exchange of information (for example, sub-paragraphs 2.c and 2.d, paragraphs 3 and 4). First, Article 21 states explicitly that the rights and safeguards secured to persons by the laws or administrative practice are not reduced in any way by the Convention (Art. 21, para 1).

Article 21 then sets limits to the obligation to provide assistance. While it is not structured as a mandatory provision under which the requested State must impose the relevant limits in responding to requests for assistance, some States may wish to operate

3. Under Art. 21.2.g, except in the case of Article 14 (*i.e.* time limits), the provisions of this Convention shall not be construed so as to impose on the requested State the obligation […] to provide administrative assistance if the applicant State has not pursued all reasonable measures available under its laws or administrative practice, except where recourse to such measures would give rise to disproportionate difficulty.

strictly within these limits (Comm. to Art. 21, para 2, n. 182). The Article states that the requested State is not obliged to (Art. 21, para 2):

a) to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant State;

b) to carry out measures which would be contrary to public policy (*ordre public*);

c) to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant State or its administrative practice;

d) to supply information which would disclose any trade, business, industrial, commercial or professional secret, or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*);

e) to provide administrative assistance if and insofar as it considers the taxation in the applicant State to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation, or of any other convention which the requested State has concluded with the applicant State;

f) to provide administrative assistance for the purpose of administering or enforcing a provision of the tax law of the applicant State, or any requirement connected therewith, which discriminates against a national of the requested State as compared with a national of the applicant State in the same circumstances;

g) to provide administrative assistance if the applicant State has not pursued all reasonable measures available under its laws or administrative practice, except where recourse to such measures would give rise to disproportionate difficulty;

h) to provide assistance in recovery in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the applicant State.

Article 21 also clarifies that if information is requested by the applicant State in accordance with the Convention, the requested State shall use its information gathering measures to obtain the requested information, even though the requested State may not need such information for its own tax purposes (Art. 21, para 3). Further, a requested State shall not decline to supply information to a treaty partner solely because the information is held by a bank or other financial institution (Art. 21, para 4). Thus, these provisions override limits to obligations under paragraphs 1 and 2 to the extent that those paragraphs would otherwise permit a requested Contracting State to decline to supply information on grounds of domestic tax interest requirements or bank secrecy.

VII. Use of information received (Art. 22)

Any information obtained by a Party under the Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law (Art. 22, para 1). Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes (Art. 22, para 2).

The Convention makes it clear that if a Party declared that it reserves the right not to provide any form of assistance in relation to certain taxes, any other Party obtaining information from that Party shall not use it for the purpose of a tax in a category subject to the reservation. Similarly, the Party making such a reservation shall not use information obtained under this Convention for the purpose of a tax in a category subject to the reservation (Art. 22, para 3).

Notwithstanding the above, information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use (Art. 22, para 4).

VIII. Sharing of information received with other local authorities (Art. 22)

Information shall be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes (Art. 22, para 2).

Notwithstanding the above, information received by a Party may be shared with other law enforcement authorities and used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use.

IX. Sharing of information received with foreign authorities (Art. 22)

Information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes (Art. 22, para 2).

Notwithstanding the above, information provided by a Party to another Party may be transmitted by the latter to a third Party, subject to prior authorisation by the competent authority of the first-mentioned Party (Art. 22, para 4).

X. Relationship with other instruments (Art. 27)

The Convention states that the possibilities of assistance provided by it do not limit, nor are they limited by, those contained in existing or future international agreements or other arrangements between the Parties concerned or other instruments which relate to co-operation in tax matters (Art. 27, para 1). Notwithstanding this, those Parties which are member States of the European Union can apply, in their mutual relations, the possibilities of assistance provided for by the Convention in so far as they allow a wider co-operation than the possibilities offered by the applicable European Union rules (Art. 27, para 2).

4. Council Directive 2011/16/EU on administrative cooperation in the field of taxation

Key Points

- The Council Directive 2011/16/EU on administrative co-operation in the field of taxation and repealing Directive 77/799/EEC establishes rules on administrative co-operation between European Union countries. It applies to direct taxes as well as indirect taxes that are not yet covered by other European Union legislation.
- It provides for different forms of co-operation such as exchange of information on request, simultaneous controls and mandatory or spontaneous exchange of information.
- Transmission of requests under this Directive shall be effected between the competent authorities designated by the Member States.
- The Directive provides for different grounds for denying/postponing assistance. For instance, the requested Member State may refuse to provide information where the requesting Member State is unable, for legal reasons, to provide similar information.
- The information received under the Directive may be used for different purposes, in particular for the administration and enforcement of the domestic laws of the Member States concerning the taxes covered by the Council Directive.
- The information received under the Directive may be shared with third countries under certain conditions laid down in the Directive.

I. Parties

The Council Directive 2011/16/EU of 15 February 2011 on administrative co-operation in the field of taxation and repealing Directive 77/799/EEC entered into force on 11 March 2011. It applies to the Member States of the European Union.

II. Scope (Art. 1 and Art. 2)

Under this Directive, the Member States shall co-operate with each other with a view to exchanging information that is foreseeably relevant[1] to the administration and enforcement of the domestic laws of the Requesting Member State (Art. 1, para 1).

This Directive shall apply to all taxes of any kind levied by, or on behalf of, a Member State or the Member State’s territorial or administrative subdivisions, including the local authorities (Art. 2, para 1). However, the Directive shall not apply to value added tax and customs duties, or to excise duties covered by other European Union legislation on administrative co-operation between Member States. This Directive shall also not apply to compulsory social security contributions payable to the Member State or a subdivision of the Member State or to social security institutions established under public law (Art. 2, para 2). Paragraph 3 further provides that in no case shall the taxes

[1]. The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affaires of a given taxpayer (introductory remark 9 to the Directive).

referred to in paragraph 1 be construed as including: (a) fees, such as for certificates and other documents issued by public authorities; or (b) dues of a contractual nature, such as consideration for public utilities.

III. Forms of co-operation

Exchange of information on request (Art. 5)

At the request of the requesting authority, the requested authority shall communicate to the requesting authority any information referred to in Article 1 paragraph 1 that it has in its possession or that it obtains as a result of administrative enquiries (Art. 5).

Mandatory automatic exchange of information[2] (Art. 8)

Article 8 paragraph 1 provides that the competent authorities of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State, information regarding taxable periods as from 1 January 2014 that is available concerning residents in that other Member State, on the following specific categories of income and capital as they are to be understood under the national legislation of the Member State which communicates the information: (a) income from employment; (b) director’s fees; (c) life insurance products not covered by other European Union legal instruments on exchange of information and other similar measures; (d) pensions; (e) ownership of and income from immovable property. The communication of information shall take place at least once a year, within six months following the end of the tax year of the Member State during which the information became available (Art. 8, para 6).

Spontaneous exchange of information[3] (Art. 9)

Article 9 paragraph 1 provides that the competent authority of each Member State shall communicate the information referred to in Article 1 paragraph 1 to the competent authority of any other Member State concerned, in any of the following circumstances:

a) the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;

b) a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to an increase in tax or to liability to tax in the other Member State;

c) business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;

d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;

2. “Automatic exchange” means the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals (Art. 3, para 9).

3. “Spontaneous exchange” means the non-systematic communication, at any moment and without prior request, of information to another Member State (Art. 3, para 10).

e) information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.

The competent authorities of each Member State may communicate, by spontaneous exchange, to the competent authorities of the other Member States any information of which they are aware and which may be useful to the competent authorities of the other Member States (Art. 9, para 2).

Presence in administrative offices and participation in administrative enquiries (Art. 11)

Article 11 paragraph 1 provides that by agreement between the requesting authority and the requested authority, officials authorised by the requesting authority, may with a view to exchanging the information referred to in Article 1 paragraph 1: (a) be present in the offices where the administrative authorities of the requested Member State carry out their duties; (b) be present during administrative enquiries carried out in the territory of the requested Member State.

Simultaneous controls (Art. 12)

Under the Directive, Member States may agree to conduct simultaneous controls, in their own territory, of one or more persons of common or complementary interest to them, with a view to exchanging the information thus obtained (Art. 12).

Administrative notification (Art. 13)

At the request of the competent authority of a Member State, the competent authority of another Member State shall, in accordance with the rules governing the notification of similar instruments in the requested Member State, notify the addressee of any instruments and decisions which emanate from the administrative authorities of the requesting Member State and concern the application in its territory of legislation on taxes covered by this Directive (Art. 13, para 1).

IV. Authorities that can use the instrument (Art. 4)

Each Member State shall inform the Commission of its competent authority for the purposes of this Directive (Art. 4, para 1). Most of the Member States designated their Ministry or Minister of Finance (*e.g.* Germany, Austria). The competent authority shall designate a single central liaison office (Art. 4, para 2), liaison departments (Art. 4, para 3) and competent officials (Art. 4, para 4).

V. Conditions for requesting assistance (Art. 17 and Art. 20)

Requests for exchange of information shall be sent using a standard form including at least the following information to be provided by the requesting authority: (a) the identity of the person under examination or investigation and (b) the tax purpose for which the information is sought (Art. 20, para 1 and 2).

Article 17 paragraph 1 provides that requests for exchange of information shall be granted provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives.

VI. Grounds for denying / postponing assistance (Art. 17 and Art. 18)

The Directive shall impose no obligation upon a requested Member State to carry out enquiries or to communicate information, if it would be contrary to its legislation to conduct such inquiries or to collect the information requested for its own purposes (Art. 17, para 2). Moreover, Article 17 paragraph 3 provides that the competent authority of a requested Member State may decline to provide information where the requesting Member State is unable, for legal reasons, to provide similar information. Further, the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy (Art. 17, para 4).

The requested authority shall inform the requesting authority of the grounds for refusing a request for information (Art. 17, para 5).

However, Member States cannot decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person (Art. 18, para 2).

VII. Use of information received (Art. 16)

Information communicated between Member States pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.

Such information may be used for the administration and enforcement of the domestic laws of the Member States concerning the taxes covered by the Council Directive. Such information may also be used for the assessment and enforcement of other taxes and duties covered by Article 2 of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures[4], or for the assessment and enforcement of compulsory social security contributions. In addition, it may be used in connection with judicial and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law, without prejudice to the general rules and provisions governing the rights of defendants and witnesses in such proceedings (Art. 16, para 1).

4. The Council Directive 2010/24/EU shall apply to claims relating to : (a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union ; (b) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), including sums to be collected in connection with these actions and (c) levies and other duties provided for under the common organisation of the market for the sugar sector. The scope of the Council Directive 2010/24/EU shall also include: (a) administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities; (b) fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties and (c) interest and costs relating to the claims for which mutual assistance may be requested (Art. 2 of the Council Directive 2010/24/EU).

With the permission of the competent authority of the Member State communicating information pursuant to this Directive, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information and documents received pursuant to this Directive may be used for other purposes. Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information (Art. 16, para 2).

VIII. Sharing of information received with other local authorities (Art. 16)

With the permission of the competent authority of the Member State communicating information pursuant to this Directive, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information and documents received pursuant to this Directive may be used for other purposes such as sharing of information received with other local authorities. Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information (Art. 16, para 2).

IX. Sharing of information received with foreign authorities (Art. 16 and Art. 24)

Where a competent authority of a Member State considers that information which it has received from the competent authority of another Member State is likely to be useful to the competent authority of a third Member State, it may transmit that information to the latter competent authority. It shall inform the competent authority of the Member State from which the information originates about its intention to share that information with a third Member State. The Member State of origin of the information may oppose such a sharing of information within 10 working days of receipt of the communication from the Member State wishing to share the information (Art. 16, para 3).

Competent authorities may communicate information obtained in accordance with this Directive to a third country, provided that all of the following conditions are met: (a) the competent authority of the Member State from which the information originates have consented to that communication; (b) the third country concerned has given an undertaking to provide the co-operation required to gather evidence of the irregular or illegal nature of transactions which appear to contravene or constitute an abuse of tax legislation (Art. 24, para 2).

Moreover, where the competent authority of a Member State receives from a third country information that is foreseeably relevant to the administration and enforcement of the domestic laws of that Member State concerning the taxes covered by the Council Directive, that authority may, in so far as this is allowed pursuant to an agreement with that third country, provide that information to the competent authorities of Member States for which that information might be useful and to any requesting authorities (Art. 24, para 1).

X. Relationship with other instruments (Art. 1)

The Directive shall not affect the application in the Member States of the rules on mutual assistance in criminal matters. It shall also be without prejudice to the fulfillment of any obligations of the Member States in relation to wider administrative co-operation ensuing from other legal instruments, including bilateral or multilateral agreements (Art. 1, para 3).

5. EU Council Regulation No. 904/2010 on administrative cooperation and combating fraud in the field of value added tax

Key Points

- The Council Regulation 904/210 sets out rules and procedures for co-operation and exchanges of information between competent authorities responsible for applying value added tax (VAT), with a view to: (a) assessing VAT correctly; (b) monitoring the correct application of VAT; (c) combating VAT fraud and (d) protecting VAT revenue.
- It provides for different forms of co-operation such as exchange of information on request or without prior request, request for administrative notification or simultaneous controls.
- Transmission of requests under this Regulation shall be effected between the competent authorities designated by the Member States.
- This Regulation provides for different grounds for denying/postponing assistance. For instance, the requested Member State may refuse to provide information where the requesting Member State is unable, for legal reasons, to provide similar information.
- The information received under the Regulation may be used for different purposes, in particular for the purpose of establishing the assessment base or the collection or administrative control of tax for the purpose of establishing the assessment base.
- The information received under the Regulation may be shared with third countries under certain conditions laid down in the Regulation.

I. Parties

The Council Regulation 904/2010 of 7 October 2010 on administrative co-operation and combating fraud in the field of value added tax entered into force on 1 November 2010. It applies to the Member States of the European Union.

II. Scope (Art. 1)

This Regulation applies to value added tax. It lays down rules and procedures to enable the competent authorities of the Member States to co-operate and to exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud (Art. 1, para 1).

III. Forms of co-operation

Exchange of information on request (Art. 7, Art. 9)

At the request of the requesting authority, the requested authority shall communicate any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions and combat VAT fraud, including any information relating to a specific case or cases (Art. 7, para 1). The requested authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information (Art. 7, para 2).

Article 9 paragraph 1 provides that at the request of the requesting authority, the requested authority shall communicate to it any pertinent information it obtains or has in its possession as well as the results of administrative enquiries, in the form of reports, statements and any other documents, or certified true copies or extracts thereof.

Exchange of information without prior request (Art. 13, Art. 14, Art. 15)

In accordance with Article 13 paragraph 1, the competent authority of each Member State shall, without prior request, forward the information referred to in Article 1 to the competent authority of any other Member State concerned, in the following cases: (a) where taxation is deemed to take place in the Member State of destination and the information provided by the Member State of origin is necessary for the effectiveness of the control system of the Member State of destination; (b) where a Member State has grounds to believe that a breach of VAT legislation has been committed or is likely to have been committed in the other Member State; and (c) where there is a risk of tax loss in the other Member State.

The exchange of information without prior request shall either be automatic, in accordance with Article 14 of the Regulation, or spontaneous, in accordance with Article 15.

The exact categories of information subject to automatic exchange shall be determined by the Standing Committee on Administration Cooperation composed of the representatives of the Member States and chaired by the representative of the Commission (Art. 14, para 1). The competent authorities of the Member States shall, by spontaneous exchange, forward to the competent authorities of the other Member States any information referred to in Article 13 paragraph 1 which has not been forwarded under automatic exchange, of which they are aware and which they consider may be useful to those competent authorities (Art. 15).

Storage and exchange of specific information (Art. 17 and Art. 21)

Article 17 paragraph 1 provides that each Member State shall store in an electronic system specific information (such as recapitulative statements, submitted by taxable person identified for VAT purposes, of the acquirers identified for VAT purposes to whom he supplies goods). Every Member shall grant the competent authority of any other Member State automated access to this stored information (Art. 21, para 1).

Request for administrative notification (Art. 25)

The requested authority shall, at the request of the requesting authority and in accordance with the rules governing the notification of similar instruments in the Member State in which the requested authority is established, notify the addressee of all instruments and decisions which emanate from the competent authorities and concern the application of VAT legislation in the territory of the Member State in which the requesting authority is established (Art. 25).

Presence in administrative offices and participation in administrative enquiries (Art. 28)

By agreement between the requesting authority and the requested authority, officials authorised by the requesting authority may, with a view to exchanging the information referred to in Article 1, be present in the offices of the administrative authorities of the

requested Member State and during administrative enquiries carried out in the territory of the requested Member State (Art. 28, para 1 and 2).

Simultaneous controls (Art. 29)

Member States may agree to conduct simultaneous controls whenever they consider such controls to be more effective than controls carried out by only one Member State (Art. 29).

Eurofisc (Art. 33 and Art. 34)

This Regulation establishes a network for the swift exchange of targeted information between Member States: Eurofisc. Within the framework of Eurofisc, Member States shall accordingly to Article 33 paragraph 2: (a) establish a multilateral early warning mechanism for combating VAT fraud; (b) co-ordinate the swift multilateral exchange of targeted information in the subject areas in which Eurofisc will operate; and (c) co-ordinate the work of the Eurofisc liaison officials of the participating Member States in acting on warnings received.

Member States shall participate in the Eurofisc working fields of their choice and may also decide to terminate their participation therein (Art. 34, para 1).

IV. Authorities that can use the instrument (Art. 3, Art. 4 and Art. 36)

Each Member State shall inform the Commission of its competent authority for the purposes of this Regulation (Art. 3). Most of the Member States designated their Ministry or Minister of Finance (*e.g*. Germany, Austria). Each Member State shall also designate a single central liaison office to which principal responsibility shall be delegated for contacts with other Member States and the Commission in the field of administrative co-operation (Art. 4, para 1), as well as liaison departments (Art. 4, para 2) and competent officials (Art. 4, para 3). Furthermore, the competent authorities of each Member State shall designate at least one Eurofisc liaison official (Art. 36, para 1).

V. Conditions for requesting assistance (Art. 8, Art. 13, Art. 26 and Art. 54)

Article 54 states that the requested authority in one Member State shall provide a requesting authority in another Member State with information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions and combat VAT fraud provided that: (a) the number and the nature of the requests for information made by the requesting authority within a specific period do not impose a disproportionate administrative burden on that requested authority; and (b) that requesting authority has exhausted the usual sources of information which it could have used in the circumstances to obtain the information requested, without running the risk of jeopardising the achievement of the desired end.

Requests for exchange of information shall be sent using a standard form (Art. 8 and Art. 13, para 3). Requests for administrative notifications, mentioning the subject of the instrument or decision to be notified, shall indicate the name, address and any other relevant information for identifying the addressee (Art. 26).

VI. Grounds for denying/postponing assistance (Art. 54)

Article 54 specifies that this Regulation shall impose no obligation to have enquiries carried out or to provide information on a particular case if the laws or administrative

practices of the Member State which would have to supply the information do not authorise the Member State to carry out those enquiries or collect or use that information for that Member State's own purposes (Art. 54, para 2).

The requested Member State may refuse to provide information where the requesting Member State is unable, for legal reasons, to provide similar information (Art. 54, para 3). Further, the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy (Art. 54, para 4). The requested authority shall inform the requesting authority of the grounds for refusing a request for assistance (Art. 54, para 6).

However, the Regulation shall not be interpreted as authorising the requested Member State to refuse to supply information on a taxable person identified for VAT purposes in the Member State of the requesting authority on the sole ground that this information is held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a legal person (Art. 54, para 5).

VII. Use of information received (Art. 55)

Information communicated or collected in any form pursuant to this Regulation, shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under both the national law of the Member State which received it and the corresponding provisions applicable to European Union authorities. Such information shall be used only in the circumstances provided for in this Regulation (Art. 55, para 1).

Such information may be used: (a) for the purpose of establishing the assessment base or the collection or administrative control of tax for the purpose of establishing the assessment base; (b) for the assessment of other levies, duties, and taxes covered by Article 2 of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures;[1] and (c) it may be used in connection with judicial proceedings that may involve penalties, initiated as a result of infringements of tax law without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in such proceedings.

Information received under the Regulation may be used for other purposes in the Member State of the requesting authority provided that (i) the competent authority of the Member State providing the information gives its consent and (ii) the information can be

[1.] The Council Directive 2008/55/EC covers claims relating to : (a) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), including sums to be collected in connection with these actions ; (b) levies and other duties provided for under the common organisation of the market for the sugar sector ; (c) import duties ; (d) export duties ; (e) value added tax ; (f) excise duties on manufactured tobacco, alcohol and alcoholic beverages, mineral oils ; (g) taxes on income and capital ; (h) taxes on insurance premiums ; (i) interest, administrative penalties and fines, and costs incidental to the claims referred to in points (a) to (h), with the exclusion of any sanction of a criminal nature as determined by the laws in force in the Member State in which the requested authority is situated. The Council Directive 2008/55/EC shall also apply to claims relating to taxes which are identical or analogous to taxes on insurance premiums (Art. 2 of the Council Directive 2008/55/EC).

used for similar purposes under the legislation of the Member State of the requested authority (Art. 55, para 3).

VIII. Sharing of information received with other local authorities (Art. 55)

Information received under the Regulation may be used for other purposes such as sharing of information received with other local authorities, in the Member State of the requesting authority provided that (i) the competent authority of the Member State providing the information gives its consent and (ii) the information can be used for similar purposes under the legislation of the Member State of the requested authority (Art. 55, para 3).

IX. Sharing of information received with foreign authorities (Art. 50 and Art. 55)

Where the requesting authority considers that information it has received from the requested authority is likely to be useful to the competent authority of a third Member State, it may transmit it to the latter authority. It shall inform the requested authority thereof in advance. The requested authority may require that the transmission of the information to a third party be subject to its prior agreement (Art. 55, para 4).

Competent authorities may communicate information obtained in accordance with this Regulation to a third country, provided that the following conditions are met: (a) the competent authority of the Member State from which the information originates has consented to that communication; and (b) the third country concerned has given an undertaking to provide the co-operation required to gather evidence of the irregular nature of transactions which appear to contravene VAT legislation (Art. 50, para 2).

Article 50 paragraph 1 provides that where the competent authority receives information from a third country, that authority may pass the information on to the competent authorities of Member States which might be interested in it and, in any event, to all those which request it, in so far as permitted by assistance arrangements with that particular third country (Art. 50, para 1).

X. Relationship with other instruments (Art. 60)

This Regulation shall be without prejudice to the fulfillment of any wider obligations in relation to mutual assistance ensuing from other legal acts, including bilateral or multilateral agreements (Art. 60, para 1).

6. EC Council Regulation No. 2073/2004 on administrative cooperation in the field of excise duties

Key Points

- The Council Regulation 2073/2004 on administrative co-operation in the field of excise duties lays down the conditions under which the administrative authorities responsible in the Member States for implementing legislation on excise duties are to co-operate with each other in order to ensure compliance with that legislation.
- It provides for different forms of co-operation such as request for information and for administrative enquiries, simultaneous controls and exchange of information without prior request.
- Transmission of requests under this Regulation shall be effected between the competent authorities designated by the Member States.
- The Regulation provides for different grounds for denying/postponing assistance. For instance, the requested Member State may refuse to forward information if the requesting Member State cannot, for legal reasons, provide similar information.
- The information received under the Regulation may be used for different purposes, in particular for the purpose of establishing the assessment base, for collection or administrative control of excise duties, the monitoring of movements of excisable products, for risk analysis and for enquiries.
- The information received under the Regulation may be shared with third countries under certain conditions laid down in the Regulation.

I. Parties

The Council Regulation 2073/2004 of 16 November 2004 on administrative co-operation in the field of excise duties entered into force on 1 July 2005. It applies to the Member States of the European Union.

II. Scope (Art. 1)

This Regulation applies to excise duties.[1] It lays down rules and procedures to enable the competent authorities of the Member States to co-operate and to exchange any information that may help them to effect a correct assessment of excise duties (Art. 1).

III. Forms of co-operation

Request for information and for administrative enquiries (Art. 5 and Art. 7)

At the request of the requesting authority, the requested authority shall communicate any information that may help to effect a correct assessment of excise duties, including any information relating to a specific case or cases (Art. 5, para 1). The requested

1. "Excise duties" means the taxes which are subject to the Community legislation in the field of excise, and includes the taxes on energy products and electricity under Council Directive 2003/96/EC.

authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information (Art. 5, para 2).

At the request of the requesting authority, the requested authority shall communicated to it any pertinent information in its possession in the form of reports, statements and any other documents or certified true copies or extracts thereof and the results of administrative enquiries (Art. 7, para 1).

Presence in administrative offices and participation in administrative enquiries (Art. 11)

Article 11 provides that by agreement between the requesting authority and the requested authority, officials authorised by the requesting authority may be present in the offices where the administrative authorities of the Member State in which the requested authority is established carry out their duties and may also be present during the administrative enquiries, with a view to exchanging any information that may help to effect a correct assessment of excise duties (Art. 11, para 1 and 2).

Simultaneous controls (Art. 12)

With a view to exchanging the information referred to in Article 1, two or more Member States may agree to conduct simultaneous controls, in their own territory, of the excise duty situation of one or more persons who are of common or complementary interest, whenever such controls would appear to be more effective than controls carried out by only one Member State.

Request for notification of administrative decisions and measures (Art. 14)

Article 14 states that the requested authority shall, at the request of the requesting authority, notify the addressee of all administrative decisions and measures taken by the administrative authorities of the requesting Member State concerning the application of legislation on excise duties.

Exchange of information without prior request (Art. 17, Art. 18 and Art. 19)

The Regulation provides for both automatic exchange[2] and spontaneous exchange.[3]

The competent authority of each Member state shall, according to Article 17, forward the information referred to in Article 1 to the competent authority of any other Member State concerned, in the following cases: (a) where an irregularity or an infringement of excise duty legislation has occurred, or is suspected to have occurred, in the other Member State; (b) where an irregularity or an infringement of excise duty legislation which has occurred, or is suspected to have occurred, in the territory of one Member State may have repercussions in another Member State; and (c) where there is a risk of fraud or a loss of excise duty in the other Member State. The exact categories of information to be exchanged and the frequency of such automatic exchange shall be determined by the Member States (Art. 18).

2. "Automatic exchange" means the systematic communication of predefined information, without prior request to another Member State. It can either be occasional or regular automatic exchange.

3. "Spontaneous exchange" means the occasional communication without prior request of information to another Member State.

In any case, Article 19 states that the competent authorities of the Member States may without prior request, forward to each other, by means of spontaneous exchange, the information referred to in Article 1 of which they are aware.

Storage and exchange of information specific to intra-community transactions (Art. 22 and Art. 25)

The Regulation requires each Member State's competent authorities to maintain an electronic database containing a register of persons who are authorised warehouse keepers or traders registered for excise purposes and a register of premises authorised as tax warehouses (Art. 22, para 1).

These registers include: (a) the identification number issued by the competent authority in respect of the person or premises; (b) the name and address of the person or premises; (c) the category and nomenclature relating to excise products of the products which may be held or received by the person or which may be held or received at these premises; (d) identification of the central liaison office or the excise office from which further information may be obtained; (e) the date of issue, amendment and where applicable, the date of cessation of validity of the authorisation as an authorised warehousekeeper or as a registered trader; and (f) the information required to identify persons who have assumed obligations or who are involved on an occasional basis in the movement of excisable products (Art. 22, para 2).

Each national register is available, for excise duty purposes only, to the competent authorities of the other Member States (Art. 22, para 3). The information is kept for at least three years from the end of the calendar year in which the movement was initiated (Art. 25, para 1).

IV. Authorities that can use the instrument (Art. 3)

Each Member States shall designate a competent authority under this Regulation (Art. 3, para 1). Further it shall designate a central liaison office to which principal responsibility shall be delegated for contacts with other Member States in the field of administrative co-operation (Art. 3, para 2), liaison departments (Art. 3, para 4) and competent officials (Art. 3, para 5).

V. Conditions for requesting assistance (Art. 6, Art. 15 and Art 30)

According to Article 30 paragraph 1, the requested authority in one Member State shall provide the requesting authority in another Member State with any information that may help to effect a correct assessment of excise duties provided that: (a) the number and the nature of the request for information made by the requesting authority within a specific period do not impose a disproportionate administrative burden on the requested authority; and (b) the requesting authority has exhausted the usual sources of information which it could have used in the circumstances to obtain the information requested, without running the risk of jeopardising the achievement of the desired end.

Requests for information and for administrative enquiries shall be sent using a standard form (Art. 6). Requests for notification, mentioning the subject of the decision or measure to be notified, shall indicate the name, address and any other relevant information for identifying the addressee (Art. 15).

VI. Grounds for denying/postponing assistance (Art. 30)

Article 30 paragraph 3 specifies that this Regulation shall impose no obligation to have enquiries carried out or to provide information if the laws or administrative practices of the Member State which would have to provide the information do not authorise the competent authority to carry out those enquiries or to collect or use that information for that Member State's own purposes.

The requested Member State may refuse to forward information if the requesting Member State cannot, for legal reasons, provide similar information (Art. 30, para 4). Further, the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or where its disclosure would be contrary to public policy (Art. 30, para 5). The requested authority shall inform the requesting authority of the grounds for refusing a request for assistance (Art. 30, para 6).

VII. Use of information received (Art. 31)

Article 31 paragraph 1 provides that information communicated pursuant to this Regulation shall be covered by the obligation of official secrecy and shall enjoy the protection extended to similar information under both the national law of the Member State which received it and the corresponding provisions applicable to Community authorities.

Such information may be used: (a) for the purpose of establishing the assessment base, for collection or administrative control of excise duties, the monitoring of movements of excisable products, for risk analysis and for enquiries; (b) it may be used in connection with judicial or administrative proceedings that may involve penalties initiated as a result of infringements of tax law, without prejudice to the general rules and legal provisions governing the right of the defendants and witnesses in such proceedings; and (c) it may also be used to establish other taxes, duties and charges covered by Article 2 of Directive 76/308 EEC.[4]

Article 31 paragraph 2 further specifies that the competent authority of the Member State providing the information shall permit its use for other purposes in the Member State of the requesting authority, if the legislation of the Member State of the requested authority allows the information to be used for similar purposes.

VIII. Sharing of information received with other local authorities (Art. 31)

Article 31 paragraph 2 states that the competent authority of the Member State providing the information shall permit its use for other purposes such as sharing of information received with other local authorities, in the Member State of the requesting authority, if the legislation of the Member State of the requested authority allows the information to be used for similar purposes.

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[4]. The Council Directive 76/308 covers claims relating to: (a) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guidance and Guarantee Fund, including sums to be collected in connection with these actions; (b) agricultural levies; (c) customs duties; and (d) interest and costs incidental to the recovery of the claims referred to above (Article 2 of the Council Directive 76/308).

IX. Sharing of information received with foreign authorities (Art. 27 and Art. 31)

Where the requesting authority considers that information it has received from the requested authority may be useful to the competent authority of a third Member State, it may forward it to the latter authority. It shall inform the requested authority that it has done so. The requested authority may make the communication of information to a third Member State subject to its prior consent (Art. 31, para 3).

Provided the third country concerned has given a legal undertaking to provide the assistance required to gather evidence of the irregular nature of transactions which appear to contravene excise duty legislation, information obtained under this Regulation may be communicated to that third country, with the consent of the competent authorities which supplied the information, in accordance with their domestic provisions applying to the communication of personal data to third countries (Art. 27, para 2).

When the competent authority of a Member State receives information from a third country, that authority may pass the information on to the competent authorities of any Member States which might be interested in it and in any event, to all those which requested it, in so far as permitted by assistance arrangements with that particular third country. Such information may also be passed on to the Commission whenever it is of Community interest (Art. 27, para 1).

X. Relationship with other instruments (Art. 1)

Article 1 paragraph 2 provides that this Regulation shall not affect the application in the Member States of the rules on mutual assistance in criminal matters. It shall also be without prejudice to the fulfillment of any obligation in relation to mutual assistance ensuing from other legal instruments, including bilateral or multilateral agreements.

7. Convention on mutual assistance and cooperation between customs administrations (Naples II)

Key Points

- The Convention provides for mutual assistance and co-operation among the Member States of the European Union through their customs administrations, with a view to preventing and detecting infringements of national customs provisions as well as prosecuting and punishing infringements of Community and national customs provisions. The scope of the Convention also covers the laundering of money deriving from such infringements.
- The Convention provides for the following forms of co-operation: assistance on request, spontaneous assistance and special forms of co-operation. These three categories include, *inter alia*, request for information, request for enquiries, spontaneous information and co-operation through joint special investigation teams.
- Member States shall appoint in their customs authorities a central unit (co-ordinating unit) which shall be responsible for receiving all applications for mutual assistance and for co-ordinating mutual assistance. The unit shall also be responsible for co-operation with other authorities involved in an assistance measure under the Convention. Co-ordination and planning of cross-border operations shall also be the responsibility of the central co-ordinating units. The activity of the central co-ordinating units shall not exclude, particularly in an emergency, direct co-operation between other services of the customs authorities of the Member States. In order to promote co-operation between Member States' customs administrations, the Convention also allows Member States to make agreements between themselves on the exchange of liaison officers who shall have no powers of intervention in the host country.
- The use and transmission of the personal data communicated pursuant to the Convention by the recipient authority shall be authorised only for the purposes of (a) preventing and detecting infringements of national customs provisions and (b) prosecuting and punishing infringements of Community and national customs provisions. That authority may forward them without prior consent of the Member State supplying them, to its customs administrations, its investigative authorities and its judicial bodies to enable them to prosecute and punish infringements as defined by the Convention. In all other cases of data transmission, the consent of the Member State which supplied the information is necessary. In any case, a Member State may impose conditions on the use of information by another Member State.

I. Parties

The Convention on mutual assistance and cooperation between customs administrations (hereinafter also referred as to the “Convention”), also known as Naples II Convention, was adopted by the Council of the European Union in 1997. It is addressed to the Member States of the European Union which were required to adopt it in accordance with their respective constitutional requirements. The Convention repealed the previous Convention on the provision of mutual assistance between customs administrations adopted in 1967 by improving customs cross-border co-operation in the fight against drugs trafficking and other customs offences, also known as Naples I Convention.

II. Scope

The Member States of the European Union shall provide each other with mutual assistance and shall co-operate with one another through their customs administrations, with a view to (a) preventing and detecting infringements of national customs provisions and (b) prosecuting and punishing infringements of Community and national customs provisions (Art. 1, para 1).[1] For the purposes of the Convention, "infringements" mean any acts in conflict with national or Community customs provisions, including, *inter alia,* the participation in, or attempts to commit, such infringements; the participation in a criminal organisation committing such infringements; and the laundering of money deriving from such infringements (Art. 4, para 3).

III. Forms of co-operation

The Convention provides for assistance on request (Art. 8 to Art. 14) and spontaneous assistance (Art. 15 to Art. 18), measures which were already introduced by Naples I Convention. In addition, the Convention introduces special forms of co-operation (Art. 19 to Art. 24) which, *inter alia*, include co-operation through joint special investigation teams (Art. 24).

Secondment of liaison officers

It should be noticed that, in order to promote co-operation between Member States' customs administrations, the Convention allows Member States to make agreements between themselves on the exchange of liaison officers for limited or unlimited periods, and on mutually agreed conditions who shall have no powers of intervention in the host country (Art. 6, para 1 and para 2). Liaison officers may, with the agreement or at the request of the competent authorities of the Member States, have the following duties (Art. 6, para 3): (a) promoting and speeding up the exchange of information between the Member States; (b) providing assistance in investigations which relate to their own Member State or the Member State they represent; (c) providing support in dealing with requests for assistance; (d) advising and assisting the host country in preparing and carrying out cross-border operations; (e) any other duties which Member States may agree between themselves. Member States may agree bilaterally of multilaterally on the terms of reference and the location of the liaison officers. Liaison officers may also represent the interests of one or more Member States (Art. 6, para 4).

1. For the purposes of the Convention, "national customs provisions" mean all laws, regulations and administrative provisions of a Member State the application of which comes wholly or partly within the jurisdiction of the customs administration of the Member State concerning (i) cross-border traffic in goods subject to bans, restrictions or controls, in particular pursuant to Articles 36 and 223 of the Treaty establishing the European Community, and (ii) non-harmonised excise duties (Art. 4, para 1); "community customs provisions" mean: (i) the body of Community provisions and associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9(2) of the Treaty establishing the European Community or goods subject to additional controls or investigations for the purposes of establishing their Community status, (ii) the body of provisions adopted at Community level under the common agricultural policy and the specific provisions adopted with regard to goods resulting from the processing of agricultural products, and (iii) the body of provisions adopted at Community level for harmonised excise duties and for value-added tax on importation together with the national provisions implementing them (Art. 4, para 2).

Assistance on request

Assistance on request as provided by the Convention includes several forms of assistance, namely requests for information (Art. 10), requests for surveillance (Art. 11) and requests for enquiries (Art. 12).

At the request of the applicant authority, the requested authority shall communicate to it all information which may enable it to prevent, detect and prosecute infringements (Art. 10, para 1). The information communicated is to be accompanied by reports and other documents, or certified copies or extracts of the same, on which that information is based and which are in the possession of the request authority or which were produced or obtained in order to execute the request for information (Art. 10, para 2). By agreement between the applicant authority and the requested authority, officers authorised by the applicant authority may, subject to detailed instructions from the requested authority, obtain information from the offices of the requested Member State. This shall apply to all information derived from the documentation to which the staff of those offices has access. Those officers shall be authorised to take copies of the said documentation (Art. 10, para 3).

The requested authority shall at the request of the applicant authority carry out, or arrange to have carried out, appropriate enquiries concerning operations which constitute, or appear to the applicant authority to constitute, infringements. The requested authority shall communicate the results of such enquiries to the applicant authority. The results communicated are to be accompanied by reports and other documents, or certified copies or extracts of the same, on which that information is based and which are in the possession of the requested authority or which were produced or obtained in order to execute the request for enquiry (Art. 12, para 1). By agreement between the applicant authority and the requested authority, officers appointed by the applicant authority may be present at the enquiries. Enquiries shall at all times be carried out by officers of the requested authority. The applicant authority's officers may not, of their own initiative, assume the powers conferred on officers of the requested authority. They shall, however, have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the enquiry being carried out (Art. 12, para 2).

At the request of the applicant authority, the requested authority shall, in accordance with the national rules of the Member State in which it is based, notify the addressee or have it notified of all instruments or decisions which emanate from the competent authorities of the Member State in which the applicant authority is based and concern the application of the Convention (Art. 13, para 1). Requests for notification, mentioning the subject of the instrument or decision to be notified, shall be accompanied by a translation in the official language or an official language of the Member State in which the requested authority is based, without prejudice to the latter's right to waive such a translation (Art. 13, para 2).

In order to provide the assistance required under the above described provisions, the requested authority or the competent authority which it has addressed shall proceed as though it were acting on its own account or at the request of another authority in its own Member State. In so doing it shall avail itself of all the legal powers at its disposal within the framework of its national law in order to respond to the request (Art. 8, para 1). The requested authority shall extend this assistance to all circumstances of the infringement which have any recognisable bearing on the subject of the request for assistance without this requiring any additional request. In case of doubt, the requested authority shall firstly contact the applicant authority (Art. 8, para 2).

Spontaneous assistance

The Convention states that the competent authorities of each Member State shall, subject to any limitations imposed by national law, provide assistance to the competent authorities of the other Member States without prior request (Art. 15). Spontaneous assistance as provided by the Convention includes surveillance (Art. 16) and spontaneous information (Art. 17). Regarding this latter, the competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned, on their own initiative, all relevant information concerning planned or committed infringements and, in particular, information concerning the goods involved and new ways and means of committing such infringements (Art. 17).

Special forms of co-operation

The Convention provides for cross-border co-operation among customs administrations in the forms of hot pursuit (Art. 20), cross-border surveillance (Art. 21), controlled delivery (Art. 22), covert investigations (Art. 23) and joint special investigation teams (Art. 24). In this context, customs administrations shall provide each other with the necessary assistance in terms of staff and organisational support (Art. 19, para 1).

The above mentioned forms of cross-border co-operation shall be permitted for the prevention, investigation and prosecution of certain infringements which include, *inter alia*, illegal cross-border commercial trade in taxable goods to evade tax or to obtain unauthorised State payments in connection with the import or export of goods, where the extent of the trade and the related risk to taxes and subsidies is such that the potential financial cost to the budget of the European Communities or the Member States is considerable (Art. 19, para 2).[2] In this context, by mutual agreement, the authorities of several Member States may set up a joint special investigation team based in a Member State and comprising officers with the relevant specialisations. The joint special investigation team shall have the following tasks: (a) implementation of difficult and demanding investigations of specific infringements, requiring simultaneous, co-ordinated action in the Member States concerned and (b) co-ordination of joint activities to prevent and detect particular types of infringement and obtain information on the persons involved, their associates and the methods used (Art. 24, para 1). Membership of the team shall not bestow on officers any powers of intervention in the territory of another Member State (Art. 24, para 3).

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2. Art. 19, paragraph 2 reads "Cross-border cooperation […] shall be permitted for the prevention, investigation and prosecution of infringements in cases of: (a) illicit traffic in drugs and psychotropic substances, weapons, munitions, explosive materials, cultural goods, dangerous and toxic waste, nuclear material or materials or equipment intended for the manufacture of atomic, biological and/or chemical weapons (prohibited goods); (b) trade in substances listed in Tables I and II of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances and intended for the illegal manufacture of drugs (precursor substances); (c) illegal cross-border commercial trade in taxable goods to evade tax or to obtain unauthorised State payments in connection with the import or export of goods, where the extent of the trade and the related risk to taxes and subsidies is such that the potential financial cost to the budget of the European Communities or the Member States is considerable; (d) any other trade in goods prohibited by Community or national rules.

IV. Authorities that can use the instrument

Member States shall set up a central unit (co-ordinating unit) in their customs authorities which shall be responsible for receiving all applications for mutual assistance under the Convention and for co-ordinating mutual assistance. The unit shall also be responsible for co-operation with other authorities involved in an assistance measure under the Convention. The co-ordinating units of the Member States shall maintain the necessary direct contact with each other, particularly in the cases of special forms of co-operation (see below) (Art. 5, para 1). The activity of the central co-ordinating units shall not exclude, particularly in an emergency, direct co-operation between other services of the customs authorities of the Member States. For reasons of efficiency and consistency, the central co-ordinating units shall be informed of any action involving such direct co-operation (Art. 5, para 2). If the customs authority is not, or not completely, competent to process a request, the central co-ordinating unit shall forward the request to the competent national authority and inform the applicant authority that it has done so (Art. 5, para 3). If it is not possible to accede to the request for legal or substantive reasons, the co-ordinating unit shall return the request to the applicant authority with an explanation as to why the request could not be processed (Art. 5, para 4).The Convention states that co-ordination and planning of cross-border operations shall be the responsibility of the central co-ordinating units (Art. 19, para 1).

V. Conditions for requesting assistance

The Convention provides for specific formal conditions to be fulfilled when requesting assistance. Any requests for assistance shall always be made in writing, shall be submitted in an official language of the Member State of the requested authority or in a language acceptable to such authority and all documents necessary for the execution of such requests shall accompany the request (Art. 9, para 1 and para 3). When required because of the urgency of the situation, oral requests shall be accepted, but must be confirmed in writing as soon as possible (Art. 9, para 4). Further, any requests of assistance shall include the following information: (a) the applicant authority making the request; (b) the measure requested; (c) the object of, and the reason for, the request; (d) the laws, rules and other legal provisions involved; (e) indications as exact and comprehensive as possible on the natural or legal persons being the target of the investigations; (f) a summary of the relevant facts, with some exceptions (Art. 9, para 2). The Convention allows the requested authority to agree to apply a particular procedure in response to a request, provided that procedure is not in conflict with the legal and administrative provisions of the requested Member State (Art. 9, para 6). The above described requirements shall also apply to requests for cross-border co-operation as provided by the Convention (Art. 19, para 1).

With regard to cross-border co-operation, the Convention states that, if necessary under the national law of the Member States, the participating authorities shall apply to their judicial authorities for approval of the planned investigations. Where the competent judicial authorities make their approval subject to certain conditions and requirements, the participating authorities shall ensure that those conditions and requirements are observed in the course of the investigations (Art. 19, para 4). Further, the Convention makes it clear that, in the course of cross-border operations, officers on mission in the territory of another Member State shall be treated in the same way as officers of that State as regards infringements committed against them or by them (Art. 19, para 8).

Certain conditions apply specifically to joint investigations. Special joint investigation teams shall operate under the following general conditions: (a) they shall be set up only for a specific purpose and for a limited period; (b) an officer from the Member State in which the team's activities take place shall head the team; (c) the participating officers shall be bound by the law of the Member State in whose territory the team's activities take place; (d) the Member State in which the team's activities take place shall make the necessary organisational arrangements for the team to operate (Art. 24, para 2).

VI. Grounds for denying/postponing assistance

The Convention shall not oblige the authorities of Member States to provide mutual assistance where such assistance would be likely to harm the public policy or other essential interests of the State concerned, particularly in the field of data protection, or where the scope of the action requested, in particular in the context of the special forms of co-operation, is obviously disproportionate to the seriousness of the presumed infringement. In such cases, assistance may be refused in whole or in part or made subject to compliance with certain conditions (Art. 28, para 1). Reasons must be given for any refusal to provide assistance (Art. 28, para 2).

Further, with specific regard to special forms of co-operation, the Convention states that the requested authority shall not be obliged to engage in the specific forms of co-operation if the type of investigation sought is not permitted or not provided for under the national law of the requested Member State. In this case, the applicant authority shall be entitled to refuse, for the same reason, the corresponding type of cross-border co-operation in the reverse case, where it is requested by an authority of the requested Member State (Art. 19, para 3).

VII. Use of information received

The Convention expressly provides for limitations in the use of personal data exchanged pursuant to it. The processing of such data by the recipient authority shall be authorised only for the purposes of (a) preventing and detecting infringements of national customs provisions and (b) prosecuting and punishing infringements of Community and national customs provisions (Art. 25, para 2, let. a). For the purposes of this provision, "processing of personal data" shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation, alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction (Art. 25, para 3).[3]

The customs administrations shall take account, in each specific case of exchange of information, of the requirements of investigation secrecy. To that end, a Member State may impose conditions covering the use of information by another Member State to which that information may be passed (Art. 27).

The Convention makes it clear that findings, certificates, information, documents, certified true copies and other papers obtained in accordance with their national law by officers of the requested authority and transmitted to the applicant authority in the cases

[3]. The Convention refers to the definition of processing of personal data provided by Article 2(b) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

of assistance on request provided for by the Convention may be used as evidence in accordance with national law by the competent bodies of the Member State where the applicant authority is based (Art. 14). Likewise, information obtained by officers during joint investigations according to the Convention may be used, in accordance with national law and subject to particular conditions laid down by the competent authorities of the State in which the information was obtained, as evidence by the competent bodies of the Member State receiving the information (Art. 19, para 7).

VIII. Sharing of information received with other local authorities

The Convention also provides for express limitations in the transmission of personal data exchanged pursuant to it. The processing of such data by the recipient authority shall be authorised only for the purpose of (a) preventing and detecting infringements of national customs provisions and (b) prosecuting and punishing infringements of Community and national customs provisions. The recipient authority may forward personal data communicated pursuant to the application of the Convention, without prior consent from the Member State supplying them, to its customs administrations, its investigative authorities and its judicial bodies to enable them to prosecute and punish infringements as defined by the Convention. In all other cases of data transmission, the consent of the Member State which supplied the information is necessary. (Art. 25, para 2, let a).

IX. Sharing of information received with foreign authorities

The processing of personal data communicated pursuant to the Convention by the recipient authority shall be authorised only for the purpose of (a) preventing and detecting infringements of national customs provisions and (b) prosecuting and punishing infringements of Community and national customs provisions. The recipient authority may forward personal data communicated pursuant to the application of the Convention, without prior consent from the Member State supplying them, to its customs administrations, its investigative authorities and its judicial bodies to enable them to prosecute and punish infringements as defined by the Convention. In all other cases of data transmission, the consent of the Member State which supplied the information is necessary (Art. 25, para 2, let. a).

X. Relationship with other instruments

The Convention covers mutual assistance and co-operation in the framework of criminal investigations concerning infringements of national and Community customs provisions, concerning which the applicant authority has jurisdiction on the basis of the national provisions of the relevant Member State. Where a criminal investigation is carried out by or under the direction of a judicial authority, that authority shall determine whether requests for mutual assistance or co-operation in that connection shall be submitted on the basis of the provisions applicable concerning mutual assistance in criminal matters or on the basis of this Convention (Art. 3).

In any case, without prejudice to what said above, the Convention shall not affect the provisions applicable regarding mutual assistance in criminal matters between judicial authorities, more favourable provisions in bilateral or multilateral agreements between Member States governing co-operation between the customs authorities or other competent authorities of the Member States, or arrangements in the same field agreed on the basis of uniform legislation or of a special system providing for the reciprocal application of measures of mutual assistance (Art. 1, para 2).

8. International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences and its Protocol

Key points

- The Convention provides for mutual assistance with a view to preventing, investigating and repressing Customs offences as defined by the Convention. Mutual assistance as provided for by the Convention shall not extend to requests for the arrest of persons or for the recovery of duties, taxes, charges, fines or any other monies on behalf of another Contracting Party.
- The communications between Contracting Parties provided for by the Convention shall pass directly between Customs administrations, which shall designate the services or officials responsible for such communications.
- Any intelligence, documents or other information communicated or obtained under the Convention (a) shall be used only for the purposes specified in the Convention, including use in judicial or administrative proceedings, and subject to such restrictions as may be laid down by the Customs administration which furnished them and (b) shall be afforded in the receiving country the same protection in respect of confidentiality and official secrecy as applies in that country to the same kind of intelligence, documents and other information obtained in its own territory. Such intelligence, documents or other information may be used for other purposes only with the written consent of the Customs administration which furnished them and subject to any restrictions laid down by that administration.

I. Parties

The International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (hereinafter referred to as "the Convention"), also known as the Nairobi Convention, was adopted in Nairobi in 1977 under the auspices of the World Customs Organization (WCO).[1] It entered into force in 1980. Currently, 28 Parties have acceded to the Convention.[2] The Convention was amended by a Protocol which entered into force in 1989 and opened the Convention to any State member of the United Nations.[3] The Convention consists of a body, 11 Annexes, which may be accepted independently of each other, and a Commentary.

1. The World Customs Organization was established in 1952 as the Customs Co-operation Council (referred to as "the Council") following the adoption of the Convention establishing the Customs Co-operation Council. As of 30 June 2011, 177 countries are members of the WCO.

2. Status of ratifications as at April 2012: Algeria, Canada, Finland, India, Ireland, Italy, Ivory Coast, Jordan, Kenya, Malawi, Malaysia, Mauritius, Morocco, New Zealand, Niger, Nigeria, Norway, Pakistan, Saudi Arabia, Sri Lanka, Sweden, Tunisia, Turkey, Uganda, United Kingdom of Great Britain, Ireland, Zambia, Zimbabwe.

3. The original Convention was opened for accession only to the members of the WCO. It should be noted that in 2003 the WCO developed the International Convention on Mutual Administrative Assistance in Customs Matters, which is not currently being enforced.

II. Scope (Art. 2)

Under the Convention, the Contracting Parties agree that their Customs administrations shall afford each other mutual assistance with a view to preventing, investigating and repressing Customs offences, in accordance with the provisions of the Convention (Art. 2, para 1). The Customs administration of a Contracting Party may request mutual assistance as provided for by the Convention in the course of any investigation or in connexion with any judicial or administrative proceedings being undertaken by that Contracting Party. If the Customs administration is not itself conducting the proceedings, it may request mutual assistance only within the limits of its competence in these proceedings. Similarly, if proceedings are undertaken in the country of the requested administration, the latter provides the assistance requested within the limits of its competence in these proceedings (Art. 2, para 2).

Mutual assistance as provided for by the Convention shall not extend to requests for the arrest of persons or for the recovery of duties, taxes, charges, fines or any other monies on behalf of another Contracting Party (Art. 2, para 3).

The term "Customs offence" means any breach, or attempted breach, of Customs law, this latter being defined as all the statutory or regulatory provisions enforced or administered by the Customs administrations concerning the importation, exportation or transit of goods (Art.1, let. a and let. b).

III. Forms of co-operation (Annex I to Annex XI)

The Convention provides for different forms of co-operation, namely: (a) assistance by a customs administration on its own initiative (Annex I); (b) assistance, on request, in the assessment of import or export duties and taxes (Annex II); (c) assistance, on request, relating to controls (Annex III); (d) assistance, on request, relating to surveillance (Annex IV); (e) enquiries and notifications, on request, on behalf of another contracting party (Annex V); (f) appearance by customs officials before a court or tribunal abroad (Annex VI); (g) presence of customs officials of one contracting party in the territory of another contracting party (Annex VII); (h) participation in investigations abroad (Annex VIII); (i) pooling of information (Annex IX); (j) assistance in action against the smuggling of narcotic drugs and psychotropic substances (Annex X); (k) assistance in action against the smuggling of works of art, antiques and other cultural property (Annex XI).

Assistance by a customs administration on its own initiative (Annex I)

The Customs administration of a Contracting Party shall, on its own initiative, communicate to the Customs administration of the Contracting Party concerned, any information of a substantial nature which has come to light in the course of its normal activities and which gives good reason to believe that a serious Customs offence will be committed in the territory of the other Contracting Party. The information to be communicated shall concern, in particular, the movements of persons, goods and means of transport (Annex I, para 1). The Customs administration of a Contracting Party shall, where deemed appropriate, communicate on its own initiative to the Customs administration of another Contracting Party documents, reports, records of evidence or certified copies thereof in support of the information furnished (Annex I, para 2). The Customs administration of a Contracting Party shall, on its own initiative, communicate to the Customs administration of another Contracting Party that is directly concerned, any information likely to be of material assistance to it in connection with Customs offences

and, particularly, in connection with new means or methods of committing such offences (Annex I, para 3).

Assistance, on request, in the assessment of import or export duties and taxes (Annex II)[4]

At the request of the Customs administration of a Contracting Party which has good reason to believe that a serious Customs offence has been committed in its country, the Customs administration of the requested Contracting Party shall communicate all available information which may help to ensure the proper assessment of import or export duties and taxes (Annex II, para 1). A Contracting Party shall be taken to have fulfilled its obligations in this respect if, for example, it communicates as appropriate in response to a request the following information or documents available to it (Annex II, para 2): (a) in respect of the value of goods for Customs purposes: the commercial invoices presented to the Customs of the country of exportation or importation or copies of such invoices, certified or not by the Customs, as the circumstances may require; documentation showing current export or import prices; a copy of the declaration of value made on exportation or importation of the goods; trade catalogues, price lists, etc. published in the country of exportation or in the country of importation; (b) in respect of the tariff classification of goods: analyses carried out by laboratory services to determine the tariff classification of the goods; the tariff description declared on importation or exportation; (c) in respect of the origin of goods: the declaration of origin made on exportation, when such declaration is required; the Customs status of the goods in the country of exportation (Customs transit Customs warehouse, temporary admission, free zone, free circulation, exported under drawback, etc.).

Assistance, on request, relating to controls (Annex III)

At the request of the Customs administration of a Contracting Party, the Customs administration of another Contracting Party shall communicate to that Customs administration information concerning the following matters (Annex III, para 1): (a) the authenticity of official documents produced in support of a Goods declaration made to the Customs authorities of the requesting Contracting Party; (b) whether goods imported into the territory of the requesting Contracting Party have been lawfully exported from the territory of the other Contracting Party; (c) whether goods exported from the territory of the requesting Contracting Party have been lawfully imported into the territory of the requested Contracting Party.

4. The term "import or export duties and taxes" means Customs duties and all other duties, taxes, fees or other charges which are collected on or in connection with the importation or exportation of goods but not including fees and charges which are limited in amount to the approximate cost of services rendered (Art. 1, let. e). The Commentary clarifies that this definition reproduces the one which appears in other international instruments prepared by the WCO, particularly the international Convention on the simplification and harmonisation of Customs procedures (Kyoto Convention). In this connection, the Permanent Technical Committee considered that the mutual assistance provided for by the Convention does not apply in cases of dumping (since the WTO/GATT anti-dumping Code includes assistance measures on this subject) or of countervailing duties (which are referred to in Article VI of WTO/GATT) (Commentary, Section B, para 2).

Enquiries and notifications, on request, on behalf of another contracting party (Annex V)

At the request of the Customs administration of a Contracting Party, the Customs administration of another Contracting Party shall, subject to the laws and regulations in force in its territory, make enquiries to obtain evidence concerning a Customs offence under investigation in the territory of the requesting Contracting Party, and take statements from any persons sought in connection with that offence or from witnesses or experts, and communicate the results of the enquiry, as well as any documents or other evidence, to the Customs administration of the requesting Contracting Party (Annex V, para 1).

At the written request of the Customs administration of a Contracting Party, the Customs administration of another Contracting Party shall, subject to the laws and regulations in force in its territory, notify the persons concerned residing in its territory or have them notified by the competent authorities of any action or decisions taken by the requesting Contracting Party concerning any matter falling within the scope of the Convention (Annex V, para 2).

Appearance by customs officials before a court or tribunal abroad (Annex VI)

Where it is not sufficient for evidence to be given solely in the form of a written statement, at the request of the Customs administration of a Contracting Party the Customs administration of another Contracting Party, to the extent of its ability, shall authorise its officials to appear before a court or tribunal in the territory of the requesting Contracting Party as witnesses or experts in the matter of a Customs offence. The request for appearance shall specify, in particular, in what case and in what capacity the official is to be heard. The Customs administration of the Contracting Party accepting the request shall, in authorising appearance, state any limits with which its officials should comply in giving evidence (Annex VI, para 1).

Presence of customs officials of one contracting party in the territory of another contracting party (Annex VII)

At the written request of the Customs administration of a Contracting Party investigating a specific Customs offence, the Customs administration of another Contracting Party shall, where deemed appropriate, authorise officials specially designated by the requesting Contracting Party to consult, in its offices, the relevant books, registers and other documents or data media held in those offices, take copies thereof, or extract any information or particulars relating to the offence (Annex VII, para 1). In the application of the above, all possible assistance and co-operation shall be afforded to the officials of the requesting Contracting Party to facilitate their investigations (Annex VII, para 2). At the written request of the Customs administration of a Contracting Party, the Customs administration of another Contracting Party shall, where deemed appropriate, authorise officials of the requesting administration to be present in the territory of the requested Contracting Party in connection with enquiries into or the official reporting of a Customs offence of concern to the requesting Contracting Party (Annex VII, para 3).

Participation in investigations abroad (Annex VIII)

Where deemed appropriate by both Contracting Parties, the officials of the Customs administration of a Contracting Party shall, at the request of another Contracting Party, participate in investigations carried out in the territory of that other Contracting Party (Annex VIII, para 1).

Pooling of information (Annex IX)

The Customs administrations of Contracting Parties shall communicate to the Secretary General of the Council, upon request, the complementary information as may be necessary to prepare summaries and studies of new and recurring trends in Customs fraud (Annex IX, para 1 and para 2). The Secretary General of the Council shall circulate to the services or officials named by the Customs administrations of the Contracting Parties specific information contained in the central index[5], to the extent that he deems such circulation useful, and any summaries and studies referred to above (Annex IX, para 4). Further, the Secretary General of the Council shall, upon request, supply Contracting Parties with any other information available to him under Annex IX (Annex IX, para 5).

Assistance in action against the smuggling of narcotic drugs and psychotropic substances (Annex X)

The Convention provides for specific forms of assistance against the smuggling of narcotic drugs and psychotropic substances.[6] These would include, *inter alia*:

a) Exchange of information by Customs administrations on their own initiative: the Customs administrations of Contracting Parties shall, on their own initiative and without delay, communicate to other Customs administrations which may be directly concerned, any available information concerning (Annex X, para 3): (i) operations which are known or suspected to constitute, or which seem likely to give rise to, smuggling of narcotic drugs or psychotropic substances; (ii) persons known to be engaged in or, insofar as information concerning such persons can be communicated under national law, persons suspected of engaging in operations referred to in paragraph (i) above, and vehicles, ships, aircraft and other means of transport used, or suspected of being used, for such operations; (iii) new means or methods used for smuggling narcotic drugs or psychotropic substances; (iv) products which are newly developed or newly used as narcotic drugs or psychotropic substances and which are the subject of smuggling;

b) Enquiries, on request, on behalf of another Contracting Party: at the request of the Customs administration of a Contracting Party, the Customs administration of another Contracting Party shall, subject to the laws and regulations in force in its territory, make enquiries to obtain evidence concerning any smuggling of narcotic drugs or

5. According to the Commentary, the "central Index" shall be taken to mean any system of pooling information designed to meet the requirements of Contracting Parties in respect of the exchange of information of international interest including national trends, modus operandi, major seizures and articles of special interest in the field of combating Customs fraud, drug trafficking and the smuggling of works of arts, antiques and other cultural property (Commentary, Section A, para 3.B).

6. The Convention defines the term “smuggling” as any Customs fraud consisting in the movement of goods across a Customs frontier in any clandestine manner (Art. 1, let. e).

psychotropic substances under investigation in the territory of the requesting Contracting Party, and take statements from any persons sought in connection with that smuggling or from witnesses or experts, and communicate the results of the enquiry, as well as any documents or other evidence, to the Customs administration of the requesting Contracting Party (Annex X, para 5);

c) Action by Customs officials of one Contracting Party in the territory of another Contracting Party: where it is not sufficient for evidence to be given solely in the form of a written statement, at the request of the Customs administration of a Contracting Party the Customs administration of another Contracting Party, to the extent of its ability, shall authorise its officials to appear before a court or tribunal in the territory of the requesting Contracting Party as witnesses or experts in the matter of smuggling of narcotic drugs or psychotropic substances. The request for appearance shall specify, in particular, in what case and in what capacity the official is to be heard. The Customs administration of the Contracting Party accepting the request shall, in authorising appearance, state any limits with which its officials should comply in giving evidence (Annex X, para 6). At the written request of the Customs administration of a Contracting Party, the Customs administration of another Contracting Party shall, where deemed appropriate and to the extent of its competence and ability, authorise officials of the requesting administration to be present in the territory of the requested Contracting Party in connection with enquiries into or the official reporting of smuggling of narcotic drugs or psychotropic substances of concern to the requesting Contracting Party (Annex X, para 7). Where deemed appropriate by both Contracting Parties and subject to the laws and regulations in force in their territories, the officials of the Customs administration of a Contracting Party shall, at the request of another Contracting Party, participate in investigations carried out in the territory of that other Contracting Party (Annex X, para 8);

d) Pooling of information: the Customs administrations of Contracting Parties shall communicate to the Secretary General of the Council, to the extent that such information is of international interest, information specified hereafter (Annex X, para 9).

IV. Authorities that can use the instrument (Art. 6)

The communications between Contracting Parties provided for by the Convention shall pass directly between Customs administrations (Art. 6, para 1). The Customs administrations of the Contracting Parties shall designate the services or officials responsible for such communications and shall advise the Secretary General of the Council of the names and addresses of those services or officials (Art. 6, para 2). The Secretary General shall communicate this information to the other Contracting Parties (Art. 6, para 3).

V. Conditions for requesting assistance (Art. 7)

In general, the Convention states that a Contracting Party has an obligation to render assistance to another Contracting Party only insofar as both have accepted the same Annex under the principle of reciprocity (Art. 2, para 1). However, even if this principle cannot be respected, assistance may be requested, provided that the requesting administration draws attention to this fact in its request (Art. 4).

The Convention also sets out specific conditions for filing requests for mutual legal assistance. Such requests for assistance shall normally be made in writing; they shall

contain the requisite information and be accompanied by such documents as may be deemed useful (Art. 7, para 1). Requests in writing shall be in a language acceptable to the Contracting Parties concerned. Any documents accompanying such requests shall be translated into a mutually acceptable language, if necessary (Art. 7, para 2). Contracting Parties shall in all cases accept requests for assistance and accompanying documents in English or French or accompanied by a translation into English or French (Art. 7, para 3). When, for reasons of urgency in particular, requests for assistance have not been made in writing, the requested Contracting Party may require written confirmation (Art. 7, para 4).

VI. Grounds for denying / postponing assistance (Art. 3 and Art. 4)

The Convention states that if a Contracting Party considers that the assistance sought would infringe upon its sovereignty, security or other substantial national interests or prejudice the legitimate commercial interests of any enterprise, public or private, it may decline to provide that assistance or give it subject to certain conditions or requirements (Art. 3).

As stated above, if the Customs administration of a Contracting Party requests assistance which it itself would be unable to give if requested to do so by the other Contracting Party, it shall draw attention to that fact in its request. Compliance with such a request shall be within the discretion of the requested Contracting Party (Art. 4).

VII. Use of information received (Art. 5)

Any intelligence, documents or other information communicated or obtained under the Convention shall be used only for the purposes specified in the Convention, including use in judicial or administrative proceedings, and subject to such restrictions as may be laid down by the Customs administration which furnished them (Art. 5, para 1, let. a). Such intelligence, documents or other information may be used for other purposes only with the written consent of the Customs administration which furnished them and subject to any restrictions laid down by that administration (Art. 5, para 2).

VIII. Sharing of information received with other local authorities (Art. 5)

Any intelligence, documents or other information communicated or obtained under the Convention shall be afforded in the receiving country the same protection in respect of confidentiality and official secrecy as applies in that country to the same kind of intelligence, documents and other information obtained in its own territory (Art. 5, para 1, let. b).

IX. Sharing of information received with foreign authorities (Art. 5)

Any intelligence, documents or other information communicated or obtained under the Convention shall be afforded in the receiving country the same protection in respect of confidentiality and official secrecy as applies in that country to the same kind of intelligence, documents and other information obtained in its own territory (Art. 5, para 1, let. b).

X. Relationship with other instruments (Art. 11)

The provisions of the Convention shall not preclude the application of any more extensive mutual assistance which certain Contracting Parties grant or may grant in future (Art. 11).

In this respect, the Commentary makes it clear that (Commentary, Section A, para 3.A.1): (a) where the provisions of the Convention seem too general to meet particular co-operation requirements, the Contracting Parties concerned may modify the scope of those provisions by signing more specific agreements with particular countries; (b) specific co-operation of this kind may take several forms; in particular, it may involve the exchange of certain sensitive data or information that is of purely local interest; (c) this bilateral or regional co-operation should, however, still have as its framework the provisions of the Convention which constitute the ideal basis for co-operation and mutual administrative assistance between Contracting Parties.

9. Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters as amended by Regulation (EC) No 766/2008 of 9 July 2008

Key Points

- The Regulation assists in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation. It lays down the ways in which the administrative authorities responsible for implementation of the legislation on customs and agricultural matters in the Member States shall co-operate with each other and with the Commission in order to ensure compliance with that legislation within the framework of a Community system.
- The Regulation provides for several forms of co-operation, namely assistance on request (which includes exchange of information, notifications, surveillance, administrative enquiries, provision of documents and provision of evidence); spontaneous assistance (including exchange of information, provision of documents, provision of evidence and surveillance); forms of co-operation involving the participation of the Commission (such as exchange of information, on request or spontaneous, through the Commission, the establishment of a directory of data powered by public or private service providers active in the international supply chain, provision of trainings and community administrative and investigative co-operation missions in third countries); "Customs Information System" (CIS) and "Customs Files Identification Database" (FIDE).
- Each Member State shall communicate to the other Member States and the Commission a list of the competent authorities it has appointed for the purposes of applying the Regulation. With regard to the CIS, direct access to the system shall be reserved for customs administrations, but it may also be reserved for other authorities competent, according to the laws, regulations and procedures of the Member State in question, to act in order to achieve the aim of the CIS.
- Regardless of the form, any information transmitted pursuant to the Regulation shall be of a confidential nature, including the data stored in the CIS. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities.
- Provided the third country concerned has given a legal undertaking to provide the assistance required to gather proof of the irregular nature of operations which appear to constitute breaches of customs or agricultural legislation or to determine the scope of operations which have been found to constitute breaches of that legislation, information obtained under the Regulation may be communicated to that third country as part of a concerted action, subject to the agreement of the competent authorities supplying the information, in accordance with their internal provisions concerning the communication of personal data to third countries.

I. Parties

The Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs and

agricultural matters (hereinafter referred to as "the Regulation") was developed by the Council of the European Union in 1997. It shall be applicable in all Member States, starting from 13 March 1998. The Regulation repealed former Regulation (EEC) No 1468/81 on the same matters.[1] The Regulation was amended by the Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008.

II. Scope (Art. 1)

The Regulation lays down the ways in which the administrative authorities responsible for implementation of the legislation on customs[2] and agricultural matters in the Member States shall co-operate with each other and with the Commission in order to ensure compliance with that legislation within the framework of a Community system (Art.1, para 1). It assists in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation.

III. Forms of co-operation

The Regulation provides for several forms of co-operation, namely assistance on request (Art. 4 to Art. 12), which includes exchange of information, notifications, surveillance, administrative enquiries, provision of documents and provision of evidence; spontaneous assistance (Art. 13 to Art. 16), including exchange of information, provision of documents, provision of evidence and surveillance. It also provides for some forms of co-operation involving the participation of the Commission, such as exchange of information, on request or spontaneous, through the Commission (Art. 18), the establishment of a directory of data powered by public or private service providers active in the international supply chain (Art. 18.a), provision of trainings (Art. 18.b) and community administrative and investigative co-operation missions in third countries (Art. 20). The Regulation also provides for the establishment of the "Customs Information System" (CIS) and the Customs Files Identification Database (FIDE) which are aimed at ensuring more rapid and effective co-operation between the competent authorities referred to in the Regulation.

Exchange of information upon request (Art. 4)

The Regulation states that at the request of the applicant authority, the requested authority shall transmit to it any information which may enable it to ensure compliance with the provisions of customs or agricultural legislation, and in particular those concerning: (a) the application of customs duties and charges having equivalent effect together with agricultural levies and other charges provided for under the common agricultural policy or the special arrangements applicable to certain goods resulting from the processing of agricultural products; (b) operations forming part of the system of financing by the European Agricultural Guidance and Guarantee Fund (Art. 4, para 1). In

[1] See Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters.

[2] For the purposes of the Regulation, "customs legislation" means the body of Community provisions and the associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9 (2) of the Treaty establishing the European Community or goods subject to additional controls or investigations for the purposes of establishing their Community status.

order to obtain the information sought, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own country (Art. 4, para 2).

The Regulation also states that by agreement between the applicant authority and the requested authority and in accordance with the arrangements laid down by the latter, officials duly authorised by the applicant authority may obtain, from the offices where the administrative authorities of the Member State in which the requested authority is based exercise their functions, information concerning the application of the law on customs and agricultural matters which is needed by the applicant authority and which is derived from documentation to which the staff of those offices have access. These officials shall be authorised to take copies of the said documentation (Art. 10). The Regulation allows officials of the Commission to collect the above described information under conditions laid down in Article 10 by common accord (Art. 18, para 5).

Spontaneous exchange of information (Art. 15)

The Regulation states that the competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned all relevant information concerning operations which constitute, or appear to them to constitute, breaches of customs or agricultural legislation, and in particular concerning the goods involved and new ways and means of carrying out such operations (Art. 15, para 1).

The competent authorities of each Member State may also, by regular automatic exchange or occasional automatic exchange, communicate to the competent authority of any other Member State concerned information received concerning the entry, exit, transit, storage and end-use of goods, including postal traffic, moved between the customs territory of the Community and other territories, and the presence and movement within the customs territory of the Community of non-community and end-use goods, where necessary to prevent or detect operations which constitute, or appear to constitute, breaches of customs or agricultural legislation (Art. 15, para 2).

Exchange of information, on request or spontaneous, through the Commission

Under the Regulation, the competent authorities of each Member State shall communicate to the Commission as soon as it is available to them: (a) any information they consider relevant concerning (i) goods which have been or are suspected of having been the object of breaches of customs or agricultural legislation, (ii) methods or practices used or suspected of having been used to breach customs or agricultural legislation, (iii) requests for assistance, action taken and information exchanged in application of Articles 4 to 16 which are capable of revealing fraudulent tendencies in the field of customs and agriculture; (b) any information on shortcomings or gaps in customs and agricultural legislation that become apparent or may be deduced from the application of that legislation (Art. 17, para 1). The Commission shall communicate to the competent authorities in each Member State, as soon as it becomes available, any information that would help them to enforce customs or agricultural legislation (Art. 17, para 2).

Further, where a Member State's competent authorities become aware of operations which constitute, or appear to constitute, breaches of customs or agricultural legislation that are of particular relevance at Community level, and especially (a) where they have, or might have, ramifications in other Member States or in third countries, or (b) where it appears likely to the above authorities that similar operations have also been carried out

in other Member States, they shall communicate to the Commission as soon as possible, either on their own initiative or in response to a reasoned request from the Commission, any relevant information, be it in the form of documents or copies or extracts thereof, needed to determine the facts so that the Commission may co-ordinate the steps taken by the Member States. The Commission shall convey this information to the competent authorities of the other Member States. Within six months of the receipt of the information conveyed by the Commission, the competent authorities of the Member States shall forward to the Commission a summary of the anti-fraud measures taken by them on the basis of that information. The Commission shall, on the basis of those summaries, regularly prepare and convey to the Member States reports on the results of measures taken by the Member States (Art. 18, para 1). Where a Member State's competent authorities invoke Article 18, para 1, they need not communicate information as provided in Articles 14 (b) and 15 (*i.e.* spontaneous provision of information) to the competent authorities of the other member States concerned (Art. 18, para 2). In response to a reasoned request from the Commission, the Member State's competent authorities shall act in the manner laid down in Articles 4 to 8 (*i.e.* following the provisions regulating the exchange of information upon request) (Art. 18, para 3).

Provision of documents on request or spontaneous (Art. 5, Art. 8 and Art. 14)

The Regulation states that at the request of the applicant authority, the requested authority shall supply it with any attestation, document or certified true copy of a document in its possession or obtained according to Art. 4, para 2 (*i.e.* by proceeding as though acting on its own account or at the request of another authority in its own country) which relates to operations covered by customs or agricultural legislation (Art. 5). The Regulation also provide that at the request of the applicant authority, the requested authority shall make available any information in its possession or obtained in the manner referred to in Article 4, para 2, and particularly reports and other documents or certified true copies or extracts thereof, concerning operations detected or planned which constitute, or appear to the applicant authority to constitute, breaches of customs or agricultural legislation or, where applicable, concerning the findings of the special watch carried out pursuant to the Regulation. However, original documents and items shall be provided only where this is not contrary to the legislation in force in the Member State in which the requested authority is based (Art. 8).

Further, where they consider it useful for ensuring compliance with customs or agricultural legislation, each Member State's competent authorities shall communicate spontaneously to the competent authorities of the other Member States concerned all information in their possession, and in particular reports and other documents or certified true copies or extracts thereof, concerning operations which constitute, or appear to them to constitute, breaches of customs or agricultural legislation (Art. 14, let. b).

Notifications (Art. 6)

At the request of the applicant authority, the requested authority shall, while observing the rules in force in the Member State in which it is based, notify the addressee or have it notified of all instruments or decisions which emanate from the administrative authorities and concern the application of customs or agricultural legislation (Art. 6, para 1).

Enquiries (Art. 9)

The requested authority shall at the request of the applicant authority carry out, or arrange to have carried out, the appropriate administrative enquiries concerning operations which constitute, or appear to the applicant authority to constitute, breaches of customs or agricultural legislation. The requested authority or the administrative authority to which it has recourse shall conduct administrative enquiries as though acting on its own account or at the request of another authority in its own country. The requested authority shall communicate the results of such administrative enquiries to the applicant authority (Art. 9, para 1).

The Regulation allows, by agreement between the applicant authority and the requested authority, officials appointed by the applicant authority, to be present at the administrative enquiries referred to above. Administrative enquiries shall at all times be carried out by staff of the requested authority. The applicant authority's staff may not, of their own initiative, assume powers of inspection conferred on officials of the requested authority. They shall, however, have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the administrative enquiry being carried out. In so far as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, the applicant authority's staff shall not take part in such acts. In any event, they shall not participate in particular in searches of premises or the formal questioning of persons under criminal law. They shall, however, have access to the information thus obtained subject to the conditions laid down in the Regulation (Art. 9, para 2).

The Regulation also provides that where the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall at the earliest opportunity carry out an enquiry, at which Commission officials may be present under the conditions outlined above. The Member State or States concerned shall, as soon as possible, communicate to the Commission the findings of the enquiry (Art. 18, para 4).

Community administrative and investigative co-operation missions in third countries (Art. 20)

In pursuit of the objectives of the Regulation, the Commission may, under the conditions laid down in the Regulation, conduct Community administrative and investigative co-operation missions in third countries in co-ordination and close co-operation with the competent authorities of the Member States (Art. 20, para 1). The Commission shall inform the Member States and the European Parliament of the results of missions carried out pursuant to this provision (Art. 20, para 3).

Provision of evidence (Art. 12 and Art. 16)

Findings, certificates, information, documents, certified true copies and any intelligence obtained by the staff of the requested authority and communicated to the applicant authority in the course of the assistance, on request or spontaneous, provided for in the Regulation may be invoked as evidence by the competent bodies of the Member States of the authority receiving the information (Art. 12 and Art. 16).

This provision shall apply *mutatis mutandis* to the findings and information obtained in the course of the administrative and investigative co-operation missions in third countries as provided by the Regulation (Art. 21, para 2). For the purposes of their use as

evidence, original documents obtained or certified true copies thereof shall be forwarded by the Commission to the competent authorities of the Member States if they so request (Art. 21, para 3).

Directory of data powered by public or private service providers active in the international supply chain (Art. 18.a)

The Regulation states that the Commission shall establish and manage a directory of data received from public or private service providers active in the international supply chain with a view to assisting the authorities responsible for implementation of the legislation on customs and agricultural matters in the Member States to detect movements of goods that are the object of operations in potential breach of customs and agricultural legislation and means of transport, including containers, used for that purpose. That directory shall be directly accessible to those authorities (Art. 18.a).

Provision of trainings (Art. 18.b)

The Commission shall be authorised to provide training and all forms of assistance other than financial assistance for the liaison officers of third countries and of European and international organisations and agencies (Art. 18.b, para 1). The Commission may make expertise, technical or logistical assistance, training or communication activity or any other operational support available to the Member States both for the achievement of the objectives of the Regulation and in the performance of Member States' duties in the framework of the implementation of the customs co-operation provided for by the Treaty on European Union (Art. 18.b, para 2).

Customs Information System (CIS) (Art. 23 to Art. 41) and Customs Files Identification Database (FIDE) (Art. 41.a to Art 41.c)

The Regulation states that an automated information system, the "Customs Information System", (hereinafter referred to as the "CIS") is thereby established to meet the requirements of the administrative authorities responsible for applying the legislation on customs or agricultural matters, as well as those of the Commission (Art. 23, para 1). The aim of the CIS, in accordance with the provisions of the Regulation, shall be to assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation by making information available more rapidly and thereby increasing the effectiveness of the co-operation and control procedures of the competent authorities referred to in the Regulation (Art. 23, para 2). The CIS shall consist of a central database facility and it shall be accessible via terminals in each Member State and at the Commission. It shall comprise exclusively data necessary to fulfill its aim as stated above (Art. 24). The Regulation provides for guidance on what information shall be included in the CIS, depending on the category the information belongs to (Art. 25 to Art. 27).

The CIS shall also include a specific database called the "Customs files identification database" (FIDE). All the provisions of the Regulation relating to the CIS shall also apply to the FIDE, and any reference to the CIS shall include that database (Art. 41.a, para 1). The objectives of the FIDE shall be to help to prevent operations in breach of customs legislation and of agricultural legislation applicable to goods entering or leaving the customs territory of the Community and to facilitate and accelerate their detection and prosecution (Art. 41.a, para 2). The purpose of the FIDE shall be to allow the Commission, when it opens a co-ordination file within the meaning of Article 18 or

prepares a Community mission in a third country within the meaning of Article 20, and the competent authorities of a Member State designated as regards administrative enquiries in accordance with Article 29, when they open an investigation file or investigate one or more persons or businesses, to identify the competent authorities of the other Member States or the Commission departments which are or have been investigating the persons or businesses concerned, in order to achieve the objectives specified in paragraph 2 by means of information on the existence of investigation files (Art. 41.a, para 3). If the Member State or the Commission making a search in the FIDE needs fuller information on the registered investigation files on persons or businesses, it shall ask for the assistance of the supplier Member State (Art. 41.a, para 4). The customs authorities of the Member States may use the FIDE within the framework of customs co-operation provided for in Articles 29 and 30 of the Treaty on European Union. In such a case, the Commission shall ensure the technical management of the database (Art. 41.a, para 5).

IV. Authorities that can use the instrument (Art. 2 and Art. 29)

The Regulation states that each Member State shall communicate to the other Member States and the Commission a list of the competent authorities it has appointed for the purposes of applying the Regulation (Art. 2, para 2).

With regard to the CIS, the Regulation clarifies that direct access to data included therein shall be reserved exclusively for the national authorities designated by each Member State and the departments designated by the Commission. These national authorities shall be customs administrations, but may also include other authorities competent, according to the laws, regulations and procedures of the Member State in question, to act in order to achieve the aim of the CIS (Art. 29, para 1). Each Member State shall send the Commission a list of its designated competent authorities which have direct access to the CIS stating, for each authority, to which data it may have access and for what purposes. The Commission shall inform the other Member States accordingly. It shall also inform all the Member States of the corresponding details concerning the Commission departments authorised to have access to the CIS (Art. 29, para 2).[3] In reaching the decision account shall be taken in particular of any existing bilateral or Community arrangements and of the adequacy of the level of data protection.

V. Conditions for requesting assistance (Art. 20 and Art. 34)

The Regulation provides for some conditions which shall be met in order to utilise the CIS as a tool to co-operate internationally. It is stated that each CIS partner intending to receive personal data from, or include them in, the CIS shall adopt national legislation, or internal rules applicable to the Commission, guaranteeing the protection of the rights and freedoms of individuals with regard to the processing of personal data (Art. 34, para 1). A CIS partner may receive personal data from, or include them in, the CIS only where the arrangements for the protection of such data provided for above have entered into force.

[3]. Notwithstanding this, the Council, acting on a proposal from the Commission, may decide to permit access to the CIS by international or regional organisations, provided that, where relevant, a protocol is at the same time concluded with those organisations in conformity with Article 7 (3) of the Convention between Member States of the Community on the use of information technology for customs purposes. See Council Act 95/C316/02 of 26 July 1995 drawing up the Convention on the use of information technology for customs purposes.

Each Member State shall also have previously designated a national supervisory authority or authorities as provided for by the Regulation (Art. 34, para 2).[4]

The Regulation provides for specific conditions to be met when carrying out community missions under its provisions. The Community missions to third countries referred to above shall indeed be governed by the following conditions (Art. 20, para 2): (a) they may be undertaken at the Commission's initiative, where appropriate on the basis of information supplied by the European Parliament, or at the request of one or more Member States; (b) they shall be carried out by Commission officials appointed for that purpose and by officials appointed for that purpose by the Member State(s) concerned; (c) they may also, by agreement with the Commission and the Member States concerned, be carried out on behalf of the Community by officials of a Member State, in particular under a bilateral assistance agreement with a third country; in that event the Commission shall be informed of the results of the mission; (d) mission expenses shall be paid by the Commission.

VI. Grounds for denying/postponing assistance (Art. 48)

The Regulation shall not bind Member States' administrative authorities to grant each other assistance where that would be likely to be injurious to public policy (*ordre public*) or other fundamental interests, in particular with regard to data protection, of the Member State in which they are based (Art. 48, para 1). Reasons shall be stated for any refusal to grant assistance. The Commission shall be informed as early as possible of any refusal to grant assistance and the reasons given for refusal (Art. 48, para 2).

VII. Use of information received

The Regulation states that, regardless of the form, any information transmitted pursuant to the Regulation shall be of a confidential nature, including the data stored in the CIS. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities. In particular, the information referred to above may not be used for purposes other than those provided for in the Regulation, unless the Member State, or the Commission, which supplied it or entered it in the CIS has expressly agreed, subject to the conditions laid down by that Member State or by the Commission and insofar as such communication or use is not prohibited by the provisions in force in the Member State in which the recipient authority is based (Art. 45, para 1). This shall not preclude the use of information obtained under the Regulation in any legal action or proceedings subsequently initiated in respect of failure to comply with customs or agricultural legislation. The competent authority which supplied that information shall be notified of such use forthwith (Art. 45, para 3).

The provisions under Article 45 above described also apply to findings and information obtained in the course of the Community missions, and in particular documents passed on by the competent authorities of the third countries concerned (Art. 21, para 1).

With respect to exchange of information between the Commission and the Member States pursuant to Articles 17 and 18, the Regulation states that such data may be stored

4. See Art. 37.

and used for the purpose of strategic and operational analysis (Art. 18, para 7). The Member States and the Commission may exchange the results of operational and strategic analyses carried out under the Regulation (Art. 18, para 8).[5]

The Regulation also includes provisions specific to the use of information stored in the CIS. Such provision states that CIS partners may use data obtained from the CIS only in order to achieve the aim provided for in the Regulation.[6] Notwithstanding the above, CIS partners may use it for administrative or other purposes with the prior authorisation of the CIS partner which introduced the data into the system subject to conditions imposed by it or, where applicable, the Commission, which included it in the System. Such other use shall be in accordance with the laws, regulations and procedures of the Member State which seeks to use it and, where appropriate, the corresponding provisions applicable to the Commission in this connection (Art. 30, para 1). Further, the Regulation states that the inclusion of data in the CIS shall be governed by the laws, regulations and procedures of the supplying Member State and, where appropriate, the corresponding provisions applicable to the Commission in this connection, unless the Regulation lays down more stringent provisions (Art. 31, para 1). The processing of data obtained from the CIS, including their use or performance of any action under Article 27, para 1 (*i.e.* sighting and reporting, discreet surveillance or specific checks) suggested by the supplying CIS partner, shall be governed by the laws, regulations and procedures of the Member State processing or using such data and the corresponding provisions applicable to the Commission in this connection, unless the Regulation lays down more stringent provisions (Art. 31, para 2).

VIII. Sharing of information received with other local authorities

Regardless of the form, any information transmitted pursuant to the Regulation shall be of a confidential nature, including the data stored in the CIS. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities. In particular, the information referred to above may not be sent to persons other than those in the Member States or within the Community institutions whose functions require them to know or use it. Nor may it be used for purposes other than those provided for in the Regulation, unless the Member State, or the Commission, which supplied it or entered it in the CIS has

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[5] For the purposes of the Regulation, “operational analysis" means analysis of operations which constitute, or appear to constitute, breaches of customs or agricultural legislation, involving the following stages in turn: (a) the collection of information, including personal data; (b) evaluation of the reliability of the information source and the information itself; (c) research, methodical presentation and interpretation of links between these items of information or between them and other significant data; (d) the formulation of observations, hypotheses or recommendations directly usable as risk information by the competent authorities and by the Commission to prevent and detect other operations in breach of customs and agricultural legislation and/or to identify with precision the person or businesses implicated in such operations. "Strategic analysis" means research and presentation of the general trends in breaches of customs and agricultural legislation through an evaluation of the threat, scale and impact of certain types of operation in breach of customs and agricultural legislation, with a view to subsequently setting priorities, gaining a better picture of the phenomenon or threat, reorienting action to prevent and detect fraud and reviewing departmental organisation. Only data from which identifying factors have been removed may be used for strategic analysis (Art. 2, para 1).

[6] This holds true also with respect to personal data (Art. 35, para 1).

expressly agreed, subject to the conditions laid down by that Member State or by the Commission and insofar as such communication or use is not prohibited by the provisions in force in the Member State in which the recipient authority is based (Art. 45, para 1). This also applies to findings and information obtained in the course of the Community missions, and in particular documents passed on by the competent authorities of the third countries concerned (Art. 21, para 1).

The Regulation also includes a provision specific to the dissemination of information stored in the CIS. It states that data obtained from the CIS may, with the prior authorisation of, and subject to any conditions imposed by, the Member State which included them in the System, be communicated for use by national authorities other than competent authorities as defined by the Regulation, third countries and international or regional organisations wishing to make use of them. Each Member State shall take special measures to ensure the security of such data when they are being transmitted or supplied to departments located outside its territory. This shall apply *mutatis mutandis* to the Commission where it has entered the data in the System (Art. 30, para 4).

Without prejudices to the provisions specific to the CIS, information concerning natural and legal persons shall be transmitted under the Regulation only where strictly necessary to prevent, investigate or take proceedings in respect of operations in breach of customs or agricultural legislation (Art. 45, para 2).

IX. Sharing of information received with foreign authorities (Art. 19)

The Regulation states that, provided that the third country concerned has legally committed itself to providing the assistance necessary to assemble all the evidence of the irregular nature of operations which appear to be in breach of customs or agricultural legislation or to determine the extent of the operations which have been found to be in breach of such legislation, information obtained pursuant to the Regulation may be communicated to it: (a) by the Commission or by the Member State concerned, subject, where appropriate, to the prior agreement of the competent authorities of the Member State which provided it, or (b) by the Commission or the Member States concerned within the framework of a joint action if information is provided by more than one Member State, subject to the prior agreement of the competent authorities of the Member States which provided it. Such communication by a Member State shall be made in compliance with its domestic provisions applicable to the transfer of personal data to third countries. In all cases, it shall be ensured that the rules of the third country concerned offer a degree of protection equivalent to that provided for in Article 45, para 1 and para 2 of the Regulation (Art. 19).

X. Relationship with other instruments (Art. 1 and Art. 51)

The provisions of the Regulation shall not apply where they overlap with the specific provisions of other legislation on mutual assistance between Member States' administrative authorities and co-operation between the latter and the Commission for the application of customs or agricultural legislation (Art. 1, para 2). Further, the Regulation shall not affect the application in the Member States of rules on criminal procedure and mutual assistance in criminal matters, including those on secrecy of judicial inquiries (Art. 51).

10. Convention A/P5/5/82 for Mutual Administrative Assistance in Customs Matters

Key points

- Under the Convention, the Member States of ECOWAS agree that their competent authorities shall render each other assistance with a view to the prevention, detection and punishment of customs infringements. Assistance shall also cover mutual administrative assistance in customs matters among Member States.
- The Convention provides for a number of forms of co-operation, namely (a) obligatory assistance; (b) assistance with regard to determination of import or export duties and taxes; (c) assistance with regard to monitoring; (d) assistance as regards surveillance; (e) enquiries and notifications carried out on behalf of another member state; (f) statements by representatives of competent authorities before foreign tribunals; (g) presence of representatives of the competent authorities of one member state on the territory of another member state; (h) participation in foreign enquiries; (i) co-operation in the compilation and analysis of customs statistics; (j) co-operation in the preparation and operation of customs training arrangements.
- Communication between Member States provided for under the Convention shall take place directly between the competent authorities, defined as any national customs administration or any other national authority designated to assist customs administration.
- The particulars, documents and other sources of information communicated or obtained under the application of the Convention shall: (a) be used only for the purposes given in the Convention including judicial or administrative proceedings, and only on condition that the conditions stipulated by the competent authorities are fulfilled; and (b) benefit in the receiving country from the same measures protecting confidential information and professional secrets as in that country for particulars, documents and other sources of information obtained within its own territory. Particulars, documents and other sources of information may only be used for other purposes with the written consent of the customs authorities or equivalent authority providing such information, and according to the limitations stated by such authorities or authority.

I. Parties

The Convention A/P5/5/82 for Mutual Administrative Assistance in Customs Matters (hereinafter referred to as "the Convention") was adopted in 1982 under the auspices of the Economic Community of West African States (ECOWAS).[1]

II. Scope (Art. 2 and Art. 3)

Under the Convention, Member States agree that their competent authorities shall render each other assistance with a view to the prevention, detection and punishment of

[1] The Economic Community of West African States (ECOWAS) is a regional group founded in 1975. Its mission is to promote economic integration in all fields of economic activity, particularly industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, social and cultural matters. It has 15 Member States. These are: Benin, Burkina Faso, Cabo Verde, Côte D'Ivoire, Gambia, Ghana, Guinee, Guinee Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togolese.

customs infringements[2], in accordance with the provisions of the Convention (Art. 2, para 1). The competent authorities of any State may request such assistance in the course of any enquiry or judicial or administrative proceedings undertaken by that State. If the competent authorities lack jurisdiction in instituting direct proceeding it may request assistance only to the extent of the competence attributed to it with regard to these proceedings. Similarly, if proceedings are initiated in the country of the administration from whom the assistance is requested, the latter may provide the requested assistance to the extent of the competence attributed to it with regard to these proceedings (Art. 2, para 1.1).

In addition to the above, the Convention shall cover mutual administrative assistance in customs matters among Member States (Art. 2, para 2). The provisions of the Convention shall also apply to non-recorded traffic in drugs and narcotics (Art. 3).

III. Forms of co-operation (Art. 9 to Art. 18)

The Convention provides for a number of forms of co-operation, namely (a) obligatory assistance (Art. 9); (b) assistance with regard to determination of import or export duties and taxes (Art. 10); (c) assistance with regard to monitoring (Art. 11); (d) assistance as regards surveillance (Art. 12); (e) enquiries and notifications carried out on behalf of another member state (Art. 13); (f) statements by representatives of competent authorities before foreign tribunals (Art. 14); (g) presence of representatives of the competent authorities of one member state on the territory of another member state (Art. 15); (h) participation in foreign enquiries (Art. 16); (i) co-operation in the compilation and analysis of customs statistics (Art. 17); (j) co-operation in the preparation and operation of customs training arrangements (Art. 18).

Obligatory assistance (Art. 9)

The competent authorities of any Member State shall communicate to the competent authorities of other Member State, any significant information reaching it in the course of its normal activities, which leads it to suspect that a serious customs or trade infringement has been or is about to take place on the territory of that Member State. Such information shall concern the movement of entities or of merchandise or the means of transport used (Art. 9, para 1). The competent authorities of a Member State shall communicate to the competent authorities of any other Member State, any document, reports, records or proceedings in support of information provided in accordance with paragraph 1 of Article 9 either in the form of originals or as certified copies (Art. 9, para 2). The competent authorities of any Member State shall communicate to the competent authorities of any other Member State directly concerned, any information likely to be useful to it relating to customs and trade infringements and especially to new means or methods used in the commission of such infringements (Art. 9, para 3).

[2] "Customs infringements" mean any violation or attempt to violate customs legislation (Art. 1, num. 7), this latter being defined as the totality of legislative and regulative measures applied by customs administrations as regards the imports, exports or transit of merchandise, currency movement across the borders, including the monitoring of exchange control regulations (Art. 1, num. 5).

Assistance with regard to determination of import or export duties and taxes (Art. 10)

At the request of the competent authorities having reason to suspect that customs or trade infringements have been committed within their country, the competent authorities of the Member State to whom such a request is submitted shall communicate any information at their disposal which is likely to assist in determining the exact amount of import or export duties and taxes due. This includes, in particular (Art. 10, para 1):

a) as regards the customs value of merchandise, commercial invoices submitted to the customs authorities of the exporting or importing country, or copies of the said invoices certified by the customs and as required by the circumstances; documents showing current export or import prices, a copy of the declaration of value made when merchandise was exported or imported; trade catalogues, current prices etc., whether published in the country of export or import (Art. 10, para 1, let a);

b) as regard the classification of merchandise for tariff purposes, the results of any analysis carried out by laboratories to determine the classification of merchandise whether for import or export purposes (Art. 10, para 1, let b);

c) as regards the origin of merchandise, the declaration of origin as established if necessary in accordance with the provisions of the Protocol relating to the ECOWAS rules of origin, when such declarations are required, the customs status of merchandise in the country of export (*i.e.* for consumption, in customs transit, in bounded warehouses on temporary importation, in a free zone, export duty drawback etc.) (Art. 10, para 1, let c).

Assistance with regard to monitoring (Art. 11)

At the request of the competent authorities of a Member State, the competent authorities of another Member State shall submit information on the following: (a) the authenticity of the official documents submitted in support of a declaration of merchandise to the customs authority of the Member State presenting the request; (b) the regularity of exports, from the territory of the Member State to whom the request is submitted, of merchandise imported into the territory of the Member State requesting the information (Art. 11).

Assistance as regards surveillance (Art. 12)

At the request of the competent authorities of any Member State, the competent authorities of any other Member State shall exercise, to the extent of its competence and powers, special surveillance for a determined period:

a) on the movements, particularly at territorial entry and exit points of entities suspected of engaging professionally or by customs, in suspicious activities on the territory of the Member State requesting the information (Art. 12, let a);

b) on the movement of any merchandise indicated by the competent authorities of the Member State requesting information as being the object of considerable illicit traffic to or from the territory of that Member State (Art. 12, let b);

c) on any locations where stores of merchandise have been built up, indicating their possible future use for illicit imports into the territory of the Member State requesting the information (Art. 12, let c);

d) on any vehicles, ships, aircraft or other means of transport which there is reason to believe are used to commit customs or trade infringements in the territory of the Member State requesting the information; and shall communicate the results to the competent authorities of the Member submitting the request (Art. 12, let d).

Enquiries and notifications carried out on behalf of another member state (Art. 13)

At the request of the competent authorities of any Member State, the competent authorities of any other Member State shall act in accordance with the laws and regulations in force in their own country to carry out enquiries with a view to obtaining items of evidence with regard to customs or trade infringements which are the object of investigation on the territory of the Member State submitting the request, shall record the statements of individuals suspected or wanted in connection with such infringements, as well as those of witnesses or experts, and shall communicate the results of such an enquiry, together with the relevant documents or other items of evidence, to the competent authorities of the Member State submitting the request (Art. 13, para 1). Upon a written request from the competent authorities of any Member State, the competent authorities of any other Member State shall act in accordance with the laws and regulations in force in their own country to notify any interested parties resident on their territory, requesting for information with regard to any matter relevant to the application of the Convention (Art. 13, para 2).

Statements by representatives of competent authorities before foreign tribunals (Art. 14)

When a simple written statement is not sufficient and the competent authorities of a Member State request it, the competent authorities of the other Member State shall as far as possible authorise its agents to file evidence before the appropriate tribunal in session on the territory of the Member State requesting information, as witnesses or experts in any matter concerning a customs or trade infringement. The request to appear before the tribunal shall specify the case in question and the capacity in which the agent or official is to give evidence (Art. 14).

Presence of representatives of the competent authorities of one member state on the territory of another member state (Art. 15)

Upon written request from the competent authorities of a Member State enquiring about a specific trade or customs infringement, the competent authorities of the other Member State shall authorise, whenever they deem it appropriate, any agents specially designated by the Member State requesting information to gain access to any papers, records and other documents or complementary sources of relevant information held by its offices, and to take copies of such documents or extract from the information or items relevant to the said infringement (Art. 15, para 1). In the application of the provisions above, the greatest possible assistance and collaboration shall be provided to agents of the competent authorities of the Member State requiring information, so as to facilitate its enquiries (Art. 15, para 2). On the written request of the competent authorities of a Member State, the competent authorities of any other States shall authorise, whenever they deem it appropriate, agents of the competent authorities requesting information to be present on the territory of the Member State to whom the request is submitted, in

connection with enquiries into or establishment of a customs or trade infringement involving the Member State requesting information (Art. 15, para 3).

Participation in foreign enquiries (Art. 16)

When the two Member States concerned deem it appropriate, representative of the competent authorities of one of these Member States shall participate at the request of the other in enquiries carried out on the territory of the latter (Art. 16).

Co-operation in the compilation and analysis of customs statistics (Art. 17)

The competent authorities of Member States shall assist each other in the preparation and analysis of trade statistics of imports, exports and re-exports passing through common frontiers. To this end each exporting customs office shall communicate to the related importing customs office in the neighbouring country a monthly statement listed under tariff nomenclature positions, or quantities exported to the neighbouring country (Art. 17, para 1). At the request of the competent authorities of a Member State, the competent authorities of another Member State shall carry out enquiries in order to check the correctness of statistics prepared by the requesting authorities in respect to imports, exports and re-exports of goods through common frontiers (Art. 17, para 2).

Co-operation in the preparation and operation of customs training arrangements (Art. 18)

The competent authorities of Member States shall assist each other in the preparation and operation of customs training arrangements. This provision may apply to (a) the planning and operation of joint training institution or facilities and (b) the invitation by the competent authorities of a Member State to the competent authorities of another Member State to designate officials to participate in training activities, in order to improve their knowledge of formalities, procedures and other professional subjects of mutual interest.

IV. Authorities that can use the instrument (Art. 5)

Communication between Member States provided for under the Convention shall take place directly between the competent authorities. The Convention defines “competent authorities” as any national customs administration or any other national authority designated to assist customs administration (Art. 1, num. 13). The competent authorities of Member States shall indicate the departments or officials responsible for such communications, and inform the Executive Secretariat of the Economic Community of West African States of the names and addresses of these departments. The Executive Secretariat shall communicate such information to the Member States (Art. 5, para 1). The competent authorities of any Member State to whom a request for assistance is addressed shall take all necessary steps to comply with the request, with due regard to the laws and regulations in force within its own territory (Art. 5, para 2). The competent authorities of a Member State to whom a request is addressed shall reply to such a request within the shortest possible time (Art. 5, para 3).

V. Conditions for requesting assistance (Art. 6)

Request for assistance on the basis of the Convention shall normally be submitted in writing, accompanied by the necessary information and any documents deemed relevant

(Art. 6, para 1). All written requests shall be submitted in one of the official languages of the Community acceptable to the Member States concerned (Art. 6, para 2). Whenever requests for assistance are not submitted in writing, primarily on account of their urgency, the Member State to whom a request is addressed may demand written confirmation (Art. 6, para 5).

VI. Grounds for denying / postponing assistance (Art. 6)

When the competent authorities of a Member State present a request for assistance to another Member State, which it would be unable to reciprocate if that other State were to submit a similar request, this fact shall be stated when the request is made. The Member State to whom the request is directed shall be at liberty to decide what action should be taken with regard to the said request (Art. 6, para 3).

VII. Use of information received (Art. 4)

The particulars, documents and other sources of information communicated or obtained under the application of the Convention shall be used only for the purposes of the Convention including judicial or administrative proceedings, and only on condition that the conditions stipulated by the submitting competent authorities are fulfilled (Art. 4, para 1, let a).

Particulars, documents and other sources of information may only be used for other purposes with the written consent of the customs authorities or equivalent authority providing such information, and only on condition that the conditions stipulated by the submitting competent authorities are fulfilled (Art. 4, para 2).

VIII. Sharing of information received with other local authorities (Art. 4)

The Convention does not provide for specific restrictions in the sharing of information received under its provisions. The Convention only states that the particulars, documents and other sources of information communicated or obtained under the application of the Convention shall benefit in the receiving country, from the same measures protecting confidential information and professional secrets as are in that country for particulars, documents and other sources of information obtained within its own territory (Art. 4, para 1, let b).

IX. Sharing of information received with foreign authorities (Art. 4)

The Convention does not provide for specific restrictions in the sharing of information received under its provisions on mutual legal assistance. The Convention only states that the particulars, documents and other sources of information communicated or obtained under the application of the Convention shall benefit in the receiving country, from the same measures protecting confidential information and professional secrets as are in that country for particulars, documents and other sources of information obtained within its own territory (Art. 4, para 1, let b).

X. Relationship with other instruments

The assistance provided under the Convention does not cover requests to effect arrest, nor to recover duties, taxes, charges, fines or any other sum due to a Member State, in so far as these matters come under the Community Customs Code (Art. 2, para 3).

B. Anti-money laundering related instruments

1. United Nations Convention against Transnational Organized Crime (Palermo Convention)

Key points

- The Palermo Convention provides for a number of measures that shall apply to the prevention, investigation and prosecution of certain offences (participation in an organised criminal group, laundering of proceeds of crime, corruption, obstruction of justice) and serious crimes which are transnational in nature and involve an organised criminal group.
- International co-operation measures contained in the Convention include: measures to combat money-laundering, confiscation and seizure, extradition, transfer of sentenced persons, mutual legal assistance, joint investigations, special investigative techniques, transfer of criminal proceedings, protection of witnesses, protection of victims, law enforcement co-operation, collection, exchange and analysis of information on the nature of organised crime, training and technical assistance.
- When dealing specifically with mutual legal assistance, each State Party shall designate a central authority that shall have the responsibility and power to receive requests for assistance and either to execute them or to transmit them to the competent authorities for execution.
- With specific regard to measures to prevent money-laundering each State Party shall consider the establishment of FIUs to serve as national centres for the collection, analysis and dissemination of information regarding potential money-laundering.
- Information or evidence obtained under the Convention shall not be used/transmitted for investigations, prosecutions or judicial proceedings other than those stated in the request unless the prior consent of the requested State Party is obtained (some exceptions exist).

I. Parties

The United Nations Convention against Transnational Organized Crime (also known as the "Palermo Convention") was adopted on 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations. Currently there are 165 Parties to the Convention.[1]

[1] Status of Parties to the Convention as at April 2012: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial, Guinea, Estonia, Ethiopia, European Union, Finland, France, Gabon, Gambia, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica ,Japan ,Jordan ,Kazakhstan ,Kenya ,Kiribati ,Kuwait ,Kyrgyzstan ,Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania ,Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta,

II. Scope (Art. 1 and Art. 3)

The Convention's purpose is to promote co-operation to prevent and combat transnational organised crime more effectively (Art. 1). To this end, the Convention provides for a number of measures that shall apply to the prevention, investigation and prosecution of the offences established in accordance with the Convention and serious crime as defined in the Convention, where the offence is transnational in nature and involves an organised criminal group (Art. 3, para 1).

An offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State (Art. 3, para 2).

Under the Convention, the following conducts are to be considered as criminal offences, when committed intentionally: Participation in an organised criminal group (Art. 5); Laundering of proceeds of crime (Art. 6); Corruption (Art. 8); Obstruction of justice (Art. 23).

Serious crime is defined as any conducts constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty (Art. 2, let b).

III. Forms of co-operation

The Convention allows for the following forms of international co-operation: Measures to combat money-laundering (Art. 7), Confiscation and seizure (Art. 12 and Art.13), Extradition (Art. 16), Transfer of sentenced persons (Art.17); Mutual legal assistance (Art. 18); Joint investigations (Art. 19); Special investigative techniques (Art. 20); Transfer of criminal proceedings (Art. 21); Protection of witnesses (Art. 24); Protection of victims (Art. 25); Law enforcement co-operation (Art. 27); Collection, exchange and analysis of information on the nature of organised crime (Art. 28); Training and technical assistance (Art. 29).

Measures to combat money-laundering (Art. 7)

The Convention states that each State Party shall, without prejudice to Articles 18 (mutual legal assistance) and 27 (law enforcement co-operation) of the Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial

Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, Zimbabwe.

authorities) have the ability to co-operate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering (Art. 7, para 1, let b).

Further, States Parties shall endeavour to develop and promote global, regional, subregional and bilateral co-operation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering (Art. 7, para 4).

Mutual Legal Assistance (Art. 18)

Mutual legal assistance to be afforded in accordance with the Convention may be requested for any of the following purposes (Art. 18, para 3): a) Taking evidence or statements from persons; b) Effecting service of judicial documents; c) Executing searches and seizures, and freezing; d) Examining objects and sites; e) Providing information, evidentiary items and expert evaluations; f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; h) Facilitating the voluntary appearance of persons in the requesting State Party; i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

With regard to information exchange, the Convention also allows for spontaneous exchange of information relating to criminal matters where the competent authorities of a State Party believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the receiving State Party pursuant to the Convention.

Further, the Convention states that when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party (Art. 18, para 18).

Joint Investigations (Art. 19)

Joint investigations may be undertaken by agreement on a case-by-case basis or by entering into bilateral or multilateral agreements or arrangements among States Parties. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Special Investigative Techniques (Art. 20)

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 to allow for the appropriate use by its competent authorities of controlled delivery and other special investigative techniques (such as electronic or other forms of surveillance and undercover operations), within its territory (Art. 20, para 1). The use of such special investigative techniques may be based either on

bilateral or multilateral agreements or arrangements (Art. 20, para 2) or on decisions made on a case-by-case basis (Art. 20, para 3).

Law Enforcement Co-operation (Art. 27)

States Parties shall co-operate closely with one another to enhance the effectiveness of law enforcement action to combat the offences covered by the Convention. Each State Party shall, in particular, adopt effective measures:

a) to enhance and, where necessary, establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by the Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

b) to co-operate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning: (i) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned; (ii) the movement of proceeds of crime or property derived from the commission of such offences; (iii) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

c) to provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

d) to facilitate effective co-ordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

e) to exchange information with other States Parties on specific means and methods used by organised criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

f) to exchange information and co-ordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

In order to give effect to the above mentioned measures, States Parties shall consider entering into/amending bilateral or multilateral agreements or arrangements on direct co-operation between their law enforcement agencies. In the absence of such agreements or arrangements, the Parties may consider the Convention as the basis for mutual law enforcement co-operation in respect of the offences covered by it (Art. 27, para 2).

Collection, Exchange and Analysis of Information on the Nature of Organised Crime (Art. 28)

Under the Convention, each State Party shall consider analysing, in consultation with experts, trends in organised crime in its territory, as well as the circumstances in which organised crime operates and the groups and technologies involved (Art. 28, para 1) and developing and sharing with each other analytical expertise concerning organised crime. To this end, common definitions, standards and methodologies should be developed and applied as appropriate (Art. 28, para 2).

Each State Party shall also consider monitoring its policies and actual measures to combat organised crime and making assessments of their effectiveness and efficiency (Art. 28, para 3).

Training and Technical Assistance (Art. 29)

Under the Convention, each State Party shall initiate, develop or improve specific training programmes for its law enforcement personnel and other personnel charged with the prevention, detection and control of the offences covered by the Convention. Such programmes shall deal, in particular and to the extent permitted by domestic law, with the following:

a) Methods used in the prevention, detection and control of the offences covered by this Convention;

b) Routes and techniques used by persons suspected of involvement in offences covered by this Convention, including in transit States, and appropriate countermeasures;

c) Monitoring of the movement of contraband;

d) Detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or other instrumentalities, as well as methods used in combating money laundering and other financial crimes;

e) Collection of evidence;

f) Control techniques in free trade zones and free ports;

g) Modern law enforcement equipment and techniques, including electronic surveillance, controlled deliveries and undercover operations;

h) Methods used in combating transnational organised crime committed through the use of computers, telecommunications networks or other forms of modern technology; and

i) Methods used in the protection of victims and witnesses.

States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in the areas above mentioned (Art. 29, para 2). States Parties shall also promote training and technical assistance that will facilitate extradition and mutual legal assistance (Art. 29, para 3).

IV. Authorities that can use the instrument

The Convention provides for different ways to identify authorities that are allowed to receive and execute international co-operation requests, depending on what forms of co-operation is considered.

When dealing with mutual legal assistance under Art. 18 of the Convention, each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. In most of the cases the designated authority is the Ministry of Justice/Attorney General. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it

through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible (Art. 18, para 13).

With specific regard to measures to prevent money-laundering (Art. 7) the Convention states that, without prejudice to mutual legal assistance provisions under Article 18 and law enforcement co-operation provisions under Article 27, each State Party shall consider the establishment of financial intelligence units (FIUs) to serve as national centres for the collection, analysis and dissemination of information regarding potential money-laundering (Art. 7, para 1, let b).

V. Conditions for requesting assistance (Art. 18)

The Convention sets out specific conditions for filing requests for mutual legal assistance under Article 18. Any requests and communication related thereto shall be transmitted to the central authorities designated by the States Parties (Art. 18, para 13).

Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith (Art. 18, para 14).

Requests for mutual legal assistance shall contain: (a) the identity of the authority making the request; (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding; (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents; (d) a description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed; (e) where possible, the identity, location and nationality of any person concerned; and (f) the purpose for which the evidence, information or action is sought (Art. 18, para 15). The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution (Art. 18, para 16).

VI. Grounds for denying/postponing assistance (Art. 18)

The Convention provides for certain circumstances under which the States Parties are allowed to refuse rendering mutual legal assistance under Article 18. States Parties shall however not decline to render mutual legal assistance pursuant to this Article on the ground of bank secrecy (Art. 18, para 8). States Parties may decline to render mutual legal assistance on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party (Art. 18, para 9).

According to the Convention, mutual legal assistance may also be refused (Art. 18, para 21):

a) If the request is not made in conformity with the provisions of this Article;

b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

It is stated that States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters (Art. 18, para 22).

Reasons shall be given for any refusal of mutual legal assistance (Art. 18, para 23).

Mutual legal assistance may be also postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding (Art. 18, para 25).

Before refusing or postponing a request pursuant to the above mentioned provisions, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions (Art. 18, para 26).

VII. Use of information received (Art. 18)

The requesting State Party shall not use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. This shall not prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party (Art. 18, para 19).

With specific regard to spontaneous exchange of information under Article 18, para 4, the Convention states that competent authorities receiving any information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party (Art. 18, para 5).

VIII. Sharing of information received with other local authorities (Art. 18)

The requesting State Party shall not transmit information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. This shall not prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party (Art. 18, para 19).

The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to

execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party (Art. 18, para 20).

IX. Sharing of information received with foreign authorities (Art. 18)

The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party (Art. 18, para 19).

The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party (Art. 18, para 20).

X. Relationship with other instruments (Art. 18)

Provisions of mutual legal assistance provided for by the Convention under Art. 18 shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance (Art. 18, para 6).

If States Parties are bound by another treaty of mutual legal assistance, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply the provisions on mutual legal assistance provided for by the Convention, *i.e.* Article 18, paragraphs 9-29. States Parties are strongly encouraged to apply these latter paragraphs if they facilitate co-operation (Art. 18, para 7).

2. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)

Key points

- The Vienna Convention, to which 186 Parties currently participate, was adopted by the United Nations in 1988 to address the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.
- It covers various forms of co-operation including confiscation, extradition, mutual legal assistance and other forms of co-operation and training, some of which deal specifically with co-operation with transit States and developing countries.
- Mutual legal assistance under the Vienna Convention may be requested for several purposes, such as taking evidence or statements from persons, executing searches and seizures, providing information and evidentiary items, providing relevant documents and records and identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.
- Use and transmission of the information or evidence furnished/obtained under this Convention are restricted to the investigations, prosecutions or proceedings stated in the request, unless the prior consent of the requested party for the broader use or transmission of the information is obtained.
- Transmission of requests for mutual legal assistance under the Convention shall be effected between the authorities designated by the Parties. These typically are the Ministry of Justice/Attorney-General and the Ministry of Foreign Affairs. If necessary, parties are allowed to designate more than one competent authority.

I. Parties

The United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances (hereinafter referred as to “the Convention”) was adopted by the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, held at Vienna in 1988. It considered the various aspects of this problem as a whole and, in particular, those aspects not envisaged in other international instruments existing at the time in the field of narcotic drugs and psychotropic substances. Currently the participants to the Convention are 186.[1]

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[1] Status of Parties to the Convention as at April 2012: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Estonia, Ethiopia, European Union, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania,

II. Scope (Art. 2, Art. 3 and Art. 7)

The main purpose of the Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension (Art. 2). To this end, the Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with the Convention (Art. 7, para 1). Under the Convention, the Parties shall adopt such measures as may be necessary to establish as criminal offences, when committed intentionally, a number of conducts which belong to several specific categories (Art. 3, para 1), including (i) the conversion or transfer of property, knowing that such property is basically derived from the production and sale of any narcotic drug or any psychotropic substance for the purpose of concealing or disguising the illicit origin of the property (Art. 3, para 1, let. b, point i) and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived, basically, from the production and sale of any narcotic drug or any psychotropic substance (Art. 3, para 1, let. b, point ii).

III. Forms of co-operation (Art. 5 to Art. 11)

The Convention allows for a number of international co-operation measures, such as Confiscation (Art. 5), Extradition (Art. 6), Mutual Legal Assistance (Art. 7), Transfer of Proceedings (Art. 8), Other Forms of Co-operation and Training (Art. 9), International Co-operation and Assistance for Transit States (Art. 10) and Controlled Delivery (Art. 11).

Mutual Legal Assistance (Art.7)

Mutual legal assistance under Article 7 of the Convention may be requested for any of the following purposes (Art. 7, para 2): taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information and evidentiary items; providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party (Art. 7, para 3). This shall include facilitating or encouraging the presence or availability of persons, including persons in

Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, Zimbabwe.

custody, who consent to assist in investigations or participate in proceedings (Art. 7, para 4). In such circumstances, specific safety obligations arise on the hands of the requesting Party (Art. 7, para 18).

Transfer of Proceedings (Art. 8)

Under the Convention, the Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with the Convention, in cases where such transfer is considered to be in the interests of a proper administration of justice.

Other Forms of Co-operation and Training (Art. 9)

The Convention states that Parties shall, on the basis of bilateral or multilateral agreements or arrangements (Art. 9, para 1):

a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with the Convention, including, if appropriate, links with other criminal activities;

b) Co-operate with one another in conducting enquiries, with respect to offences established in accordance with the Convention, having an international character, concerning: i) the identity, whereabouts and activities of persons suspected of being involved in offences established in accordance with the Convention; ii) the movement of proceeds or property derived from the commission of such offences; iii) the movement of narcotic drugs, psychotropic substances and other substances specified by the Convention[2] and instrumentalities used or intended for use in the commission of such offences;

c) When appropriate, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of the Convention;

d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

e) Facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.

Further, each Party shall initiate, develop or improve specific training programmes for its law enforcement and other personnel, including customs, charged with the suppression of offences established in accordance with the Convention (Art. 9, para 2). The Parties shall also assist one another to plan, and implement research and training programmes designed to share expertise and, to this end, shall also use regional and international conferences and seminars to promote co-operation and stimulate discussion on problems of mutual concern, including the special problems and needs of transit States (Art. 9, para 3).

[2.] See Annex to the Convention, Table I and Table II.

International Co-operation and Assistance for Transit States[3] (Art. 10)

The Convention requires that Parties shall co-operate, directly or through competent international or regional organisations, to assist and support transit States and, in particular, developing countries in need of such assistance and support, to the extent possible, through programmes of technical co-operation on interdiction and other related activities (Art. 10, para 1). To enhance the effectiveness of this kind of international co-operation, the Parties may conclude bilateral or multilateral agreements or arrangements (Art. 10, para 3).

IV. Authorities that can use the instrument (Art. 7, para 8)

Parties shall designate an authority(ies) which shall have the responsibility and power to execute requests for mutual legal assistance under Article 7 or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General.

Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible.

Some parties designated as competent authority for the purposes of mutual legal assistance the Ministry of Justice/Attorney-general/Ministry of Security; some others designated the Ministry of Foreign Affairs and Trade (*e.g.* Brunei).

V. Conditions for requesting Assistance (Art. 7)

The Convention sets out specific conditions for filing requests for mutual legal assistance. For instance, requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith (Art. 7, para 9).

Further, any request for mutual legal assistance shall have a minimum content (Art. 7, para 10): a) The identity of the authority making the request; b) The subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding; c) A summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents; d) A description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed; e) Where possible, the identity, location and nationality of any person concerned; f) The purpose for which the evidence, information or action is sought.

The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution (Art. 7, para 11).

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3. Art.1, let. u) of the Convention defines "Transit State" as a State through the territory of which illicit narcotic drugs, psychotropic substances and substances […] are being moved, which is neither the place of origin nor the place of ultimate destination thereof.

VI. Grounds for denying/postponing assistance (Art. 7)

Mutual Legal Assistance under Article 7 of the Convention could be refused in the following circumstances:

a) If the request is not made in conformity with the provisions of the Convention;

b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction;

d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

Reasons shall be given for any refusal of mutual legal assistance (Art. 7, para 16).

The Convention also states that a Party shall not decline to render mutual legal assistance on the grounds of bank secrecy (Art. 7, para 5).

Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary (Art. 7, para 17).

VII. Use of information received (Art. 7)

The requesting party shall not use information or evidence furnished by the requested party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested party (Art. 7, para 13).

VIII. Sharing of information received with other local authorities (Art. 7)

The requesting party shall not transmit information or evidence furnished by the requested party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested party (Art. 7, para 13).

On its side, the requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party (Art. 7, para 14).

IX. Sharing of information received with foreign authorities (Art. 7)

The requesting party shall not transmit information or evidence furnished by the requested party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested party (Art. 7, para 13).

On its side, the requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party (Art. 7, para 14).

X. Relationship with other instruments (Art. 7)

The Convention expressly states that provisions of mutual legal assistance shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or part, mutual legal assistance in criminal matters (Art.7, para 6).

If Parties are bound by another treaty of mutual legal assistance, the corresponding provisions of that treaty shall apply unless the Parties agree to apply the provisions on mutual legal assistance provided for by the Convention (*i.e.* Art. 7, para 8-19)

3. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention)

Key points

- The Convention, which entered into force on 1993, has been ratified / acceded by 48 member and non-member States of the Council of Europe.
- The aim of this Convention is to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof.
- The Convention provides for different forms of international co-operation: investigative assistance, provisional measures such as freezing of bank accounts and measures to confiscate the proceeds of crime.
- The Parties shall designate a central authority which shall be responsible for sending and answering requests made under the Convention, the execution of such requests or the transmission of them to the authorities competent for their execution. Most of the Parties designated their Ministry of Justice.
- The requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be used by the authorities of the requesting Party of investigations or proceedings other than those specified in the request.

I. Parties

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime has been opened for signature by the member States and for accession by non-member States on 11 November 1990. The Convention entered into force on 1 September 1993. It has been ratified / acceded by 48 States.[1]

II. Scope (Chapter II and Chapter III)

The Convention requires Parties to take a certain number of measures at national level to combat serious crime (investigative, provisional and confiscation measures) in order for international co-operation to be effective.

The Convention aims at providing a complete set of rules for international co-operation, covering all the stages of the procedure from the first investigations to the imposition and enforcement of confiscation sentences. In this regard, Article 7 of the Convention states that the Parties shall co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities (any property used or intended to be used, in any manner, wholly or in

1. Status of ratifications as at April 2012: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, Australia.

part, to commit a criminal offence or criminal offences) and proceeds (any economic advantage derived from criminal offences).

III. Forms of co-operation (Chapter III)

Investigative assistance (Chapter III, Section 2)

The Parties shall afford each other, upon request, the widest possible measure of assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation. Such assistance shall include any measure providing and securing evidence as to the existence, location or movement, nature, legal status or value of this property (Art. 8).

Further, Article 10 provides that a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings or might lead to a request by that Party under the Convention.

Provisional measures (Chapter III, Section 3)

One Party shall, at the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage may be the subject of a request for confiscation or which might be such as to satisfy the request (Art. 11, para 1).

Confiscation (Chapter III, Section 4)

Regarding confiscation requests concerning instrumentalities or proceeds situated in the territory of the requested Party, Article 13 paragraph 1 of the Convention provides that the latter shall: (a) enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or (b) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.

IV. Authorities that can use the instrument (Art. 23)

The Parties shall designate a central authority which shall be responsible for sending and answering requests made under the Convention, the execution of such requests or the transmission of them to the authorities competent for their execution (Art. 23, para 1). Most of the Parties designated their Ministry of Justice (such as France or Denmark) or their department of public prosecution (Armenia, Luxembourg).

The central authorities shall communicate directly with one another (Art. 24, para 1). However, in the event of urgency, requests or communications under this chapter may be sent directly by the judicial authorities, including public prosecutors, of the requesting Party to such authorities of the requested Party (Art. 24, para 2). Any request or communication may be made through the International Criminal Police Organisation (Interpol).

V. Conditions for requesting assistance (Art. 24 and Art. 27)

Article 27 of the Convention provides that any request for co-operation under the Convention shall specify:

a) The authority making the request and the authority carrying out the investigations or proceedings;

b) The object of and the reason for the request;

c) The matters, including the relevant facts to which the investigations or proceedings relate;

d) In so far as the co-operation involves coercive action: i) the text of the statutory provisions or, where this is not possible, a statement of the relevant law applicable; and ii) an indication that the measure sought or any other measures having similar effects could be taken in the territory of the requesting Party under its own law;

e) Where necessary and in so far as possible: i) details of the person or persons concerned, including name, date and place of birth, nationality and location, and, in the case of a legal person, its seat; and ii) the property in relation to which co-operation is sought, its location, its connection with the person or persons concerned, any connection with the offence, as well as any available information about other persons, interests in the property; and

f) Any particular procedure the requesting Party wishes to be followed.

VI. Grounds for denying / postponing assistance (Art. 18, Art. 19, Art. 20 and Art. 30)

Article 18 of the Convention provides with certain circumstances in which a requested Party can deny assistance. For instance, co-operation may be refused if:

a) The action sought would be contrary to the fundamental principles of the legal system of the requested Party; or

b) The execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested Party; or

c) In the opinion of the requested Party, the importance of the case to which the request relates does not justify the taking of the action sought; or

d) The offence to which the request relates is a political or fiscal offence[2]; or

e) The requested Party considers that compliance with the action sought would be contrary to the principle *non bis in idem*; or

f) The offence to which the request relates would not be an offence under the law of the requested Party if committed within its jurisdiction.[3]

2. Article 5 of the European Convention on Extradition describes fiscal offences as offences in connection with taxes, duties, customs and exchange

3. The ground for refusal contained in sub-paragraph *f* indicates the requirement of double criminality. It is not, however, a requirement which is valid for all kinds of assistance under the Convention. In respect of assistance under Section 2 (investigative assistance), the requirement is only valid when coercive action is implied.

Article 18 paragraph 7 states that a Party shall not invoke bank secrecy as a ground to refuse any co-operation under the Convention.

The requested Party can postpone action on a request provided that such action would prejudice investigation or proceedings by its authorities (Art. 19).

The Convention provides for the possibility of a partial or conditional granting of a request, where the requested and requesting Parties deem it is appropriate (Art. 20).

Article 30 of the Convention imposes on the requested Party to give reasons for any decision to refuse, postpone or make conditional any co-operation under the Convention.

VII. Use of information received (Art. 32)

The requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be used by the authorities of the requesting Party of investigations or proceedings other than those specified in the request (Art. 32).

VIII. Sharing of information received with other local authorities (Art. 32 and Art. 33)

Article 32 of the Convention states the requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request.

Moreover, the Convention provides that the requesting Party shall keep confidential any evidence and information provided by the requested Party, if not contrary to its national law and if so requested, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request (Art. 33, para 2).

For its part, the requesting Party may require that the requested Party keep confidential the facts and substance of the request, except to the extent necessary to execute the request (Art. 33, para 1).

IX. Sharing of information received with foreign authorities (Art. 32 and Art. 33)

Article 32 of the Convention states the requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request.

Moreover, the Convention provides that the requesting Party shall keep confidential any evidence and information provided by the requested Party, if not contrary to its national law and if so requested, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request (Art. 33, para 2).

For its part, the requesting Party may require that the requested Party keep confidential the facts and substance of the request, except to the extent necessary to execute the request (Art. 33, para 1).

X. Relationship with other instruments (Art. 39)

The Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters (Art. 39, para 1). The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it (Art. 39, para 2). Parties may not conclude agreements which derogate from the Convention. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relation in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation (Art. 39, para 3).

4. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention)

Key points

- The Convention, which entered into force in 2008, has been ratified / acceded by 22 member States of the Council of Europe. Non-member States may also become parties to the Convention.
- The 2005 Convention complements the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. It has a larger scope as compared to the 1990 Convention since it covers not only laundering and confiscation (as the 1990 Convention) but also financing of terrorism.
- It provides for different forms of international co-operation: investigative assistance, provisional measures such as freezing of bank accounts, confiscation measures and co-operation between FIUs.
- Transmission of requests for mutual legal assistance under this Convention shall be effected between central authorities designated by Parties with the exceptions of requests under Chapter V of the Convention which are dealt with between FIUs.

I. Parties

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism has been opened for signature by the member States and for accession by non-member States on 16 May 2005. The Convention entered into force on 1 May 2008. It has been ratified / acceded by 22 States.[1]

II. Scope (Chapter II, III, IV and V)

Similarly to the 1990 Convention, the 2005 Convention imposes on Parties to take a certain number of measures at national level (investigative, provisional and confiscation measures) to combat serious crime in order for international co-operation to be effective.[2] For instance, Article 9 of the 2005 Convention imposes on Parties to criminalise laundering while Article 12 states that each Party shall establish a financial intelligence unit.[3]

1. Status of ratifications as at February 2012: Albania, Armenia, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Hungary, Latvia, Malta, Moldova, Montenegro, Netherlands, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, The former Yugoslav Republic of Macedonia, and Ukraine.

2. Together with the Framework Decision 2001/500 of 26 June 2001, the 2005 Convention forms part of the EU current approach towards criminalisation of money laundering and terrorist financing.

3. "Financial intelligence unit" (hereinafter referred to as "FIU") means a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds and

The 2005 Convention provides for a set of rules on international co-operation, covering all the stages from the first investigations to the imposition and enforcement of confiscation sentences. Article 15 of the Convention states that Parties shall mutually co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities (any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences) and proceeds (any economic advantage derived from criminal offences). The Convention also goes further in that it provides FIUs with a framework for co-operation (Chapter V).

III. Forms of co-operation (Chapter IV and Chapter V)

Investigative assistance (Chapter IV, Section 2)

Parties shall afford each other, upon request, the widest possible measure of assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation. Such assistance shall include any measure providing and securing evidence as to the existence, location or movement, nature, legal status or value of this property (Art. 16).

Article 17 paragraph 1 states that each Party shall take the measures necessary to determine, in answer to a request sent by another Party, 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 (Art. 17, para 1).

Article 18 paragraph 1 states that on request by another Party, the requested Party shall provide the 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.

Further, each Party shall ensure that, at the request of another Party, it is able to monitor 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 (Art. 19, para 1).

Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings or might lead to a request by that Party under the Convention (Art. 20).

Provisional measures (Chapter IV, Section 3)

Each Party shall take the necessary provisional measures (such as freezing or seizing) at the requested of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation (Art. 21, para 1).

The information can either be given upon request (Art. 17, 18 and 19) or spontaneously (Art. 20).

potential financing of terrorism, or (ii) required by national legislation or regulation, in order to combat money laundering and financing of terrorism (Art. 1 of the Convention).

Confiscation (Chapter IV, Section 4)

Regarding confiscation requests concerning instrumentalities or proceeds situated in the territory of the requested Party, Article 23 paragraph 1 provides that the latter shall: (a) enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or (b) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.

Co-operation between FIUs (Chapter V)

Article 46 of the Convention states that FIUs are meant to co-operate for the purpose of combating money laundering. To this end, each Party shall ensure that FIUs exchange, spontaneously or on request, any accessible information that may be relevant to the processing or analysis of information or if appropriate, to investigation by the FIU regarding financial transactions related to money laundering.

Each Party shall adopt such legislative or other measures as may be necessary to permit urgent action to be initiated by a FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead for such periods and depending on the same conditions as apply in its domestic law in respect of the postponement of transactions (Art. 47, para 1). Such action shall be taken where the requested FIU is satisfied upon justification by the requesting FIU, that: (a) the transaction is related to money laundering; and (b) the transaction would have been suspended, or consent to the transaction going ahead would have been withheld, if the transaction had been the subject of a domestic suspicious transaction report (Art. 47, para 2).

IV. Authorities that can use the instrument (Art. 33)

The Parties shall designate a central authority which shall be responsible for sending and answering requests made under the Convention, the execution of such requests or the transmission of them to the authorities competent for their execution (Art. 33). Most of the Parties designated their Ministry of Justice (Netherlands, Cyprus)[4] or their department of public prosecution (Hungary, Malta).

Requests made under Chapter V (Co-operation between FIUs) are dealt with by FIUs. Parties shall designate the competent FIU for the purpose of the Convention (Art. 46, para 13). For instance, the Netherlands designated the Financial Intelligence Unit Nederland.

The central authorities shall communicate directly with one another (Art. 34, para 1) but in the event of urgency, requests or communications under the Convention may be sent directly by the judicial authorities of the requesting Party to such authorities of the requested Party (Art. 34, para 2). Article 34 paragraph 3 further provides that any request

[4]. Footnote by Turkey: The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the “Cyprus” issue.

Footnote by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.”

or communication may be made through the International Criminal Police Organisation (Interpol).

Regarding requests made under Chapter V, they are dealt with directly between FIUs.

V. Conditions for requesting assistance (Art. 37 and Art. 46)

Article 37 of the Convention provides that any request for co-operation under the Convention shall specify:

a) The authority making the request and the authority carrying out the investigations or proceedings;

b) The object of and the reason for the request;

c) The matters, including the relevant facts to which the investigations or proceedings relate;

d) In so far as the co-operation involves coercive action: i) the text of the statutory provisions or, where this is not possible, a statement of the relevant applicable law; and ii) an indication that the measure sought or any other measures having similar effects could be taken in the territory of the requesting Party under its own law;

e) Where necessary and in so far as possible: i) details of the person or persons concerned, including name, date and place of birth, nationality and location, and, in the case of a legal person, its seat; and ii) the property in relation to which co-operation is sought, its location, its connection with the person or persons concerned, any connection with the offence, as well as any available information about other persons, interests in the property; and

f) Any particular procedure the requesting Party wishes to be followed.

It is absolutely necessary that the requesting Party follow conscientiously the provisions of paragraph 1, sub-paragraphs c and e. In particular, with regard to banks, it is necessary to indicate in detail the relevant branch office and its address. It is however not the intention of the committee that the Article should be interpreted as implying a requirement on a requesting Party to furnish *prima facie* evidence (Comm. n. 265).

Other elements may be required depending on the nature of the request.

Concerning requests made under Chapter V, the requested FIU shall provide all relevant information, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties (Art. 46, para 5).

VI. Grounds for denying / postponing assistance (Art. 28, Art. 29, Art. 30 and Art. 46)

Article 28 of the Convention states the circumstances in which a requested Party can deny assistance. For instance, co-operation may be refused if:

a) The action sought would be contrary to the fundamental principles of the legal system of the requested Party; or

b) The execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested Party; or

c) In the opinion of the requested Party, the importance of the case to which the request relates does not justify the taking of the action sought; or

d) The offence to which the request relates is a fiscal offence[5], with the exception of the financing of terrorism;

e) The offence to which the request relates is a political offence, with the exception of the financing of terrorism; or

f) The requested Party considers that compliance with the action sought would be contrary to the principle *non bis in idem*; or

g) The offence to which the request relates would not be an offence under the law of the requested Party if committed within its jurisdiction.

However, Article 28 paragraph 7 states that a Party shall not invoke bank secrecy as a ground to refuse any co-operation under the Convention.

The requested Party can also postpone action on a request provided that such action would prejudice investigation or proceedings by its authorities (Art. 29).

The Convention provides with the possibility for partial of conditional granting a request, where the requested and requesting Parties deem it is appropriate (Art. 30).

At last, Article 40 of the Convention imposes on the requested Party to give reasons for any decision to refuse, postpone or make conditional any co-operation under the Convention.

Regarding requests made under Chapter V, Article 46 paragraph 6 states that an FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Party or, in exceptional circumstances, where divulging the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Party concerned or would otherwise not be in accordance with fundamental principles of national law of the requested Party. Any such refusal shall be appropriately explained to the requesting FIU.

VII. Use of information received (Art. 42 and Art. 46)

The requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be used by the authorities of the requesting Party for investigations or proceedings other than those specified in the request (Art. 42).

Regarding requests under Chapter V (co-operation between FIUs), the requesting FIU shall specify in the request how the information sought will be used (Art. 46, para 4). Information or documents obtained under Chapter V shall only be used for the purpose of combating money laundering, assembling and analysing or if appropriate, investigating relevant information on any fact which might be an indication of money laundering. Information supplied by the requested FIU shall not be used by the receiving FIU for purposes other than analysis, without prior consent of the supplying FIU (Art. 46, para 7).

[5]. Article 5 of the European Convention on Extradition describes fiscal offences as offences in connection with taxes, duties, customs and exchange.

VIII. Sharing of information received with other local authorities (Art. 42, Art. 43 and Art. 46)

Article 42 of the Convention states the requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request.

Moreover, the Convention provides that the requesting Party shall keep confidential any evidence and information provided by the requested Party, if not contrary to its national law and if so requested, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request (Art. 43, para 2).

For its part, the requesting Party may require that the requested Party keep confidential the facts and substance of the request, except to the extent necessary to execute the request (Art. 43, para 1).

Regarding information or documents obtained under Chapter V, Article 46 paragraph 7 provides that the receiving FIU shall not disseminate them to a third party, nor shall they be used for purposes other than analysis, without prior consent of the supplying FIU.

IX. Sharing of information received with foreign authorities (Art. 42, Art. 43 and Art. 46)

Article 42 of the Convention states the requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request.

Moreover, the Convention provides that the requesting Party shall keep confidential any evidence and information provided by the requested Party, if not contrary to its national law and if so requested, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request (Art. 43, para 2).

For its part, the requesting Party may require that the requested Party keep confidential the facts and substance of the request, except to the extent necessary to execute the request (Art. 43, para 1).

Regarding information or documents obtained under Chapter V, Article 46 paragraph 7 provides that the receiving FIU shall not disseminate them to a third party, nor shall they be used for purposes other than analysis, without prior consent of the supplying FIU.

X. Relationship with other instruments (Art. 52)

The Convention does not affect the rights and undertakings of Parties derived from international multilateral instruments concerning special matters (Art. 52, para 1). The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in the Convention, for the purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it (Art. 52, para 2). Parties may not conclude agreements which derogate from the Convention. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate these relations accordingly, in lieu of the Convention, if it facilitates international co-operation (Art. 52, para 3).

5. International Convention for the Suppression of the Financing of Terrorism (FT Convention)

Key points

- The Convention aims at facilitating the prosecution of persons accused of involvement in the financing of terrorist activities, as defined by the Convention, by obliging States parties to prosecute them or extradite them to another State that has established its jurisdiction to try them. To this end, the Convention provides for the criminalisation of the financing of terrorism.
- The Convention allows for several forms of international co-operation, namely extradition, mutual legal assistance, transfer of persons and measures to prevent and counteract the financing of terrorism. This latter category includes, *inter alia*, co-operation through exchange of information.
- For the purposes of exchange of information, the Convention does not qualify the competent authorities which shall ensure rapid and secure flows of information between State Parties. However, the Convention leaves it up to State Parties to exchange information through the International Criminal Police Organization (Interpol).
- The requesting Party shall not use nor transmit information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.
- Each State Party may give consideration to establishing mechanisms to share with other State Parties information or evidence needed to establish criminal, civil or administrative liability in connection with financing of terrorism as defined by the Convention.

I. Parties

The International Convention for the Suppression of the Financing of Terrorism was adopted by the United Nations General Assembly in New York on 9 December 1999. It entered into force on 10 April 2002 and, as of 26 March 2012, 179 States were Parties to thereto.[1]

[1] Status of ratifications as at April 2012: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Oman, Pakistan, Palau, Panama,

II. Scope (Art. 2 and Art. 4)

The Convention aims at facilitating the prosecution of persons accused of involvement in the financing of terrorist activities, as defined by the Convention, by obliging the Parties to prosecute them or extradite them to another Party that has established its jurisdiction to try them.

To this end, the Convention provides for the criminalisation of the financing of terrorism, by stating that any person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex to the Convention[2]; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain

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Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of), Viet Nam, Yemen.

2. The annex to the Convention mentions the following instruments: (a) Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970; (b) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; (c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; (d) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; (e) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980; (f) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988; (g) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; (h) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988; (i) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997. This list may be amended by the addition of relevant treaties that are open to the participation of all States, have entered into force and have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the Convention (Art. 23, para 1). The list of ratifications / declarations to the Convention is available here. The Convention also makes it clear that: (a) on depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of the Convention to the State Party, the treaty shall be deemed not to be included in the annex. The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact; (b) when a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty (Art. 2, para 2).

from doing any act (Art. 2, para 1). For an act to constitute an offence under the Convention, it shall not be necessary that the funds[3] were actually used to carry out such an offence (Art. 2, para 4). It is made clear that any person also commits an offence if that person attempts to commit an offence as set forth by the Convention (Art. 2, para 4).

The Convention states that each State Party shall adopt such measures as may be necessary: (a) to establish as criminal offences under its domestic law the above described offences, and (b) to make those offences punishable by appropriate penalties which take into account the grave nature of the offences (Art. 4).

III. Forms of co-operation (Art. 11 to Art. 22)

The Convention allows for several forms of international co-operation, namely extradition (Art. 11), mutual legal assistance (Art. 12), transfer of persons (Art. 16) and measures to prevent and counteract the financing of terrorism (Art. 18). This latter category includes, *inter alia*, co-operation through exchange of information (Art. 18, para 3).

Mutual legal assistance

Under the Convention, States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in Article 2 of the Convention, including assistance in obtaining evidence in their possession necessary for the proceedings (Art. 12, para 1).

Exchange of information

The Convention states that States Parties shall co-operate in the prevention of the offences set forth in Article 2 by exchanging accurate and verified information in accordance with their domestic law and co-ordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in Article 2, in particular by (Art. 18, para 3):

a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in Article 2;

b) Co-operating with one another in conducting inquiries, with respect to the offences set forth in Article 2, concerning: (i) the identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences; (ii) the movement of funds relating to the commission of such offences.

IV. Authorities that can use the instrument (Art. 18)

For the purposes of exchange of information, the Convention does not qualify the competent authorities which shall ensure rapid and secure flows of information between State Parties under Article 18. However, the Convention leaves it open to State Parties to

[3]. For the purposes of the Convention, "funds" means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit (Art. 1, para 1).

exchange information through the International Criminal Police Organization (Interpol) (Art. 18, para 4).

V. Conditions for requesting assistance (Art. 18 and Art. 20)

The Convention generally states that the States Parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States (Art. 20). It also clarifies that co-operation between State Parties through exchange of information shall be carried out in accordance with State Parties' domestic law (Art. 18, para 3). This holds true also for mutual legal assistance purposes (Art. 12, para 5).

VI. Grounds for denying / postponing assistance (Art. 12 to Art. 15)

The Convention states that a request for mutual legal assistance may not be refused on the ground of bank secrecy (Art. 12, para 2). Further, as none of the offences set forth in Article 2 of the Convention shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence (Art. 13). Likewise, none of such offences shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives (Art. 14).

Nothing in the Convention shall be interpreted as imposing an obligation to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons (Art. 15).

VII. Use of information received (Art. 12)

The requesting Party shall not use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party (Art. 12, para 3).

VIII. Sharing of information received with other local authorities (Art. 12)

The requesting Party shall not transmit information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party (Art. 12, para 3).

IX. Sharing of information received with foreign authorities (Art. 12)

The Convention states that each State Party may give consideration to establishing mechanisms to share with other State Parties information or evidence needed to establish criminal, civil or administrative liability in connection to financing of terrorism as defined by the Convention (Art. 12, para 4).

X. Relationship with other instruments (Art. 12 and Art. 21)

State Parties shall afford mutual legal assistance under the Convention in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law (Art. 12, para 5).

Further, nothing in the Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions (Art. 21).

6. European Convention on the Suppression of Terrorism as amended by the 2003 Protocol

Key points

- The Convention, which entered into force in 1978, has been ratified / acceded by 46 member States of the Council of Europe and non-member States so far.
- The purpose of the Convention is to assist in the suppression of terrorism by complementing existing extradition and mutual assistance arrangements concluded between member States of the Council of Europe.
- The Convention mainly covers extradition. It also deals with mutual assistance. Transmissions of requests shall be effected according to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.
- In 2003, the Convention has been supplemented by a Protocol which aims at broadening the scope of the European Convention on Extradition. The protocol will enter into force after 15 other ratifications.

I. Parties

The European Convention on the Suppression of Terrorism has been opened for signature by the member States of the Council of Europe and for accession by non-member States on 27 January 1977. The Convention entered into force on 4 September 1978. It has been ratified / acceded by 46 States.[1]

The Convention is supplemented by an amending Protocol which has not yet entered into force, namely the 2003 Protocol amending the European Convention on the Suppression of Terrorism. This amending Protocol aims notably at extending the list of offences to be "depoliticised".[2]

II. Scope (Art. 1, Art. 2 and Art. 8)

The European Convention on the Suppression of Terrorism applies to acts of terrorism. It complements existing extradition and mutual assistance arrangements in extending the list of extraditable offences by reducing the scope of political offences and also providing for a framework of mutual assistance in case of acts of terrorism (Art. 1, 2 and 8).

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[1] Status of ratifications as at April 2012: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

[2] Terrorist acts might be considered "political offences", and it is a principle – laid down in most existing extradition treaties as well as in the European Convention on Extradition (cf. Art. 3 para 1) – that extradition shall not be granted in respect of a political offence.

III. Forms of co-operation (Art. 1, Art. 2, Art. 7 and Art. 8)

The Convention mainly covers extradition. It also deals with mutual assistance.

Extradition (Art. 1, Art. 2, Art. 7)

Article 1 lists a certain number of offences which cannot be regarded as political offences.[3] Moreover, Article 2 of the Convention provides with a list of offences that Parties may decide not to regard as a political offence.[4]

In the event where the requested Party does not extradite the person claimed, it shall submit the case to its competent authorities for the purpose of prosecution (Art. 7).

The Protocol, not yet in force, extends the list of offences to be "depoliticised" (Art. 1 of the Protocol).

Mutual Assistance (Art. 8)

Article 8 paragraph 1 states that Parties shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in Article 1 and 2. Further, the Article provides that the law of the requested State concerning mutual assistance in criminal matters shall apply in all cases.

IV. Authorities that can use the instrument

Since no information is provided in the Convention or its Protocol on the authorities which can use the instrument, reference should be made to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.

V. Conditions for requesting assistance

Since no information is provided in the Convention or its Protocol on the conditions for requesting assistance, reference should be made to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.

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3. Article 1 provides that for the purposes of extradition between Parties, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft; (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention; (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons and (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

4. Article 2 provides that for the purpose of extradition, Parties may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: (a) a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person; (b) a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons and (c) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

VI. Grounds for denying / postponing assistance (Art. 8)

Article 8 paragraph 1 states that mutual assistance may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

VII. Use of information received

Since no information is provided in the Convention or its Protocol on the use of the information received, reference should be made to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.

VIII. Sharing of information received with other local authorities

Since no information is provided in the Convention or its Protocol on sharing of information received with other local authorities, reference should be made to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.

IX. Sharing of information received with foreign authorities

Since no information is provided in the Convention or its Protocol on sharing of information received with foreign authorities, reference should be made to the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters.

X. Relationship with other instruments (Art. 3, Art. 4 and Art. 8)

Article 3 of the Convention provides that the provisions of all extradition treaties and arrangements applicable between Parties, including the European Convention on Extradition, are modified as between Parties to the extent that they are incompatible with this Convention.

Furthermore, for the purpose of this Convention and to the extent that any offence mentioned in Article 1 or 2 is not listed as an extraditable offence in any extradition convention or treaty existing between Parties, it shall be deemed to be included as such therein (Art. 4).

The provisions of all treaties and arrangements concerning mutual assistance in criminal matters applicable between Contracting States, including the European Convention on Mutual Assistance in Criminal Matters, are modified as between Contracting States to the extent that they are incompatible with this Convention (Art. 8, para 3).

The relations between the European Convention on the Suppression of Terrorism and the 2003 Protocol are regulated by the Article 30 of the Vienna Convention of the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter. The Article states that when all the Parties to the earlier treaty are Parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty (Art. 30, para 3). However, when the Parties to the later treaty do not include all the Parties to the earlier one:

a) As between Parties to both treaties, the same rule applies as in paragraph 3;

b) As between a Party to both treaties and a Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

7. Egmont Group Memorandum of Understanding, Statement of Purpose and its Best Practices for the Improvement of Exchange of Information Between FIUs

Key points

- The Egmont Group released a Model MoU providing for the basic rules for the exchange of information between central national agencies (FIUs). It is important to note that this model is not mandatory but faithfully reflects the rules governing the FIU to FIU information exchange within the Egmont Group. The need for the use of a MoU for information exchange depends on the national legislation governing the functions and powers of the FIU.
- The Model MoU provides for co-operation in exchange of information among FIUs in order to facilitate the investigation and prosecution of persons suspected of money laundering and criminal activity related to money-laundering.
- The two documents Principles for Information Exchange (2001) and Best Practices for the Exchange of Information (2004) contain guidance on the exchange of information under the Model MoU or on the basis of reciprocity only.
- The Model MoU allows authorities to exchange information either spontaneously or upon request. Information and documents exchanged between FIUs may be used only for the specific purpose for which the information was sought or provided.
- A different use and the sharing of such information or documents with third parties is not allowed unless the prior consent of the disclosing Authority is obtained. In principle, such consent shall not be refused unless specific circumstances occur.

I. Parties

In 1995 the Egmont Group was established as an informal group of Financial Intelligence Units (FIUs) for the stimulation of international co-operation. Currently, 127 FIUs are part of the Egmont Group.

The Egmont Group released a model Memorandum of Understanding (the Model MoU) providing for the basic rules for the exchange of information between FIUs.

The two documents Principles for Information Exchange (2001) and Best Practices for the Exchange of Information (2004) were adopted in order to enhance information exchange and to provide guidelines in terms of best practices for the exchange of information between FIUs. Details provided below refer to the Model MoU unless otherwise indicated.

II. Scope (Art. 1)

The Model MoU provides for co-operation in exchange of information among competent authorities (FIUs) for the purpose of analysis in order to facilitate the investigation and prosecution of persons suspected of money laundering and criminal activity related to money-laundering.

Differences in the definition of the offences governing the competence of FIUs should not be an obstacle to free exchange of information at FIU-level. To this end, the

FIU's competence should extend to all predicate offences for money laundering as well as terrorism financing (Best Practices, Item A, para 3).

III. Forms of co-operation (Art. 1)

The Model MoU allows authorities to exchange spontaneously or upon request any available information that may be relevant to the investigation into financial transactions related to money laundering and the persons or companies involved in it.

It is stated that spontaneous exchange of information should occur when an FIU has information that might be useful to another FIU, as soon as the relevance of sharing this information is identified (Best Practices, Item B, para 1.3).

IV. Authorities that can use the instrument

The Model MoU is drafted for the purposes of co-operation between FIUs. An FIU is defined as "a central, national agency responsible for receiving, (and as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information (i) concerning suspected proceeds of crime and potential financing of terrorism or (ii) required by national legislation or regulation, in order to combat money laundering and terrorism financing".[1]

V. Conditions for requesting assistance

Any request for information should be justified by a brief statement of the underlying facts (Art.1).[2] The "Principles for Information Exchange" state that FIUs should be able to exchange information with other FIUs on the basis of reciprocity or mutual agreement and consistent with procedures understood by the requested and requesting party.[3] Further, the requesting FIU should disclose to the disclosing FIU, at a minimum: (a) the reason for the request, (b) the purpose for which the information will be used, and (c) enough information to enable the receiving FIU to determine whether the request complies with its domestic laws.[4] The Egmont Group has developed a request for information form.[5]

VI. Grounds for denying assistance (Art. 7)

The Model MoU states that assistance may be declined if judicial proceedings have already been initiated concerning the same facts as the request is related to (Art. 7).

VII. Use of information received (Art. 2 and Art. 3)

Under the Principles for Information Exchange, information exchanged between FIUs may be used only for the specific purpose for which the information was sought or provided (Item D, para 11).

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1. See The Egmont Group "Statement of Purpose", page 2.

2. See also "Best Practices", Item B, para 1.8.

3. Item C, para 9.

4. Item C, para 10.

5. Item B, para 1, num. 7.

Under the Model MoU, the information or documents obtained from the disclosing Authority cannot be used for administrative, investigative, prosecutorial or judicial purposes without the prior consent of the disclosing Authority.[6] Information obtained in accordance with the Model MoU can only be used in justice when related to money laundering originating from specific categories of criminal activity, to be identified by the MoU (Art. 2), if the countries concerned have a list based approach for predicate offences for money laundering. For those countries which have an all crimes based approach, the further use of information exchanged is not limited in scope as far as the predicate offence is concerned.

The Authorities will not permit the use of any information or document obtained from the respective Authorities for purposes other than those stated in the MoU, without the prior consent of the disclosing Authority (Art. 3).[7]

VIII. Sharing of information received with other local authorities (Art. 2 and Art. 3)

As a general principle, the information or documents obtained from the disclosing Authority cannot be shared with any third party without the prior consent of the disclosing Authority (Art. 2).[8]

The providing FIU should not refuse its consent to such dissemination unless this (a) would fall beyond the scope of application of its anti money laundering / countering financial terrorism provisions, (b) could lead to impairment of a criminal investigation, (c) would be clearly disproportionate to the legitimate interests of a natural or legal person or the State of the providing FIU, or (d) would otherwise not be in accordance with fundamental principles of its national law. Any such refusal to grant consent shall be appropriately explained.[9]

The Authorities will not permit the release of any information or document obtained from the respective Authorities for purposes other than those stated in the MoU, without the prior consent of the disclosing Authority (Art. 3).

IX. Sharing of information received with foreign authorities (Art. 2 and Art. 3)

Under the Model MoU, the information or documents obtained from the disclosing Authority cannot be disseminated to any third party without the prior consent of the disclosing Authority (Art. 2).

The providing FIU should not refuse its consent to such dissemination unless this (a) would fall beyond the scope of application of its anti money laundering / countering financial terrorism provisions, (b) could lead to impairment of a criminal investigation, (c) would be clearly disproportionate to the legitimate interests of a natural or legal person or the State of the providing FIU, or (d) would otherwise not be in accordance

6. This is also confirmed by the “Principles for Information Exchange”, Item D, para 12.

7. This is also confirmed by the Principles for Information Exchange, Item D, para 11.

8. This is also confirmed by the Principles for Information Exchange, Item D, para 12.

9. See Best Practices for the Exchange of Information, Item A, para. 8.

with fundamental principles of its national law. Any such refusal to grant consent shall be appropriately explained.[10]

The Authorities will not permit the release of any information or document obtained from the respective Authorities for purposes other than those stated in the MoU, without the prior consent of the disclosing Authority (Art. 3).

X. Relationship with other instruments

(N.A)

10. See Best Practices for the Exchange of Information, Item A, para. 8.

8. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing ("Third Anti-Money Laundering Directive") and Council Decision of 17 October 2000 concerning arrangements for co-operation between financial intelligence units of the Member States in respect of exchanging information (2000/642/JHA)

Key Points

- The Directive provides a European Framework for implementing the international standards on money laundering and terrorist financing (FATF Recommendations). It provides for the prohibition of the use of the financial system for the purpose of money laundering and terrorist financing. It applies to financial and credit institutions, as well as to certain legal and natural persons working in the financial sector, including providers of goods (when cash payments exceed certain thresholds).
- The Directive requires that each EU country set up a financial intelligence unit (FIU) in the form of a central national unit, which is responsible for receiving, requesting, analysing and disseminating to the competent authorities information concerning potential money laundering or terrorist financing. Where a Member State has designated a police authority as its FIU, this FIU may be allowed to exchange information with a competent authority of the receiving Member State designated for that purpose. Member States may also establish a central unit for the purpose of receiving or transmitting information to or from decentralised agencies.
- The Directive requires Member States to encourage to the greatest possible extent co-ordination and co-operation between FIUs, including the establishment of an EU FIU-net, and requires the Commission to lend such assistance as may be needed to facilitate such co-ordination, including the exchange of information between FIUs within the Community, either upon request or spontaneously.
- The Decision states that information or documents obtained by the FIU are intended to be used only for the purposes of assembling, analysing and investigating relevant information which might be an indication of money laundering and financing of terrorism as defined by the Directive. Transmitted information or documents may be used for criminal investigations or prosecutions, unless the transmitting Member State refuses its consent to such use. When transmitting information or documents, the transmitting FIU may impose restrictions and conditions on the use of information for purposes other than those mentioned above. The receiving FIU shall comply with any such restrictions and conditions.
- The Decision states that FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted is not accessible by any other authorities, agencies or departments. The information submitted will be protected by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU.

I. Parties

The EU Directive 2005/60/EC, also known as "Third Anti-Money Laundering Directive" (hereinafter referred as to "the Directive"), was published on the Official Journal of the European Union in November 2005 and entered into force on 15 December 2005. It is addressed to the Member States of the European Union, which were required

to transpose it in their national legislation by December 2007. It repeals the former Directive 91/308/EEC[1] as amended by the Directive 2001/97/EC. Following 2005, the Directive was subject to a number of amendments which have been incorporated into the original text.[2]

II. Scope (Art. 1, Art. 2, Art. 4 and Art. 5 of the Directive)

The Directive provides a European framework for the implementation of the international standards on money laundering and financing of terrorism, as included in the pre-2012 Recommendations of the Financial Action Task Force (FATF). It provides for the prohibition of money laundering and terrorist financing (Art. 1, para 1 of the Directive).

The Directive describes money laundering as the following conduct, when committed intentionally (Art.1, para 2 of the Directive): (a) the conversion or transfer of property derived from criminal activity to conceal or disguise its illicit origin; (b) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property known to have been derived from criminal activity; (c) the acquisition, possession or use of property known to have been derived from criminal activity; (d) the participation, or assistance, in the commission of any of the activities above. Under the Directive, money laundering must be regarded as such even if the activities that generated the laundered property were carried out in another EU or non-EU country (Art. 1, para 3 of the Directive). By "terrorist financing" the Directive means the provision or collection of funds to carry out any of the offences defined in Council Framework Decision 2002/475/JHA on combating terrorism, such as hostage taking, the drawing-up of false administrative documents and the leadership of a terrorist group (Art. 2, para 4 of the Directive).

For money laundering purposes, “criminal activity” is defined as any kind of criminal involvement in the commission of serious crime (Art. 3, num. 4). Within the meaning of “serious crimes” several offences are included, namely (Art. 3, num. 5):

a) acts defined in Articles 1 to 4 of Council Framework Decision 2002/475/JHA (terrorist offences, offences relating to a terrorist group, offences linked to terrorist activities, inciting, aiding or abetting, and attempting);

b) any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;

c) the activities of criminal organisations as defined in Article 1 of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union;

d) fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the Protection of the European Communities' Financial Interests (any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents which has as its effects the misappropriation or wrongful retention of

1. The Directive 91/308/EEC represents the first stage in combating money laundering at Community level.

2. See Directive 2010/78/EU, Directive 2009/110/EU, Directive 2008/20/EU and Directive 2007/64/EC.

funds from the general budget of the European Communities/ the illegal diminution of the resources of the general budget of the European Communities);

e) corruption;

f) all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

The Directive applies to credit and financial institutions, independent legal professions, notaries, accountants, auditors, tax advisors, real estate agents, casinos, trust and company service providers, and all providers of goods (when payments are made in cash in excess of EUR 15 000) (Art. 2 of the Directive).

The Directive allows Member States to extend its provisions to professions and to categories of undertakings, other than the institutions and persons mentioned above which engage in activities which are particularly likely to be used for money laundering or terrorist financing purposes (Art. 4 of the Directive). Further, it allows Member States to adopt or retain in force stricter provisions to prevent money laundering and terrorist financing (Art. 5 of the Directive).

III. Forms of co-operation

The Directive provides for reporting obligations for entities and persons covered by its scope to financial intelligence units (FIUs) regarding transactions which are suspected of giving rise to money laundering or terrorist financing (Art. 22 of the Directive). It also provides for reporting obligations for monitoring competent authorities and supervisory bodies to FIUs (Art. 25, para 1 and para 2 of the Directive) if they discover facts that could be related to such offences.

The Directive states that co-ordination and co-operation between FIUs, including the establishment of an EU FIU-net, should be encouraged to the greatest possible extent. To that end, the Commission should lend such assistance as may be needed to facilitate such co-ordination, including the exchange of information between FIUs within the Community. Financial assistance shall also be provided (Art. 38 of the Directive and Premises to the Directive, para 40). The co-operation between FIUs in respect of exchanging information is further regulated by the Council Decision of 17 October 2000 concerning arrangements for co-operation between financial intelligence units of the Member States in respect of exchanging information n. 2000/642/JHA (hereinafter referred as to “the Decision”).

Exchange of information between FIUs

The Decision states that Member States shall ensure that FIUs shall co-operate to assemble, analyse and investigate relevant information within the FIU on any fact which might be an indication of money laundering in accordance with their national powers (Art. 1, para 1 of the Decision). For this purposes, Member States shall ensure that FIUs exchange, spontaneously or on request and either in accordance with the Decision or in accordance with existing or future memoranda of understanding, any available information that may be relevant to the processing or analysis of information or to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved (Art. 1, para 2 of the Decision). Information may be

exchanged between FIUs within the limits of applicable national law (Art. 6 of the Decision).

Supply of information by Police FIU

The Decision makes it clear that where a Member State has designated a police authority as its FIU, it may supply information held by that FIU to an authority of the receiving Member State designated for that purpose and being competent for receiving disclosure of financial information for the purpose of combating money laundering (Art. 1, para 3 of the Decision).

IV. Authorities that can use the instrument (Art. 21 of the Directive and Art. 2 of the Decision)

For the purposes of exchange of information under the Directive, each EU country is required to set up a financial intelligence unit (FIU) in the form of a central national unit. These units are responsible for receiving, requesting, analysing and disseminating to the competent authorities information concerning potential money laundering or terrorist financing. EU countries must provide their FIU with adequate resources to fulfil its tasks and ensure that it has access to any necessary financial, administrative and law enforcement information (Art. 21 of the Directive and Art. 2, para 1 of the Decision). In this context, a Member State may establish a central unit for the purpose of receiving or transmitting information to or from decentralised agencies (Art. 2, para 2 of the Decision).

V. Conditions for requesting assistance (Art. 4 of the Decision)

Each request of information made under the Decision shall be accompanied by a brief statement of the relevant facts known to the requesting FIU. The FIU shall specify in the request how the information sought will be used (Art. 4, para 1 of the Decision). On its side, the requested FIU shall provide all relevant information, including available financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between Member States (Art. 4, para 2 of the Decision).

VI. Grounds for denying/postponing assistance (Art. 4 of the Decision)

An FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Member State or, in exceptional circumstances, where divulgation of the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Member State concerned or would otherwise not be in accordance with fundamental principles of national law. Any such refusal shall be appropriately explained to the FIU requesting the information (Art. 4, para 3 of the Decision).

VII. Use of information received (Art. 5 of the Decision)

Information or documents obtained by the FIU are intended to be used for the purposes of assembling, analysing and investigating relevant information which might be an indication of money laundering or financing of terrorism (Art. 5, para 1 of the Decision). When transmitting information or documents, the transmitting FIU may impose restrictions and conditions on the use of information for purposes other than those

above mentioned. The receiving FIU shall comply with any such restrictions and conditions (Art. 5, para 2 of the Decision).

Where a Member State wishes to use transmitted information or documents for criminal investigations or prosecutions for the above mentioned purposes, the transmitting Member State may not refuse its consent to such use unless it does so on the basis of restrictions under its national law. Such consent may also be refused when the divulgation of transmitted information could lead to impairment of a criminal investigation being conducted in the requested Member State or, in exceptional circumstances, where divulgation of the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Member State concerned or would otherwise not be in accordance with fundamental principles of national law. Any refusal to grant consent shall be appropriately explained (Art. 5, para 3 of the Decision).

VIII. Sharing of information received with other local authorities (Art. 5 and Art. 6 of the Decision)

FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted is not accessible by any other authorities, agencies or departments (Art. 5, para 4 of the Decision). The information submitted will be protected by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU (Art. 5, para 5 of the Decision).[3]

IX. Sharing of information received with foreign authorities (Art. 5 and Art. 6 of the Decision)

FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted is not accessible by any other authorities, agencies or departments (Art. 5, para 4 of the Decision). Such information will be protected by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU (Art. 5, para 5 of the Decision).

X. Relationship with other instruments (Art. 8 and Art. 9 of the Decision)

The Decision does not affect any Convention or arrangement regarding mutual assistance in criminal matters between judicial authorities (Premises to the Decision, point 9).

The Decision shall be implemented without prejudice to the Member States' obligations towards Europol, as they have been laid down in the Europol Convention (Art. 8 of the Decision).

To the extent that the level of co-operation between FIUs, as expressed in memoranda of understanding concluded or to be concluded between authorities of the Member States, is compatible with the Decision or goes further than the provisions thereof, it shall remain unaffected by the Decision. Where the provisions of the Decision go further than the

3. In this respect see Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data and Recommendation No R(87)15 of 15 September 1987 of the Council of Europe Regulating the Use of Personal Data in the Police Sector.

provisions of any memorandum of understanding concluded between the authorities of Member States, the Decision shall supersede such memoranda of understanding two years after the Decision takes effect (Art. 9 of the Decision).

9. CICAD Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses

Key Points

- The Regulations provide for the criminalisation of laundering offenses and financing of terrorism. They apply to the identification, tracing, freezing, seizing and forfeiture of the property, proceeds, or instrumentalities connected to money laundering, whose definition refers to serious criminal activities, or financing of terrorism and to the investigation and prosecution of such offenses (Art. 25, para 4).
- The Regulations provide for assistance upon request in order to identify, trace, freeze, seize or forfeit the property, proceeds, or instrumentalities connected to money laundering or financing of terrorism offenses. They also provide for assistance upon request related to civil, criminal, or administrative investigations or prosecutions, involving an offense of money laundering or the financing of terrorism, or violations of any other provision of the Regulations. Such assistance may include a number of forms of co-operation such as, *inter alia*, service of documents, execution of searches and seizures, provision of information and evidentiary items.
- The Regulations also provide for a Model MoU under which member states shall exchange, upon request or spontaneously, information related to money laundering or serious criminal activities connected thereto through designated FIUs.
- The Regulations state that each member state shall establish or designate an FIU which acts as central agency responsible for exchanging information with FIUs of other member states for the purposes of investigating into financial transactions related to money laundering and the persons or companies involved.
- The use or release of any information or document obtained from authorities of other member countries are not allowed for any purposes other than those stated in the Model MoU, *i.e.* compilation, development and analysis of information concerning financial transactions suspected of being related to money laundering or serious criminal activities connected thereto, without the prior consent of the disclosing Authority. The information acquired by the Parties in application of the Model MoU shall be confidential. It shall be subject to official secrecy and enjoy the same confidentiality as provided by the legislation of the country of the receiving Authority for similar information from national sources.

I. Parties

In 1999 the Inter-American Drug Abuse Control Commission (CICAD) established the Anti-Money Laundering Unit (AMLU) which provides technical assistance and training on judicial and financial measures as well as assistance to law enforcement agencies. AMLU also acts as the technical secretariat of CICAD’s Experts Group on Money Laundering Control which represents the hemispheric forum to debate, analyse and provide conclusions regarding the fight against money laundering and the financing of terrorism. This Experts Group developed the Model Regulations on Money Laundering Offenses related to Drug Trafficking and other criminal offenses (hereinafter also referred as to “the Regulations”) which serve as permanent legal documents to provide a legal

framework to the 34 members of CICAD.[1] The Regulations are based on relevant international conventions[2] and on pre-2012 Special Recommendations on terrorist financing issued by the Financial Action Task Force on Money Laundering.

II. Scope

The Regulations provide for the criminalisation of laundering offenses (Art. 2) and financing of terrorism (Art. 3). They apply to the identification, tracing, freezing, seizing and forfeiture of the property, proceeds, or instrumentalities connected to money laundering or financing of terrorism and to the investigation and prosecution of such offenses (Art. 25, para 4).

Laundering offenses as defined by the Regulations include (Art. 2, para 1 to para 4): (a) offenses committed by any person who converts, transfers or transports property and knows, should have known[3], or is intentionally ignorant that such property is proceeds or an instrumentality of a serious criminal activity; (b) offenses committed by any person who acquires, possesses, uses or administers property and knows, should have known, or is intentionally ignorant that such property is proceeds or an instrumentality of a serious criminal activity; (c) offenses committed by any person who conceals, disguises or impedes the establishment of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property and knows, should have known, or is intentionally ignorant that such property is proceeds or an instrumentality of a serious criminal activity; (d) offenses committed by any person who participates in, associates with, conspires to commit, attempts to commit, aids and abets, facilitates and counsels, incites publicly or privately the commission of any of the above mentioned offenses, or who assists any person participating in such an offense or offenses to evade the legal consequences of his actions. According to the Regulations, laundering offenses shall be defined, investigated, tried and sentenced by a court or competent authority as autonomous offenses distinct from any other offenses. It shall not be necessary to establish that a criminal process with respect to a possible serious criminal has occurred (Art. 2, para 6).

“Serious criminal activity” as defined by the Regulations includes illicit traffic; activities related to terrorism and the financing of terrorism, terrorist acts and terrorist organisations; illicit firearms trafficking; diversion of chemical substances; illicit traffic of human beings and human organ trafficking; prostitution; pornography; kidnapping; extortion; corruption; and, fraud (Art. 1).

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1. Status of membership as at April 2012: Antigua, & Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts & Nevis, Saint Lucia, St Vincent & Grenadines, Suriname, Trinidad & Tobago, United States, Uruguay, Venezuela.

2. The Regulations expressly refer to the following treaties: the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption, the United Nations International Convention for the Suppression of the Financing of Terrorism and the United Nations Security Council Resolution n. 1373.

3. The words “should have known” are interpreted in the Regulations as a requirement to establish a standard of negligence. In some Member States, this may fall below minimum standards required by fundamental legal principles. It is understood that Member States which implement this requirement will do so in a manner that is consistent with their respective legal systems.

III. Forms of co-operation

In general, the Regulations state that the court or other competent authority of a member State shall co-operate with the court or other competent authority of another State, taking the appropriate measures to provide assistance in matters concerning money laundering and financing of terrorism offenses in accordance with the Regulations, and within the limits of their respective legal systems (Art. 25).

The Regulations provide for assistance upon request in order to identify, trace, freeze, seize or forfeit the property, proceeds, or instrumentalities connected to money laundering or financing of terrorism offenses. To this end, the requested state shall take appropriate actions, such as special investigation techniques to be developed and utilised in application of relevant international conventions (Art. 25, para 2)[4] and necessary measures to immediately block the movement of goods and delivery of services, without prior notice or hearing[5] (Art. 8, para 4).

Further, the Regulations provide for assistance upon request related to a civil, criminal, or administrative investigation, prosecution or proceeding, as the case may be, involving an offense of money laundering or the financing of terrorism, or violations of any other provision of the Regulations. Such assistance may include (Art. 25, para 4):

a) providing original or certified copies of relevant documents and records, including those of financial institutions and government agencies;
b) obtaining testimony in the requested State;
c) facilitating the voluntary presence or availability in the requesting State of persons, including those in custody, to give testimony;
d) locating or identifying persons;
e) servicing of documents;
f) examining objects and places;
g) executing searches and seizures;
h) providing information and evidentiary items;
i) provisional measures.

Assistance provided pursuant to the Regulations shall be undertaken in accordance with the law (Art. 25, para 5).

Exchange of information upon request or spontaneous between FIUs

The Regulations provide for specific provisions applicable to the co-operation between financial intelligence units (FIUs) in the exchange of information related to money laundering and criminal activity connected with it, as defined in the Regulations.

4. Special investigation techniques shall include wire tapping, undercover agents, informants, controlled delivery, and any other technique established in accordance with national law (Art. 5). The international conventions expressly contemplated by the Regulations are the following: the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

5. See Art.8, para 4.

In this respect, the Regulations provide for a model memorandum of understanding (Model MoU) according to which, in a spirit of co-operation and mutual interest, FIUs shall co-operate in the compilation, development and analysis of information in their possession concerning financial transactions suspected of being related to money laundering or serious criminal activities connected thereto. To that end, FIUs shall exchange spontaneously or upon request, any available information that may be relevant to an investigation by the authorities into financial transactions related to money laundering and the persons or companies involved (Art. 1 of the Model MoU).[6]

IV. Authorities that can use the instrument

The Regulations state that, in accordance with the law, each member state shall establish or designate a financial intelligence unit (FIU) which acts as central agency responsible for receiving, requesting, analysing and disseminating to the competent authorities, disclosures of information that concern suspected proceeds of crime (Art. 13) and which shall also be responsible for exchanging information with FIUs of other member states for the purposes of investigating into financial transactions related to money laundering and the persons or companies involved (Art. 1 of the Model MoU).

V. Conditions for requesting assistance

(N.A)

VI. Grounds for denying/postponing assistance (Art.26)

With respect to international co-operation through compliance with foreign judgements as above described, the Regulations state that the Court or competent authority shall enforce the foreign order or measure in accordance with the Regulations, unless the Court or competent authority specifically finds that: (a) the order or measure originates from a court or competent authority that did not have jurisdiction or competence; or (b) the order or measure infringes on fundamental or constitutional rights (Art. 26, para 2).

The legal provisions referring to bank secrecy or confidentiality shall not be an impediment to compliance with the Regulations, when the information is requested by or shared with the court or other competent authority, in accordance with the law (Art. 27).

VII. Use of information received

The authorities of one Party will not permit the use of any information or document obtained from the other authorities for any purposes other than those stated in the Model MoU, *i.e.* compilation, development and analysis of information in their possession concerning financial transactions suspected of being related to money laundering or serious criminal activities connected thereto, without the prior consent of the disclosing Authority (Art. 2 of the Model MoU).

VIII. Sharing of information received with other local authorities

The Authorities of one Party will not permit the release of any information or document obtained from the other Authorities for any purposes other than those stated in the Model MoU, *i.e.* compilation, development and analysis of information in their

6. See Annex I, B to the Regulations.

possession concerning financial transactions suspected of being related to money laundering or serious criminal activities connected thereto, without the prior consent of the disclosing Authority (Art. 2 of the Model MoU). The information acquired by the Parties in application of the Model MoU shall be confidential. It shall be subject to official secrecy and enjoy the same confidentiality as provided by the legislation of the country of the receiving Authority for similar information from national sources (Art. 3 of the Model MoU).

IX. Sharing of information received with foreign authorities

The Authorities of one Party will not permit the release of any information or document obtained from the other Authorities for any purposes other than those stated in the Model MoU, *i.e.* compilation, development and analysis of information in their possession concerning financial transactions suspected of being related to money laundering or serious criminal activities connected thereto, without the prior consent of the disclosing Authority (Art. 2 of the Model MoU). The information acquired by the Parties in application of the Model MoU shall be confidential. It shall be subject to official secrecy and enjoy the same confidentiality as provided by the legislation of the country of the receiving Authority for similar information from national sources (Art. 3 of the Model MoU).

X. Relationship with other instruments

(N.A)

10. Model legislation on money laundering and financing of terrorism

Key Points

- The Model legislation contains a comprehensive set of rules to prevent, detect, and sanction effectively money laundering and the financing of terrorism, and to enable international co-operation against these crimes.
- It provides for a number of forms of international co-operation, such as exchange of information between financial intelligence units, spontaneous or upon request, mutual legal assistance, including the possibility to conduct joint investigations, and extradition. It also provides for co-operation between supervisory authorities.
- For the purposes of exchange of information FIUs shall be established as central, national agencies responsible for receiving, requesting, analysing and disseminating information concerning suspected proceeds of crime and potential financing of terrorism. The Model legislation also provides for the possibility of establishing a central authority for seizure and confiscation that shall be responsible for assisting the requested State in identifying and tracing funds and property that may be subject to seizure and confiscation.
- The information exchanged between FIUs shall be used only for the purposes of combating money laundering, predicate offences and financing of terrorism and only with the consent of the foreign counterpart agency.
- The staff of the FIU shall be required to keep confidential any information obtained within the scope of their duties, even after the cessation of those duties within the FIU. With regard to mutual legal assistance requests, where a request requires that its existence and substance be kept confidential, such requirement shall be observed.

I. Parties

The Model legislation on money laundering and the financing of terrorism (hereinafter referred as to the "Model legislation") for civil law countries is the outcome of a joint effort of the United Nations Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF). It was issued in 2005 and replaces the initial model legislation on money laundering which was issued by the UNODC in 1999 as part of its efforts to assist States and jurisdictions prepare, or upgrade, their own legislative framework in conformity with international standards and best practices in the implementation of anti-money laundering measures.

II. Scope

The Model legislation contains a comprehensive set of rules to prevent, detect, and sanction effectively money laundering and the financing of terrorism and to enable international co-operation against these crimes. It is based, to a large extent, on the relevant international instruments concerning money laundering and the financing of terrorism[1] and incorporates the FATF 40+9 Recommendations.[2] In order to facilitate its

[1]. See UN Convention against Corruption (2005), UN Convention against Transnational Organized Crime (2003), International Convention for the Suppression of the Financing of Terrorism (2002), UN Security Council Resolution 1373 (2001), Basel Committee Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (1988), Council of

adaptation to national legislation, the Model legislation presents some of its provisions in the form of variants or options (these are shown in square brackets below).

III. Forms of co-operation (Title III and Title VI)

The Model legislation provides for a number of forms of international co-operation. First, it allows for exchange of information between financial intelligence units (FIUs), spontaneous or upon request (Title III, Chapter I), and between supervisory authorities (Title III, Chapter IV) for the purposes of detecting money laundering and financing of terrorism. Then, it states that competent authorities shall provide the widest possible range of co-operation to the competent authorities of other States for purposes of extradition (Title IV, Chapter III) and mutual legal assistance (Title VI, Chapter II) in connection with criminal investigations and proceedings related to money laundering and financing of terrorism (Art. 6.1.1, para 1).

Exchange of information between FIUs (Title III, Chapter I)

The FIU established according to the Model legislation provisions may, spontaneously or upon request, share information with any foreign counterpart agency that performs similar functions and is subject to similar secrecy obligations, regardless of the nature of the agency, subject to reciprocity. For this purpose the FIU may enter into an agreement or arrangement with the foreign counterpart agency (Art. 3.1.3, para 1).

It should be noticed that in relation to any information they have received in accordance with its functions, FIUs are also allowed to obtain from any entity or persons subject to reporting suspicious activity obligations in accordance to the Model legislation provisions[3] any additional information they deem useful for the accomplishment of their functions[4] (Art. 3.1.4, para 1). Such additional information may also be obtained from police departments, authorities responsible for the supervision of the entities subject to reporting of suspicious activity obligations and other administrative agencies of the State [Option: in accordance with applicable procedures, judicial authorities]. The FIU may obtain such additional information pursuant to a request received from a foreign FIU (Art. 3.1.4, para 5).

Europe Convention of 16 May 2005 on laundering, search, seizure and confiscation of the proceeds from crime and the financing of terrorism, Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

2. The revision of FATF Recommendations has been issued on 16 February 2012. All references to FATF Recommendations in this document are per the 2003 version.

3. The Model legislation states that financial institutions, designated non-financial businesses and professions and real estate agents that suspect or have reasonable grounds to suspect that funds or property are the proceeds of crime, or are related or linked to, or are to be used for the financing of terrorism [Option: or that have knowledge of a fact or an activity that may be an indication of money laundering or financing of terrorism,] are required to submit promptly a report setting forth its suspicions to the FIU. This obligation shall also apply to dealers in precious metals/stones when they engage in any cash transaction equal or above [15 000 EUR/USD].This obligation shall also apply to attempted transactions. (Art. 3.2.1).

4. Some restrictions exist in relation to information requested to lawyers, notaries and other legal professionals (auditors, accountants and tax advisers). See Art. 3.1.4, para 3.

Exchange of information between supervisory authorities (Title III, Chapter IV)

The Model legislation requires authorities responsible for supervising entities or persons subject to preventive provisions concerning money laundering[5] to co-operate and share information with other competent authorities, and provide assistance in investigations, prosecutions or proceedings relating to money laundering, predicate offences and financing of terrorism (Art. 3.4.1, para 1, let. d). They are also required to provide prompt and effective co-operation to agencies performing similar functions in other States, including exchange of information (Art. 3.4.1, para 1, let. h).

Mutual Legal Assistance (Title VI, Chapter II)

Upon application by a foreign State, requests for mutual legal assistance in connection with money laundering or terrorist financing may include in particular: taking evidence or statements from persons; assisting in making detained persons, voluntary witnesses or others available to the judicial authorities of the requesting State in order to give evidence or assist in investigations; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing the proceeds of crime, funds or property or instrumentalities or other things for evidentiary or confiscation purposes; confiscation of assets; executing freezing and other provisional measures; any other form of mutual legal assistance not contrary to the domestic laws of the country adopting the Model legislation (Art. 6.2.1).

In the case of a request for mutual legal assistance seeking a confiscation order, the competent authorities shall either recognise and enforce the confiscation order made by a court of the requesting State or submit the request to their prosecuting authority for the purpose of obtaining a [Option: domestic] confiscation order and, if such order is granted, enforce it. The confiscation order shall apply to certain types of funds or property[6] which are situated in the territory of the requested state. Where the competent authorities recognise and enforce a confiscation order issued abroad, they shall be bound by the findings of fact on which the order is based (Art. 6.2.5).

The requested State shall have power of disposal of property confiscated on its territory at the request of foreign authorities unless provided otherwise under an agreement concluded with the requesting State, without prejudice to the return of the assets to their legitimate owner in good faith (Art. 6.2.6).

The competent authorities of the State adopting the Model legislation may enter into bilateral or multilateral agreements or arrangements, in relation to matters that are the

5. See Title II – Prevention of money laundering and financing of terrorism.

6. These are (see Art. 5.3.1): a) funds and property constituting the proceeds of crime, including property intermingled with such proceeds or derived from or exchanged for such proceeds, or property the value of which corresponds to that of such proceeds; b) funds and property forming the object of the offence; c) funds and property constituting income and other benefits obtained from such funds or property, or proceeds of crime; d) the instrumentalities; e) funds and property referred to in paragraphs a) - d) above that has been transferred to any party, unless *[the owner of such property can establish that he paid] [the court finds that the owner of such property acquired it by paying]* a fair price or in return for the provision of services corresponding to their value or on any other legitimate grounds, and that he was unaware of its illicit origin.

subject of investigations or proceedings in one or more States, to set up joint investigative teams and conduct joint investigations. In the absence of such agreement or arrangement joint investigations may be undertaken on a case by case basis (Art. 6.2.7).

IV. Authorities that can use the instrument

For the purposes of exchange of information, the Model legislation states that a FIU shall be established that serves as a central, national agency responsible for receiving, requesting, analysing and disseminating information concerning suspected proceeds of crime and potential financing of terrorism, as provided for by the Model legislation (Art. 3.1.1, para 1).

For the purposes of mutual legal assistance, the Model legislation states that the competent authority in the requested State has the responsibility and power to receive mutual legal assistance or extradition requests sent by competent foreign authorities with respect to money laundering and financing of terrorism, and it shall either execute them or transmit them to the competent authorities for execution. It shall ensure speedy and proper execution or transmissions of the request received or, if forwarded for execution, encourage speedy execution by competent authorities. In urgent cases, such requests may be sent through the International Criminal Police Organization (ICPO/Interpol) or directly by the foreign authorities to the judicial authorities of the requested State. In such cases the authority receiving the request shall notify the competent authority of the requested State (Art. 6.4.2, para 1).

The Model legislation provides for the possibility of establishing a central authority for seizure and confiscation that shall be responsible for assisting the requested State in identifying and tracing funds and property that may be subject to seizure and confiscation. It shall also collect and maintain all data associated with its mission in accordance with the law governing data processing and privacy. It shall manage seized assets in co-operation with the prosecutor's office or the judge overseeing investigations (Art. 5.4.1).

V. Conditions for requesting assistance (Art. 6.4.2. to 6.4.4)

The Model legislation states that investigative measures shall be undertaken in conformity with the procedural rules of the requested State unless the competent foreign authority has requested a specific procedure not contrary to such rules. A public official authorised by the competent foreign authority may attend the execution of the measures (Art. 6.2.3).

The Model legislation sets out specific conditions for filing requests for mutual legal assistance. Mutual legal assistance requests and answers shall be transmitted either by post or by other more rapid means of transmission that provides a written or materially equivalent record under conditions allowing the requested State to establish authenticity. Requests and their annexes shall be accompanied by a translation in a language acceptable to the requested State (Art. 6.4.2).

Further, requests shall have a minimum content. They shall specify: a) the identity of the authority requesting the measure; b) the name and function of the authority conducting the investigation, prosecution or proceedings; c) the requested authority; d) the purpose of the request and any relevant contextual remarks; e) the facts in support of the request; f) any known details that may facilitate identification of the persons concerned, in particular name, marital status, nationality, address and location and

occupation; g) any information necessary for identifying and tracing the persons, instrumentalities, funds or property in question; h) the text of the statutory provision establishing the offence or, where applicable, a statement of the law applicable to the offence and an indication of the penalty that can be imposed for the offence; i) a description of the assistance required and details of any specific procedures that the requesting State wishes to be applied (Art. 6.4.3, para 1).

In addition, requests shall include the following particulars in certain specific cases: a) in the case of requests for provisional measures: a description of the measures sought; b) in the case of requests for the issuance of a confiscation order: a statement of the relevant facts and arguments to enable the judicial authorities to order the confiscation under domestic law; c) in the case of requests for the enforcement of orders relating to provisional measures or confiscations: i) a certified copy of the order, and a statement of the grounds for issuing the order if they are not indicated in the order itself; ii) a document certifying that the order is enforceable and not subject to ordinary means of appeal; iii) an indication of the extent to which the order is to be enforced and, where applicable, the amount for which recovery is to be sought in the item or items of property; iv) where necessary and if possible, any information concerning third-party rights of claim on the instrumentalities, proceeds, property or other things in question; d) In the case of requests for extradition, if the person has been convicted of an offence, the original or a certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable and the extent to which the sentence remains to be served (Art. 6.4.3, para 2).

The competent authority of the requested State or the competent authority handling the matter shall, either on their own initiative or at the request of the requested State, may request additional information from the competent foreign authority if it appears necessary to execute or facilitate the execution of the request (Art. 6.4.4).

VI. Grounds for denying/postponing assistance

The Model legislation provides for certain circumstances under which the requested State is allowed to refuse rendering mutual legal assistance. A request for mutual legal assistance may be refused only if:

a) it was not made by a competent authority according to the legislation of the requesting country, if it was not transmitted in accordance with applicable laws or its contents are in substantial non-conformity with the law;

b) its execution is likely to prejudice the law and order, sovereignty, security, *ordre public* or other essential interests of the requested country;

c) the offence to which it relates is the subject of criminal proceedings or has already been the subject of a final judgment in the territory of the requested country;

d) there are substantial grounds for believing that the measure or order being sought is directed at the person in question solely on account of that person's race, religion, nationality, ethnic origin, political opinions, gender or status;

e) the offence referred to in the request is not provided for under the legislation of the requested country or does not have features in common with an offence provided for under the legislation of the requested country; however, assistance shall be granted if it does not entail coercive measures;

The Model legislation also states that dual criminality shall be deemed fulfilled irrespective of whether the laws of the requesting State place the offence within the same category of offence or denominate the offence by the same terminology as in the requested State, provided the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of the States concerned (Art. 6.1.1, para 2).

The Model legislation allows the requested country to include discretionary grounds for refusing mutual legal assistance in the following circumstances:

a) If, under the legislation of the requested country, the measures requested, or any other measures having similar effects, are not permitted or if they may not be used with respect to the offence referred to in the request;

b) If the measures requested cannot be ordered or executed by reason of the statute of limitations applicable to money laundering or financing of terrorism under the legislation of the requested country or the law of the requesting State;

c) If the decision whose execution is being requested is not enforceable under the legislation of the requested country;

d) If the decision rendered abroad was issued under conditions that did not afford sufficient protections with respect to the rights of the defendant.

In any case, no request for mutual legal assistance shall be refused on the basis of, or made subject to, unduly restrictive conditions (Art. 6.2.2, para 2). Further, secrecy or confidentiality provisions binding banks and other financial institutions cannot be invoked as a ground for refusal to comply with the request (Art. 6.2.2, para 3). At last, assistance shall not be refused on the sole ground that the offence is also considered to involve fiscal matters (Art. 6.2.2, para 4).

The competent authority of the requested State shall promptly inform the foreign competent authority of the grounds for refusal to execute the request (Art. 6.2.2, para 6). The Model legislation expressly states that a decision of a court in relation to a request for mutual legal assistance may be subject to appeal (Art. 6.2.2, para 5).

The Model legislation makes it clear that professional secrecy or privilege shall not be invoked as a ground not to comply with the obligations under the legislation when the information is requested, or the production of a related document is ordered in accordance with the legislation (Art. 4.2.1). However, lawyers, notaries and other independent legal professionals [Option: accountants, auditors and tax advisers] have no obligation to report information they receive from or obtain on a client, in the course of determining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceeding, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings (Art. 3.2.1, para 3).

The requested State may also delay the referral of requests to the competent authorities responsible for the execution of the request if the measure or order sought is likely to substantially interfere with an ongoing investigation or proceeding. It shall immediately so advise the requesting authority (Art. 6.4.6).

VII. Use of information received

The information exchanged between FIUs under the provision of the Model legislation shall be used only for the purposes of combating money laundering, predicate

offences and financing of terrorism and only with the consent of the foreign counterpart agency (Art. 3.1.3, para 3).

VIII. Sharing of information received with other local authorities

The staff of the FIU shall be required to keep confidential any information obtained within the scope of their duties, even after the cessation of those duties within the FIU (Art. 3.1.2). With regard to mutual legal assistance requests, where a request requires that its existence and substance be kept confidential, such requirement shall be observed. If that is not possible, the requesting authorities shall be promptly informed thereof (Art. 6.4.5).

IX. Sharing of information received with foreign authorities

The staff of the FIU shall be required to keep confidential any information obtained within the scope of their duties, even after the cessation of those duties within the FIU (Art. 3.1.2). With regard to mutual legal assistance requests, where a request requires that its existence and substance be kept confidential, such requirement shall be observed. If that is not possible, the requesting authorities shall be promptly informed thereof (Art. 6.4.5).

X. Relationship with other instruments

(N.A)

11. Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems)

Key Points

- The Model Provisions contain measures that should be incorporated into States domestic law in order to prevent, detect, and effectively sanction money laundering, the financing of terrorism and the proceeds of crime. To this end, they provide for the criminalisation of money laundering and financing of terrorism, as defined by the Model Provisions themselves.
- The Model Provisions provide for exchange of information between financial intelligence units (FIUs), spontaneous or upon request. They also allow enforcement authorities to request for assistance to enforce abroad both restraining and confiscation orders. Finally, they allow exchange of information for the purposes of proceedings for civil forfeiture.
- For the purposes of exchange of information, an FIU shall be established to serve as a central, national agency responsible for receiving, requesting, analysing and disseminating information concerning suspected proceeds of crime and terrorist property, as provided for by the Model Provisions. Regarding exchange of information for the purposes of civil forfeiture proceedings, the Model Provisions make it clear that requests of assistance may be addressed from enforcement authorities to (not better qualified) foreign authorities.
- The Model Provisions highlight that a memorandum of understanding or other arrangement, even if not required, is often the best vehicle to articulate the obligations of the FIU with respect to the information received. According to the Model Provisions, the most restrictive approach is to limit use by the receiving FIU only for the specific matter for which it was requested with no further disclosure or dissemination of the information to other authorities in the receiving State or elsewhere without the consent of the sending FIU. Alternatively there might be general agreement to such dissemination with the receiving FIU being able to use and process the information just as it would use and process domestic information it receives, with a restriction on the use of the suspicious transaction report itself (or alternatively the information in the report) in the course of judicial proceedings unless the providing authority consents.

I. Parties

The Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems) (hereinafter referred to as the “Model Provisions”) are the outcome of a collaboration between the Commonwealth Secretariat, the International Monetary Fund (IMF) and the United Nations Office on Drugs and Crime (UNODC). As part of an effort to assist jurisdictions prepare or upgrade their legislative framework to conform with international standards and best practices to implement anti-money laundering and combating the financing of terrorism (AML/CFT) measures, the UNODC in 2003 issued the Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill. The current Model Provisions, which were issued in 2009, replace the 2003 Model. The provisions, which are based upon the relevant international instruments concerning money laundering and

the financing of terrorism[1], the pre-2012 FATF 40+9 Recommendations[2] and best practices, also strengthen or supplement these standards in some respects.

II. Scope[3] (Sec. 3)

The Model Provisions evaluate the measures that should be incorporated into States' domestic laws in order to prevent, detect, and effectively sanction money laundering, the financing of terrorism and the proceeds of crime, as defined by the Model Provisions themselves. The Model Provisions provide, *inter alia*, for the criminalisation of money laundering and terrorist financing offences. For money laundering purposes:

a) any person who converts or transfers property knowing *[or believing]* that it is the proceeds of crime[4] *(Variant 1) /* knowing *[, believing]* or suspecting that it is the proceeds of crime *(Variant 2)* for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of an offence to evade the legal consequences of his action, commits an offence (Part II, Section 3, sub. 2);

b) any person who conceals or disguises the true nature, source, location, disposition, movement or ownership of or rights with respect to property knowing that such property is the proceeds of crime *(Variant 1)* / knowing or suspecting that such property is the proceeds of crime *(Variant 2)* commits an offence (Part II, Section 3, sub. 3);

c) any person who acquires, uses or possesses property knowing at the time of receipt that such property is the proceeds of crime *(Variant 1)* / knowing or suspecting at the time of receipt that such property is the proceeds of crime *(Variant 2)* commits an offence (Part II, Section 3, sub. 4);

1. See UN Convention against Corruption (2005), UN Convention against Transnational Organized Crime (2003), International Convention for the Suppression of the Financing of Terrorism (2002), UN Security Council Resolution 1373 (2001), Basel Committee Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (1988), Council of Europe Convention of 16 May 2005 on laundering, search, seizure and confiscation of the proceeds from crime and the financing of terrorism, Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

2. The revision of FATF Recommendations has been issued on 16 February 2012. All references to FATF Recommendations in this document are per the 2003 version.

3. Some provisions of the instrument present "variants" and "optional language." A "variant" provides two approaches for authorities to consider. Authorities should adopt one or the other, or their own separate approach. "Optional language" is italicised and sets forth an addition that may be included or not.

4. "Proceeds" and "proceeds of crime" means any property or economic advantage derived from or obtained directly or indirectly through the commission of a criminal offence *[Option: or in connection therewith]*. It shall include economic gains from the property and property converted or transformed, in full or in part, into other property (Part II, Section 3, sub. 1). It is made clear that "proceeds of crime" includes proceeds of an offence committed outside the national territory if the conduct constitutes an offence in the State or territory where the conduct occurred and would have constituted an offence if committed within the national territory of the State adopting the law (Part II, Section 3, sub. 9).

d) any person who performs any of the acts described above having reasonable grounds to know or suspect that the property is proceeds of crime commits an offence [optional] (Part II, Section 3, sub. 5).

The Model Provisions clarify that participation in, association with or conspiracy to commit, an attempt to commit, and aiding, abetting, facilitating and counseling the commission of any of the offences set forth above is also an offence (Part II, Section 3, sub. 6). Further, in order to prove the property is the proceeds of crime, it shall not be necessary that there be a conviction for the offence that has generated the proceeds *[option: or that there be a showing of a specific offence rather than some kind of criminal activity, or that a particular person committed the offence]* (Part II, Section 3, sub. 8).

III. Forms of co-operation (Sec. 42, Sec. 46, Sec. 60, Sec. 91 and Sec. 92)

The Model Provisions provide for a number of forms of international co-operation. First, it allows for exchange of information between financial intelligence units (FIUs), spontaneous or upon request (Part V, Section 42, sub. 1). Then, it allows enforcement authorities to request for assistance to enforce abroad both restraining (Part VI, Section 46) and confiscation (Part VI, Section 60) orders. The Model Provisions also allow exchange of information for the purposes of proceedings for civil forfeiture (Part VII, Section 91).

Exchange of information between FIUs (Part V, Section 42)

The FIU established according to the Model Provisions may, spontaneously or upon request, share information with any foreign counterpart agency that performs similar functions and is subject to similar secrecy obligations with respect to the information it receives[5] based upon reciprocity or mutual agreement *[option: add: on the basis of co-operation arrangements entered into between the FIU and such foreign counterpart agency] [option: add subsection ( ): The FIU may enter into an agreement or arrangement to facilitate the exchange of information with a foreign counterpart agency that performs similar functions and is subject to similar secrecy obligations.]* (Part V, Section 42, sub. 1).

The FIU may make inquiries on behalf of a foreign counterpart agency where the inquiry may be relevant to the foreign counterpart agency's analysis of a matter involving suspected proceeds of crime or terrorist property, or potential financing of terrorism. The FIU may (Part V, Section 42, sub. 2):

a) search its own databases, including information related to reports of suspicious transactions, and other databases to which the FIU has direct or indirect access,

[5] FIUs receive suspicious transaction reports that are generated as a result of the preventive measures obligations that the Model Provisions sets forth for financial and designated non-financial businesses and professions (see Part IV of the Model Provisions). However, it is made clear that the actions of the FIU with respect to information it receives should not be limited to suspicious transaction reports but should extend to any other information the FIU receives, for instance, if relevant in the jurisdiction, currency transaction reports (Part VI, Section 40). It should be noted that FIUs may, in relation to any report or information they have received, obtain, where not otherwise prohibited by law, any information it deems necessary to carry out its functions from: (a) a law enforcement authority; (b) any authority responsible for the supervision of the entities and persons subject to this law; and (c) any other public agency within the State (Part VI, Section 41, sub 3).

including law enforcement databases, public databases, administrative databases and commercially available databases;

b) obtain from financial institutions and designated non-financial businesses and professions information that is relevant in connection with such request;

c) obtain from competent authorities information that is relevant in connection with such request to the extent the FIU could obtain such information in a domestic matter; and

d) take any other action in support of the request of the foreign counterpart that is consistent with the authority of the FIU in a domestic matter.

Request for assistance to enforce restraining orders abroad (Part VI, Section 46)

In a domestic context, the Model Provisions provide the court with discretion to issue a restraining order where it concludes there are reasonable grounds to believe first, that a person committed the offence and there is an investigation or charge relating to that conduct, and secondly, that the property to be restrained is proceeds or an instrumentality (if a confiscation order is contemplated) or that the person derived a benefit (if a benefit recovery or extended benefit recovery order is contemplated) (Part VI, Section 45).

This shall apply (a) in respect of any offence as defined by the Model Provisions, *i.e*. any offence under the law of a State[6], and (b) in respect of an offence under the law of a foreign State in relation to acts and omissions which, had they occurred in the former State, would have constituted an offence in that former State provided that: (i) in the case of a request relating to a restraint or to the recovery proceeds, instrumentalities or benefits, there is property located in the former State that can be restrained or recovered for the purpose of a confiscation order or benefit *[Option: or extended benefit]* recovery order; or (ii) in the case of a request relating to tracing, identifying, locating or quantifying proceeds, benefits or instrumentalities, there is or may be relevant information or evidence within the former State; and (iii) a request for assistance has been made by the foreign state for the restraint or confiscation of property in relation to the offence, or for information or evidence that may be relevant to the proceeds, benefits or instrumentalities of the offence (Part VI, Section 43, sub. 1).[7]

Indeed, the Model Provisions state that where the enforcement authority believes that specified property in which the relevant person has an interest is situated abroad, it may request assistance from the government of such foreign State or territory to enforce the restraining order in such foreign State or territory (Part VI, Section 46, sub. 2). The Model Provisions highlight the importance of ensuring that this provision is considered in

6. For the purposes of Part VI of the Model Provisions, "offence" and "criminal offence" except when the term refers to a specific offence means: (a) any offence under the law of a State; and (b) any offence under a law of a foreign State, in relation to acts or omissions which, had they occurred in the former State, would have constituted an offence under subsection (a) (Part VI, Section 43). The definition of "offence" should reflect one of the three approaches in pre-2012 FATF 40 Recommendation 1. Drafting authorities should consider which approach to adopt: all offences, all serious offences, a comprehensive list that reflects all serious offences, or some combination of these (Part VI, Section 43, sub. 5). It is essential, whichever approach is chosen, that similar offences under the laws of other States are also covered.

7. With respect to the application of Part VI of the Model Provisions to the offences set forth in Section 43, sub. (1)(b), the requested authorities shall have discretion whether or not to seek orders and to otherwise apply the provisions of Part VI (Part VI, Section 43, sub. 2).

relation to provisions of domestic law permitting mutual legal assistance so that requests can be made in an effective manner.[8]

Request for assistance to enforce confiscation orders abroad (Part VI, Section 60)

In a domestic context, the Model Provisions allow the court to order confiscation[9] of both proceeds and instrumentalities as defined by the Model Provisions (Part VI, Section 59). They also state that where, after conviction for an offence, a confiscation order has been made in a State in respect of property that is proceeds or an instrumentality, and such property is situated abroad, the enforcement authority may request assistance from the foreign government to ensure that the property specified in the order is realised (Part VI, Section 60, sub. 2). If such a request has resulted in the realisation of property in the foreign State or territory, the property realised shall be applied in accordance with the terms of any agreement between the States (Part VI, Section 60, sub. 3).

This provision will apply where there has already been a restraining order in place in the foreign country, but that is not a prerequisite. Where the final confiscation order has been obtained, this provision may be used to seek enforcement of that order abroad. As with restraining orders, this provision will need to be linked to the mutual assistance provisions in the State adopting the provision so that the request for foreign enforcement can be made in an effective manner (Part VI, Section 60, Drafting Note).

Exchange of information for the purposes of proceedings for civil forfeiture (Part VII, Section 91 and Section 92)

The Model Provisions introduce the concept of civil forfeiture, which enables enforcement authorities, as defined by the Model Provisions[10], to bring civil proceedings in an appropriate civil court in the State to recover property that is or represents proceeds[11] or terrorist property.[12] The civil forfeiture order can be distinguished from the

8. It is pointed out that in some States, mutual legal assistance provisions may be comprehensive enough to permit outgoing requests of this kind, and this provision would not be necessary. It is important, however, that it be quite clear that such provisions do apply (See Part VI, Section 46, Drafting Note: Property Abroad).

9. A confiscation order is an order *in rem*, following conviction for an offence, to forfeit to the State property that is the proceeds or instrumentalities of such offence (Part VI, Section 59, sub. 1).

10. The Model Provisions provides the opportunity to define the authority that will have the responsibility for undertaking civil forfeiture actions (Part VII, Section 80, sub. 3, Drafting Note). In any case, the enforcement authority should be a legal office since the authority will be pursuing civil cases before the court. Thus, it would not be appropriate in most cases for this to be a police agency (Part VII, Section 79, Drafting Note: Enforcement Authority).

11. The definition of proceeds relates to property received through the commission of a criminal offence. Thus the scope drafting authorities decide upon for “offence” in this definitional provision will impact the availability of civil forfeiture within the jurisdiction.

12. “Terrorist property” means: (a) proceeds from the commission of a terrorist act; (b) property which has been, is being, or is intended to be used to commit a terrorist act; (c) property which has been, is being, or is intended to be used by a terrorist organisation; (d) property owned or controlled by, or on behalf of, a terrorist organisation; or (e) property which has been collected for the purpose of providing support to a terrorist organisation or funding a terrorist act (Part VII, Section 79).

definition of a confiscation order in that it does not follow a conviction and it is granted by a civil court (Part VII, Section 80, sub. 1). The Model Provisions make it clear that an offence that can give rise to civil forfeiture proceedings will include a conduct which occurs in a foreign country and is a criminal conduct under the criminal law of that country, and would be unlawful if it occurred in the State undertaking the civil forfeiture proceeding (Part VII, Section 80, sub. 6).

In this context, the enforcement authority may make a request to a foreign authority for information or evidence relevant to a civil forfeiture investigation or proceeding, or the administration of a victim claim, and may enter into an agreement with such authority relating to such request(s) and the use and disclosure of any information or evidence received. It is up to the foreign authority to determine whether such information or evidence can be provided and under what conditions (Part VII, Section 91).

The Model Provisions also provide for the opposite position, which is where the State is asked to provide information to a foreign authority in connection with a civil forfeiture investigation (Part VII, Section 92). However, this is set forth as an option. In this respect, the Model Provisions state that information the enforcement authority has obtained in connection with the exercise of any of its functions for civil forfeiture purposes may be disclosed by it, notwithstanding any rules of confidentiality to the contrary, if the disclosure is for the purposes, *inter alia*, of a civil forfeiture investigation or proceeding in another jurisdiction (Part VII, Section 92, sub. (2)(d)).[13]

IV. Authorities that can use the instrument (Sec. 38 and Sec. 91)

For the purposes of exchange of information, the Model legislation states that an FIU shall be established to serve as a central, national agency responsible for receiving, requesting, analysing and disseminating information concerning suspected proceeds of crime and terrorist property, as provided for by the Model Provisions (Part V, Section 38, sub. 1).[14]

The Model Provisions clarify that, other than this core responsibility, the FIU's responsibilities may vary significantly from State to State as will the powers conferred on the FIU and its organisational structure. An FIU may be located within a police service, the prosecutor's office, the Central Bank or a ministry of finance or justice and benefit

13. The Model Provisions highlight that the treatment of outward sharing involves consideration of a series of complex issues, including the nature of the agency that serves as the enforcement authority, an analysis of domestic data sharing and privacy protection issues, the appropriate treatment of information and evidence gathered by the enforcement authority from other domestic agencies, and foreign policy issues regarding the State's relationships with various foreign jurisdictions (Part VII, Section 92, Drafting Note).

14. The Model Provisions recommend that the phrase "terrorist property" should be used when defining FIUs rather than, for instance, "potential financing of terrorism" as terrorist property has greater breadth. It will include property already owned or possessed by a terrorist group or individual, and proceeds of a terrorist act as well as property involved in financing activities. According to the Model Provisions, "terrorist property" means: (a) proceeds from the commission of a terrorist act; (b) property which has been, is being, or is intended to be used to commit a terrorist act; (c) property which has been, is being, or is intended to be used by a terrorist organisation; (d) property owned or controlled by, or on behalf of, a terrorist organisation; or (e) property which has been collected for the purpose of providing support to a terrorist organisation or funding a terrorist act (Part VII, Section 69).

from the infrastructure and resources of these services, or it may be established as an independent office.

Regarding exchange of information for the purposes of civil forfeiture proceedings, the Model Provisions make it clear that requests of assistance may be addressed from enforcement authorities to (not better qualified) foreign authorities. In this respect, it is underlined that State Parties should consider whether any co-ordination is necessary on a domestic basis with other parts of government for the enforcement authority to enter into agreement with or seek information from foreign authorities. Sometimes a mutual legal assistance treaty may be used; more often the civil nature of the proceeding precludes the use of such treaties (Part VII, Section 91, Drafting Note).

V. Conditions for requesting assistance (Sec. 42 and Sec. 91)

The Model Provisions highlight that, for the purposes of exchange of information between FIUs, many States require a formal co-operation arrangement in order to provide an FIU in another State with information. A memorandum of understanding or other arrangement, even if not required, is often the best vehicle to articulate the obligations of the receiving FIU with respect to the information received (Part V, Section 42, sub. 1, Drafting Note: Co-operation Agreements).

Concerning exchange of information for the purposes of civil forfeiture proceedings, the Model Provisions only state that it is up to the requested foreign authority to determine whether the requested information or evidence can be provided and under what conditions (Part VII, Section 91).

VI. Grounds for denying/postponing assistance

No specific grounds for denying/postponing assistance are provided in the Model Provisions.

VII. Use of information received (Sec. 42)

The Model Provisions highlight that a memorandum of understanding or other arrangement, even if not required, is often the best vehicle to articulate the obligations of the FIU with respect to the information received. The most restrictive approach is to limit use by the receiving FIU only for the specific matter for which it was requested. Alternatively it might be agreed that the receiving FIU shall be able to use and process the information just as it would use and process domestic information it receives, with a restriction on the use of the report itself (or alternatively the information in the report) in the course of judicial proceedings unless the providing authority consents. Requiring such consent would protect against any use in a proceeding that involved criminal activity that might not be covered by the providing State's statute. The Model Provisions underline that there are innumerable variations on use. These are most appropriately addressed by specific arrangements between the two co-operating FIUs considering the specifics of their domestic frameworks (Part V, Section 42, sub.1, Drafting Note: Co-operation Agreements).

In this context, the Model Provisions recall the Egmont Group's Principles for Information Exchange (June 2001) and Best Practices for the Exchange of Information, under which FIUs may use information exchanged "only for the specific purpose for which the information was sought or exchanged," and "the requesting FIU may not make use of the information in an administrative, investigative, prosecutorial, or judicial purpose without the prior consent of the FIU that disclosed the information." Specific

arrangements in a memorandum of understanding can address these issues in the context of the specific States exchanging information (Part V, Section 42, sub.1, Drafting Note: Information Exchange).

VIII. Sharing of information received with other local authorities (Sec. 42)

The Model Provisions highlight that a memorandum of understanding or other arrangement, even if not required, is often the best vehicle to articulate the obligations of the FIU with respect to the information received. The most restrictive approach is to forbid any disclosure or dissemination of the information to other authorities in the receiving State or elsewhere without the consent of the sending FIU. Alternatively there might be general agreement to such dissemination with the receiving FIU able to process the information just as it would use and process domestic information it receives. Requiring such consent would protect against any use in a proceeding that involved criminal activity that might not be covered by the providing State's statute. The Model Provisions underline that there are innumerable variations on dissemination and use. These are most appropriately addressed by specific arrangements between the two co-operating FIUs considering the specifics of their domestic frameworks (Part V, Section 42, sub.1, Drafting Note: Co-operation Agreements).

In this context, the Model Provisions recall the Egmont Group's Principles for Information Exchange (June 2001) and Best Practices for the Exchange of Information, under which "the requesting FIU may not transfer information shared by a disclosing FIU to a third party without the prior consent of the FIU that disclosed the information." The specific arrangements in a memorandum of understanding can address these issues in the context of the specific States exchanging information (Part V, Section 42, sub.1, Drafting Note: Information Exchange).

IX. Sharing of information received with foreign authorities (Sec. 42)

The Model Provisions highlight that a memorandum of understanding or other arrangement, even if not required, is often the best vehicle to articulate the obligations of the receiving FIU with respect to the information. The most restrictive approach is to forbid any disclosure or dissemination of the information to other authorities in the receiving State or elsewhere without the consent of the sending FIU. Alternatively there might be general agreement to such dissemination with the receiving FIU able to process the information just as it would use and process domestic information it receives. Requiring such consent would protect against any use in a proceeding that involved criminal activity that might not be covered by the providing State's statute. The Model Provisions underline that there are innumerable variations on dissemination and use. These are most appropriately addressed by specific arrangements between the two co-operating FIUs considering the specifics of their domestic frameworks (Part V, Section 42, sub.1, Drafting Note: Co-operation Agreements).

In this context, the instrument recall the Egmont Group's Principles for Information Exchange (June 2001) and Best Practices for the Exchange of Information, under which "the requesting FIU may not transfer information shared by a disclosing FIU to a third party without the prior consent of the FIU that disclosed the information." The specific arrangements in a memorandum of understanding can address these issues in the context of the specific States exchanging information (Part V, Section 42, sub.1, Drafting Note: Information Exchange).

X. Relationship with other instruments

(N.A)

C. Anti-corruption related instruments

1. United Nations Convention against Corruption

Key points

- The Convention provides for a number of measures for mutual legal assistance among States Parties in investigations, prosecutions and proceedings in relation to the offences covered by the Convention. States Parties are also called to consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption. The Convention shall also apply to freezing, seizure, confiscation, return and disposal of proceeds of crime or property derived from offences established in accordance with the Convention.
- Forms of international co-operation covered by the Convention include extradition, mutual legal assistance, law enforcement co-operation, joint investigations. The Convention also allows international co-operation for purposes of training and technical assistance and collection, exchange and analysis of information on corruption. At last, for the first time in an international instrument, it provides for several measures for the purposes of asset recovery.
- When dealing with mutual legal assistance, a central authority responsible for receiving and executing requests shall be designated; the collection, analysis and dissemination of information regarding potential money-laundering shall be dealt with by financial intelligence units (FIUs), which serve as national centres for that purpose.
- States Parties are also called to consider establishing FIUs responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions for the purposes of asset recovery.
- The State Party requesting information under mutual legal assistance procedures shall not use or transmit such information or evidence for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. The requesting State Party itself may impose restrictions to the use of the information included in the request.

I. Parties

The Convention was adopted by the General Assembly of the United Nations on 31 October 2003 at United Nations Headquarters in New York. The Parties to the Convention are currently 160.[1]

[1] Status of ratifications as at April 2012: Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bhutan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, European Union, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia,

II. Scope (Art. 3 and Art. 43)

The Convention shall apply to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of the offences established in accordance to the Convention (Art. 3). The Convention requires the widest measure of mutual legal assistance among States Parties in investigations, prosecutions and proceedings in relation to the offences covered by the Convention. States Parties are also called to consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption. The Convention provides for international co-operation in criminal matters and for mutual legal assistance among States Parties in investigations of and proceedings in civil and administrative matters relating to corruption (Art. 43).

According to the Convention, the following conducts shall be established as criminal offences, when committed intentionally: (a) bribery of national public officials (Art. 15), (b) active bribery of foreign public officials and officials of public international organisations (Art. 16 para 1), (c) embezzlement, misappropriation or other diversion of property by a public official (Art. 17), (d) laundering of proceeds of crime (Art. 23), (e) obstruction of justice (Art. 25) and (f) participation in such offences (Art. 27 para 1). The following conducts may be established as criminal offences, when committed intentionally: (a) passive bribery of foreign public officials and officials of public international organisations (Art. 16 para 2), (b) trading in influence (Art. 18), (c) abuse of functions (Art. 19), (d) illicit enrichment (Art. 20), (e) bribery in the private sector (Art. 21), (f) embezzlement of property in the private sector (Art. 22), (g) concealment (Art. 24), and (h) attempt/preparation of an offence covered by the Convention (Art. 27, para 2 and para 3).

III. Forms of co-operation

The Convention allows for several forms of international co-operation in relation to matters covered by the Convention, such as Extradition (Art. 44), Transfer of sentenced persons (Art. 45), Mutual Legal Assistance (Art. 46), Transfer of Criminal Proceedings (Art. 47), Law enforcement co-operation (Art. 48), Joint Investigations (Art. 49) and (Co-operation to conduct) Special Investigative Techniques (Art. 50). The Convention also allows international co-operation for purposes of training and technical assistance (Art. 60), as well as collection, exchange and analysis of information on corruption (Art. 61) and further provides for other measures geared towards the implementation of the Convention through economic development and technical assistance (Art. 62).

Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, St. Lucia, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, Zimbabwe.

Finally, the Convention, for the first time in an international instrument, provides in a separate chapter (Chapter V) for measures of international co-operation for the purposes of asset recovery, namely Prevention and detection of transfers of proceeds of crime (Art. 52), Measures for direct recovery of property (Art. 53), Mechanisms for recovery of property through international co-operation in confiscation (Art. 54), International co-operation for purposes of confiscation (Art. 55), Special co-operation (Art. 56), Return and disposal of assets (Art. 57), Financial Intelligence Units (Art. 58) and Bilateral and multilateral agreements and arrangements (Art. 59).

Mutual Legal Assistance (Art. 46)

Mutual legal assistance to be afforded in accordance with the Convention may be requested for any of the following purposes: (a) Taking evidence or statements from persons; (b) Effecting service of judicial documents; (c) Executing searches and seizures, and freezing; (d) Examining objects and sites; (e) Providing information, evidentiary items and expert evaluations; (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; (h) Facilitating the voluntary appearance of persons in the requesting State Party; (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party; (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of the Convention concerning asset recovery; (k) The recovery of assets, in accordance with the relevant provisions of the Convention (Art. 46, para 3).

The competent authorities of a State Party may transmit spontaneously (*i.e.* without prior request) information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to the Convention (Art. 46, para 4 and para 5).

The Convention states that a request for mutual legal assistance shall be executed in accordance with the domestic law of the requested State Party and to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request (Art. 46, para 17).

The Convention allows a State Party, upon request, to permit the judicial hearing of individuals being in the territory of another State Party as witnesses or experts to take place by video conference if it is not possible or desirable for the individuals in question to appear in person in the territory of the requesting State Party States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party (Art. 46, para 18).

Law enforcement co-operation (Art. 48)

The Convention provides for the basis of mutual law enforcement co-operation in respect of the offences covered by its scope as it allows State Parties to co-operate closely with one another to enhance the effectiveness of law enforcement action to combat the offences covered by the Convention (Art. 48, para 1).

This would include taking effective measures:

a) to enhance and, where necessary, to establish channels of communication between competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by the Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

b) to co-operate with other States Parties in conducting inquiries with respect to offences covered by the Convention[2];

c) to provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

d) to exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by the Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

e) to facilitate effective co-ordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

f) to exchange information and co-ordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by the Convention.

With a view to giving effect to these measures, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct co-operation between their law enforcement agencies or amending them where already existing[3]. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement co-operation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organisations, to enhance the co-operation between their law enforcement agencies (Art. 48, para 2).

[2.] The Convention clarifies that the inquiries to be conducted in the context of law enforcement co-operation shall concern: (a) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned; (b) the movement of proceeds of crime or property derived from the commission of such offences; (c) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences.

[3.] In the area of law enforcement co-operation, only the reporting countries from the Group of African States and the Group of Asian and Pacific States reported a need for assistance which prioritised good practices and lessons learned, and capacity-building programmes for authorities responsible for cross-border law enforcement co-operation, and then technological assistance, an on-site assistance by a relevant expert, model agreement and arrangement and capacity-building programmes for authorities responsible for cross-border law enforcement co-operation. See Conference of the States Parties to the United Nations Convention against Corruption, United Nations, March 2011, p. 18.

Joint Investigations (Art. 49)

Joint investigations may be undertaken by agreement on a case-by-case basis or by entering into bilateral or multilateral agreements or arrangements among States Parties. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Special Investigative Techniques (Art. 50)

Under the Convention, 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 to allow for the appropriate use by its competent authorities of controlled delivery and 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 there from (Art. 50, para 1).

For this purpose, State Parties may conclude bilateral or multilateral agreements or arrangements (Art. 50, para 2). In the absence of such an agreement or arrangement, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis (Art. 50, para 3).

Training and Technical Assistance (Art. 60)

The Convention allows States Parties to afford one another the widest measure of technical assistance, in their respective plans and programmes to prevent and combat corruption, and training and assistance and the mutual exchange of relevant experience and specialised knowledge. This will facilitate international co-operation between States Parties in the areas of extradition and mutual legal assistance (Art. 60, para 2).

Such co-operation measures may involve State Parties:

a) strengthening, to the extent necessary, efforts to maximise operational and training activities in international and regional organisations and in the framework of relevant bilateral and multilateral agreements or arrangements (Art. 60, para 3);

b) assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption (Art. 60, para 4);

c) co-operating in providing each other with the names of experts who could assist in achieving that objective, in order to facilitate the recovery of proceeds of offences established in accordance with the Convention (Art. 60, para 5);

d) using subregional, regional and international conferences and seminars to promote co-operation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition (Art. 60, para 6);

e) establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects (Art. 60, para 7).

Collection, exchange and analysis of information on corruption (Art. 61)

Under the Convention, each State Party shall consider analysing, in consultation with experts, trends in corruption in its territory, as well as the circumstances in which corruption offences are committed (Art. 61, para 1) and developing and sharing with each other analytical expertise concerning corruption and information in order to develop common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption (Art. 61, para 2).

IV. Authorities that can use the instrument (Art. 46 and Art. 58)

The Convention provides for different ways to identify authorities that are allowed to receive and execute international co-operation requests, depending on what forms of co-operation is considered.

When dealing with mutual legal assistance under Art. 46 of the Convention, each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory (Art. 46, para 13). Most of the States Parties have designated the Ministry of Justice or the Attorney General as the central authority competent to receive or transmit requests for mutual legal assistance, however some States Parties did not follow this practice and designated as central authorities other institutions, such as Ministry of Foreign Affairs (*e.g.* Argentina, Bolivia, Chile, El Salvador, Guyana and Seychelles) and Ministry of Home Affairs (*e.g.* India and Iceland).[4]

States Parties shall also establish financial intelligence units (FIUs) responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions for the purposes of asset recovery (Art. 58).

V. Conditions for requesting assistance (Art. 46)

The Convention sets out specific conditions for filing requests for mutual legal assistance. Any requests and communication related thereto shall be transmitted to the central authorities designated by the States Parties (Art. 46, para 13).

Any requests for mutual legal assistance shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith (Art. 46, para 14).

A request for mutual legal assistance shall also have a minimum content that may be extended when it appears necessary for the execution (Art. 46, para 15 and 16): (a) the identity of the authority making the request; (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the

[4] In some cases States Parties have designated more than one competent authority. This is the case, for example, of the Russian Federation, which designated as central authorities for the purposes of Art. 46, both the Ministry of Justice, on the proceedings in civil matters, and the Prosecutor General's Office on all other matters, and Viet Nam, which designated the Ministry of Justice, the Ministry of Security and the Supreme People's Procuracy.

name and functions of the authority conducting the investigation, prosecution or judicial proceeding; (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents; (d) a description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed; (e) where possible, the identity, location and nationality of any person concerned; and (f) the purpose for which the evidence, information or action is sought. The requested State Party may request additional information.

VI. Grounds for denying/postponing assistance (Art. 46)

The Convention provides for certain circumstances under which the States Parties are allowed to refuse rendering mutual legal assistance under Art. 46. For instance, requests for assistance may be declined on the ground of absence of dual criminality. However, a requested State Party shall render assistance anyway if that does not involve coercive action. Such assistance may be refused when requests involve (a) matters of a *de minimis nature* or (b) matters for which the co-operation or assistance sought is available under other provisions of the Convention (Art. 46, para 9, let. b).

Further, according to the Convention, mutual legal assistance may be refused (Art. 46, para 21):

a) if the request is not made in conformity with the provisions of the Convention;

b) if the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

c) if the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

d) if it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

One of the key provisions of the Convention is Art. 46 paragraph 8, which states that States Parties shall not decline to render mutual legal assistance on the ground of bank secrecy. This provision intends to overcome the impediments posed by bank secrecy laws to the provision of assistance to other States investigating allegations of corruption. In view of that, the ratification and implementation of the Convention at the national level will, *inter alia*, enable States that have not yet done so to provide for the possibility of lifting bank secrecy in relevant cases so that bank, financial or commercial records could be made available or seized.

Moreover, requests for mutual legal assistance may not be declined on the sole ground that the offence is also considered to involve fiscal matters (Art. 46, para 22).

The Convention clarifies that mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding (Art. 46, para 25).

VII. Use of information received (Art. 46)

In case of spontaneous transmission of information, the competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not

prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay (Art. 46, para 5).

The State Party requesting information under mutual legal assistance procedures shall not use these information or evidence for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party (Art. 46, para 19).

The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party (Art. 46, para 20).

VIII. Sharing of information received with other local authorities (Art. 46)

The transmission of information pursuant to mutual legal assistance under this Convention shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information.

The State Party requesting information under mutual legal assistance procedures shall not transmit these information or evidence for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party (Art. 46, para 19).

IX. Sharing of information received with foreign authorities (Art. 46)

The State Party requesting information under mutual legal assistance procedures shall not transmit these information or evidence for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party (Art. 46, para 19).

X. Relationship with other instruments (Art. 46)

Provisions of mutual legal assistance provided for by the Convention under Article 46 shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance (Art. 46, para 6).

If States Parties are bound by another treaty of mutual legal assistance, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply, instead, the provisions on mutual legal assistance provided for by the Convention, *i.e.* Article 46, paragraph 9 to paragraph 29. States Parties are strongly encouraged to apply those paragraphs if they facilitate co-operation (Art. 46, para 7).

2. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Key points

- The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective, such as consultation, mutual legal assistance and extradition.
- It is the only international anti-corruption instrument focused on the 'supply side' of the bribery transaction. It entered into force in 1999. 38 countries (both member and non-member countries) have adopted this Convention so far.
- Parties to the Convention shall designate one or more authorities responsible for making and receiving requests of co-operation, which shall serve as channel of communication for these matters for them.
- The provisions of the Convention regarding international co-operation are supplemented by those contained in some related documents (mainly the 2009 Anti-Bribery Recommendation and the 2009 Recommendation on Tax Measures) which, for instance, recommend the co-operation through measures other than those included in the Convention, provide for the disallowance of the tax deductibility of bribes and give some guidance on the limitations to the use of the information exchanged under the Convention.

I. Parties

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, also known as the "Anti-Bribery Convention", entered into force on 15 February 1999. The Convention includes today 39 countries, namely the 34 OECD member countries and four non-member countries - Argentina, Brazil, Bulgaria, Russian Federation and South Africa.[1]

The Anti-Bribery Convention, along with the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Anti-Bribery Recommendation), the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation on Tax Measures), and the 2006 Recommendation on Bribery and Officially Supported Export Credits are the core OECD instruments which target the offering side of the bribery transaction. Another related document to the Convention is the Section VII of the OECD Guidelines for Multinational Enterprises (Combating Bribery, Bribe Solicitation and Extortion).

[1]. Status of ratifications as at April 2012: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russian Federation, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

II. Scope (Art. 1 and Art. 7)

The Convention shall apply to combating, investigation and prosecution of the bribery of foreign public officials. To this end, it provides for the criminalisation of the bribery of a foreign public official, which is defined as an act of intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business (Art. 1, para 1). Complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be also considered as a criminal offence under the Convention. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party (Art. 1, para 3).

Commentaries to the Convention make clear that it establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws (Commentaries to Art. 1, para 3).

The Convention also states that each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred (Art. 7).

On its side, the 2009 Recommendation on Tax Measures recommends that Member countries and other Parties to the OECD Anti-Bribery Convention shall explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner[2].

III. Forms of co-operation (Art. 4, Art. 9 and Art. 10)

The Convention allows for consultation (Art. 4), mutual legal assistance (Art. 9) and extradition (Art. 10) as forms of international co-operation.

Consultation (Art. 4)

The Convention states that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution (Art. 4, para 3).

Mutual Legal Assistance (Art. 9)

Under the Convention, each Party shall provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person (Art. 9, para 1).

[2] 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Item I.

Within this framework, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings (Commentaries to Art. 9, para 31).

Extradition (Art. 10)

The Convention states that bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party.

It should be noted that the 2009 Anti-Bribery Recommendation recommends that Parties shall co-operate through some other means of international co-operation, such as sharing of information spontaneously or upon request, provision of evidence, and identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials.[3]

IV. Authorities that can use the instrument (Art. 11)

For the purposes of consultation (Art. 4, para 3), mutual legal assistance (Art. 9) and extradition (Art. 10), each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

V. Conditions for requesting assistance

(N.A)

VI. Grounds for denying assistance (Art. 9 and Art. 10)

The Convention states that where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention (Art. 9, para 2). This holds true also with respect to extradition (Art. 10, para 4).

Under the Convention, a Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy (Art. 9, para 3).

VII. Use of information received

The text of Convention does not seem to provide for any limitation on the use of the information exchanged between the Parties under the Convention's provisions.

VIII. Sharing of information received with other local authorities

The text of Convention does not seem to provide for any limitation on the use of the information exchanged between the Parties under the Convention's provisions.

3. 2009 Anti-Bribery Recommendation, Item XIII, let. i).

IX. Sharing of information received with foreign authorities

The text of Convention does not seem to provide for any limitation to the use of the information exchanged between the Parties under the Convention's provisions.

X. Relationship with other instruments

(N.A)

3. Criminal Law Convention on Corruption as complemented by the 2003 Additional Protocol

Key Points

- The Criminal Law Convention on Corruption as complemented by the 2003 Additional Protocol aims at co-ordinating criminalisation of a large number of corrupt practices. It also provides for complementary criminal law measures and for improved international co-operation in the prosecution of corruption offences.
- It provides for different forms of co-operation such as extradition, exchange of information on request or spontaneous exchange of information.
- Transmission of requests under this Convention shall be effected between the central authorities designated by Parties.
- The Convention provides for different grounds for denying/postponing assistance. For instance, mutual legal assistance may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or *ordre public*.
- The information received may be used for the purposes of investigations and proceedings concerning criminal offences established in accordance with the Convention.
- The transmission to other countries of information received by the requesting Party for purposes of investigations or proceedings may be dependent on the prior consent of the requested Party.

I. Parties

The Criminal Law Convention on Corruption has been opened for signature by the member States of the Council of Europe and for accession by non-member States on 27 January 1999. The Convention entered into force on 1st January 2012. It has been ratified/acceded by 43 States.[1]

The Convention has been supplemented by an Additional Protocol in 2003. Unless otherwise indicated, details below refer to the Criminal Law Convention on Corruption as complemented by the 2003 Additional Protocol.

II. Scope (Chapter II and Chapter IV)

The Criminal Law Convention on Corruption as complemented by the 2003 Additional Protocol aims at co-ordinating criminalisation of a large number of corrupt practices. To do so, Chapter II of the Convention - entitled measures to be taken at

1. Status of ratification as at April 2012: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, Belarus.

national level - provides for a certain number of conducts which should be considered by Parties as criminal offences and sanctioned thereby.

These conducts include: active bribery of domestic public officials (Art. 2), passive bribery of domestic public officials (Art. 3), bribery of members of domestic public assemblies (Art. 4), bribery of foreign public officials (Art. 5), bribery of members of foreign public assemblies (Art. 6), active bribery in the private sector (Art. 7), passive bribery in the private sector (Art. 8), bribery of officials of international organisations (Art. 9), bribery of members of international parliamentary assemblies (Art. 10), bribery of judges and officials of international courts (Art. 11), trading in influence (Art. 12), money laundering of proceeds from corruption offences (Art. 13), account offences (Art. 14), participatory acts (Art. 15).

The 2003 Additional Protocol added to the list: active bribery of domestic arbitrators (Art. 2), passive bribery of domestic arbitrators (Art. 3), bribery of foreign arbitrators (Art. 4), bribery of domestic jurors (Art. 5) and bribery of foreign jurors (Art. 6).

The Convention provides for domestic co-operation (Art. 21) and international co-operation (Chapter IV) between Parties for the purposes of investigations and proceedings concerning criminal offences established in accordance with the Convention.

III. Forms of co-operation (Art. 21, Art. 25, Art. 26, Art. 27 and Art. 28)

Co-operation with and between national authorities (Art. 21)

Article 21 of the Convention provides that Parties shall adopt such measures as may be necessary to ensure that public authorities, as well as any public official, co-operate with those of its authorities responsible for investigating and prosecuting criminal offences: (a) by informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the criminal offences established in accordance with the Convention has been committed; or (b) by providing, upon request, to the latter authorities all necessary information.

International co-operation (Art. 25, Art. 26, Art. 27 and Art. 28)

The Parties shall co-operate with each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal matters, or arrangements agreed on the basis of uniform or reciprocal legislation (Art. 25, para 1). Where no such international instrument or arrangement is in force between Parties, Article 25 paragraph 2 provides that the following forms of co-operation shall apply:

a) Mutual assistance (Art. 26)

Parties shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that have the power to investigate or prosecute criminal offences established in accordance with the Convention (Art. 26, para 1).

b) Extradition (Art. 27)

The criminal offences established under the Convention shall be considered as extraditable offences in any extradition treaty existing between or among the Parties. The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them (Art. 27, para 1). If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it does not have an extradition treaty, it may consider this

Convention as the legal basis for extradition with respect to any criminal offence established in accordance with the Convention (Art. 27, para 2). Parties that do not make extradition conditional on the existence of a treaty shall recognise criminal offences established in accordance with the Convention as extraditable offences between themselves (Art. 27, para 3).

c) Spontaneous information (Art. 28)

Article 28 states that without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with the Convention or might lead to a request by that Party.

IV. Authorities that can use the instrument (Art. 29 and Art. 30)

Article 29 paragraph 1 provides that Parties shall designate a central authority or several central authorities which shall be responsible for sending and answering requests made under the Convention, the execution of such requests or the transmission of them to the authorities competent for their execution. Most of the Parties designated their Ministry of Justice.

The central authorities shall communicate directly with one another (Art. 30, para 1). However, in the event of urgency, requests for mutual assistance or communications related thereto may be sent directly by the judicial authorities, including public prosecutors, of the requesting Party to such authorities of the requested Party (Art. 30, para 2). Requests or communications related thereto may be made through the International Criminal Police Organisation (Art. 30, para 3).

V. Conditions for requesting assistance (Art. 26 and Art. 27)

Regarding mutual assistance, reference should be made to other instruments on international co-operation in criminal matters such as the European Convention on Mutual Assistance in Criminal Matters. The latter provides in its Article 14 that requests for mutual assistance shall indicate: (a) the authority making the request, (b) the object of and the reason for the request, (c) where possible, the identity and the nationality of the person concerned and (d) where necessary, the name and address of the person to be served.

Article 26 paragraph 3 of the Criminal Law Convention on Corruption provides that where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties (Art. 27, para 4). Article 12 of the European Convention on Extradition provides that the request shall be in writing. It shall be supported by:

a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

b) a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

VI. Grounds for denying/postponing assistance (Art. 26 and Art. 27)

Article 26 paragraph 2 provides that mutual legal assistance may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or *ordre public.* However, Parties shall not invoke bank secrecy as a ground to refuse any co-operation under the Convention (Art. 26, para 3).

Regarding extradition, reference should be made to other instruments on international co-operation in criminal matters such as the European Convention on Extradition providing for instance that the requested Party may refuse to extradite the person claimed if the competent authorities of such Party are already proceeding against him in respect of the offence or offences for which extradition is requested (Art. 8). Article 27 paragraph 5 of the Criminal Law Convention on Corruption states that if extradition for a criminal offence established in accordance with the Convention is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Part shall submit the case to its competent authorities for the purpose of prosecution.

VII. Use of information received

Regarding the use of information received, reference should be made to other instruments on international co-operation in criminal matters such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The latter provides that the requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be used by the authorities of the requesting Party of investigations or proceedings other than those specified in the request (Art. 32).

VIII. Sharing of information received with other local authorities

Regarding the sharing of information received with other local authorities, reference should be made to other instruments on international co-operation in criminal matters such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The latter provides that the requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request (Art. 32).

Moreover, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides that the requesting Party shall keep confidential any evidence and information provided by the requested Party, if not contrary to its national law and if so requested, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request (Art. 33, para 2). For its part, the requesting Party may require that the requested Party keep confidential the facts and

substance of the request, except to the extent necessary to execute the request (Art. 33, para 1).

IX. Sharing of information received with foreign authorities

Regarding the sharing of information received with foreign authorities, reference should be made to other instruments on international co-operation in criminal matters such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The latter provides that the requested Party may make the execution of a request dependent on the condition that the information or evidence obtained will not, without its prior consent, be transmitted by the authorities of the requesting Party for investigations or proceedings other than those specified in the request (Art. 32).

Moreover, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides that the requesting Party shall keep confidential any evidence and information provided by the requested Party, if not contrary to its national law and if so requested, except to the extent that its disclosure is necessary for the investigations or proceedings described in the request (Art. 33, para 2). For its part, the requesting Party may require that the requested Party keep confidential the facts and substance of the request, except to the extent necessary to execute the request (Art. 33, para 1).

X. Relationship with other instruments (Art. 35)

The Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters (Art. 35, para 1). The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it (Art. 35, para 2). Further, the Convention provides that if two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in the Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation (Art. 35, para 3).

The relations between the Criminal Law Convention on Corruption and the 2003 Additional Protocol are regulated by the Article 30 of the Vienna Convention of the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter. The Article states that when all the Parties to the earlier treaty are Parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty (Art. 30, para 3). However, when the Parties to the later treaty do not include all the Parties to the earlier one:

a) as between Parties to both treaties, the same rule applies as in paragraph 3;

b) as between a Party to both treaties and a Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

4. Inter-American Convention against Corruption

Key Points

- The Convention is aimed at promoting and strengthening the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption. It also aims to promote, facilitate and regulate co-operation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance (Art II).
- The Convention provides for three forms of international co-operation, namely extradition (Art. XIII), assistance and co-operation (Art. XIV) and measures regarding property (Art. XV).
- The Convention only provides for restrictions on the use of the information when this is protected by bank secrecy.
- Each State Party may designate a central competent authority for the purposes of assistance and co-operation as provided under the Convention. Such central authorities shall communicate with each other directly for the purposes of the Convention. Some States Parties designated as central competent authority the Ministry of Foreign Affairs, others designated the Ministry of Justice.

I. Parties

The Inter-American Convention against Corruption[1] (hereinafter referred as to the "Convention") was adopted by the Organization of American States at its third plenary meeting in 1996. Currently there are 34 parties to the Convention.

II. Scope (Art. II, Art. VI, Art. VIII and Art. IX)

The purposes of the Convention are (a) to promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and (b) to promote, facilitate and regulate co-operation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance (Art. II).

It provides for the criminalisation of a number of offences, namely acts of corruption (Art. VI), transnational bribery (Art. VII), illicit enrichment (Art. IX), improper use of confidential information and public property (Art. XI). The Convention is applicable provided that the alleged act of corruption has been committed or has effects in a State Party (Art. IV).

1. Status of ratifications as at April 2012: Argentina, Antigua & Barbuda, Bahamas (Commonwealth), Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St Kitts & Nevis, St Lucia, St. Vincent & Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, Venezuela.

III. Forms of co-operation (Art. XIII-XV)

The Convention allows for the following forms of co-operation: extradition (Art. XIII), assistance and co-operation (Art. XIV) and measures regarding property (Art. XV).

Assistance and Co-operation (Art. XIV)

In accordance with their domestic laws and applicable treaties, the States Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in the Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption (Art. XIV, para 1).

The States Parties shall also provide each other with the widest measure of mutual technical co-operation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption. To that end, they shall foster exchanges of experiences by way of agreements and meetings between competent bodies and institutions, and shall pay special attention to methods and procedures of citizen participation in the fight against corruption (Art. XIV, para 2).

Measures Regarding Property (Art. XV)

In accordance with their applicable domestic laws and relevant treaties or other agreements that may be in force between or among them, the States Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with this Convention (Art. XV, para 1).

A State Party that enforces its own or another State Party's forfeiture judgment against property or proceeds described in paragraph 1 of this article shall dispose of the property or proceeds in accordance with its laws. To the extent permitted by a State Party's laws and upon such terms as it deems appropriate, it may transfer all or part of such property or proceeds to another State Party that assisted in the underlying investigation or proceedings (Art. XV, para 2).

IV. Authorities that can use the instrument (Art. XVIII)

For the purposes of international assistance and co-operation provided under the Convention, each State Party may designate a central authority or may rely upon such central authorities as are provided for in any relevant treaties or other agreements. The central authorities shall be responsible for making and receiving the requests for assistance and co-operation referred to in the Convention. The central authorities shall communicate with each other directly for the purposes of the Convention (Art. XVIII).

Some States Parties designated as central competent authority for the purposes of mutual assistance the Ministry of Foreign Affairs, others designated the Ministry of Justice.

V. Conditions for requesting assistance

(N.A)

VI. Grounds for denying/postponing assistance (Art. XVI and Art. XIX)

The Convention does not expressly provide for any circumstances where the Requested State may refuse assistance. However, it makes clear that the Requested State shall not invoke bank secrecy as a basis for refusal to provide the assistance sought by the Requesting State. The Requested State shall apply this principle in accordance with its domestic law, its procedural provisions, or bilateral or multilateral agreements with the Requesting State (Art. XVI).

Further, the Convention makes it clear that, subject to the constitutional principles and the domestic laws of each State and existing treaties between the States Parties, the fact that the alleged act of corruption was committed before the Convention entered into force shall not preclude procedural co-operation in criminal matters between the States Parties. This provision shall in no case affect the principle of non-retroactivity in criminal law, nor shall application of this provision interrupt existing statutes of limitations relating to crimes committed prior to the date of the entry into force of the Convention (Art. XIX).

VII. Use of information received (Art. XVI, para 2)

The Convention only provides for restrictions on the use of the information when this is protected by bank secrecy. Indeed, it states that the Requesting State shall be obligated not to use any information received that is protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorised by the Requested State.

VIII. Sharing of information received with other local authorities

(N.A)

IX. Sharing of information received with foreign authorities

(N.A)

X. Relationship with other instruments (Art. XX)

No provision of the Convention shall be construed as preventing the States Parties from engaging in mutual co-operation within the framework of other international agreements, bilateral or multilateral, currently in force or concluded in the future, or pursuant to any other applicable arrangement or practice.

D. Regulation and Supervision related instruments

1. Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)

Key Points

- The Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) represents a common understanding amongst its signatories about how they will consult, co-operate, and exchange information for securities regulatory enforcement purposes.
- It provides for different forms of co-operation, namely: assistance in obtaining statements, exchange of information upon request and spontaneous exchange of information.
- Transmission of requests under the MMoU shall be effected between the securities regulators which have signed the MMoU.
- The MMoU provides for different grounds for denying / postponing assistance. For instance, assistance may be denied where the request would require the requested Authority to act in a manner that would violate domestic law or on grounds of public interest or essential national interest.
- The use of information received under the MMoU is limited to a few purposes including the purposes set forth in the request for assistance. If a requesting Authority intends to use the information for any other purposes, it must obtain first the consent of the requested Authority.
- The requesting Authority may not disclose information received under the MMoU, except in certain circumstances including where the disclosure responds to a legally enforceable demand.

I. Parties

The Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) was developed by IOSCO.[1] It has been adopted in May 2002 and has been signed by 82 regulators.[2]

[1] IOSCO is an international organisation consisting of most security regulators in the world. It seeks to provide an open forum for members and to establish a general framework for worldwide securities regulation, while also respecting the right of each country to regulate its own markets.

[2] Albanian Financial Services Authority (AFSA), **Albania;** Alberta Securities Commission (SC), **Alberta;** Australian Securities and Investments Commission (ASIC), **Australia;** Financial Market Authority (FMA), **Austria;** Central Bank of Bahrain (CBB), **Bahrain, Kingdom of;** Banking, Finance And Insurance Commission (CBF), **Belgium;** Bermuda Monetary Authority (BMA), **Bermuda;** Comissão de Valores Mobiliários (CVM), **Brazil;** British Columbia Securities Commission (BCSC), **British Columbia;** British Virgin Islands Financial Services Commission (FSC), **British Virgin Islands;** Financial Supervision Commission (FSC), **Bulgaria;** Cayman Islands Monetary Authority (CIMA), **Cayman Islands;** China Securities Regulatory Commission (CSRC), **China;** Superintendencia Financiera de Colombia, **Colombia;** Croatian Financial

II. Scope (Art. 7)

According to Article 7(a), the securities regulators which have signed the MMoU, hereinafter referred to as the Authorities will provide each other with the fullest assistance

Services Supervisory Authority (FSSA), **Croatia, Republic of;** Cyprus Securities and Exchange Commission (CySEC), **Cyprus, Republic of;** Czech National Bank (CNBC), **Czech Republic;** Denmark Financial Supervisory Authority (DFSA), **Denmark;** Dubai Financial Services Authority (DFSA), **Dubai;** The Financial Supervision Authority (FSA), **Estonia;** Financial Supervision Authority (FSA), **Finland;** The Securities and Exchange Commission of the Republic of Macedonia (MSEC), **Former Yugoslav Republic of Macedonia;** Autorité des marchés financiers (COB), **France;** Bundesanstalt für Finanzdienstleistungaufsicht (BAFin), **Germany;** Hellenic Republic Capital Market Commission (CMC), **Greece;** Guernsey Financial Services Commission (FSC), **Guernsey;** Securities and Futures Commission (SFC), **Hong Kong;** Hungarian Financial Supervisory Authority (HFSA), **Hungary;** The Financial Supervisory Authority (FME), **Iceland;** Securities and Exchange Board of India (SEBI), **India;** Financial Supervision Commission (IMFSC), **Isle of Man;** Israel Securities Authority (ISA), **Israel;** Commissione Nazionale per le Società e la Borsa (CONSOB), **Italy;** Financial Services Agency (FSA), **Japan;** The Ministry of Agriculture, Forestry and Fisheries, **Japan;** The Ministry of Economy, Trade and Industry, **Japan;** Jersey Financial Services Commission (FSC), **Jersey;** Jordan Securities Commission (JSC), **Jordan;** Capital Markets Authority of the Republic of Kenya (CMA), **Kenya;** The Financial Supervisory Commission (FSC) / Financial Supervisory Service (FSS), **Korea, Republic of;** The Financial Market Authority (FMA), **Liechtenstein;** Lithuanian Securities Commission (LSC), **Lithuania;** Commission de surveillance du secteur financier (CSSF), **Luxembourg;** Securities Commission (SC), **Malaysia;** The Capital Market Development Authority (CMDA), **Maldives;** Malta Financial Services Authority (MFSA), **Malta;** Comision Nacional Bancaria Y De Valores (CNBV), **Mexico;** Montenegro Securities Commission (MSC), **Montenegro;** Conseil déontologique des valeurs mobilières (CDVM), **Morocco;** The Netherlands Authority for the Financial Markets (AFM), **Netherlands, The;** Securities Commission (SC), **New Zealand;** Securities and Exchange Commission (NSEC), **Nigeria;** The Financial Supervisory Authority of Norway (FSA), **Norway;** Capital Market Authority, **Oman, Sultanate of;** Ontario Securities Commission (OSC), **Ontario;** The Securities and Exchange Commission (SECP), **Pakistan;** Financial Supervision Authority (PSEC), **Poland;** Comissão do Mercado de Valores Mobiliários (CMVM), **Portugal;** Autorité des marchés financiers (AMF), **Québec;** Romanian National Securities Commission (RNSC), **Romania;** The Capital Market Authority (CMA), **Saudi Arabia;** Securities Commission (SC), **Serbia, Republic of;** Monetary Authority of Singapore (MAS), **Singapore;** The National Bank of Slovakia (FMA), **Slovak Republic;** Securities Market Agency (SMA), **Slovenia;** Financial Services Board (FSB), **South Africa;** Comisión Nacional del Mercado de Valores (CNMV), **Spain;** Securities and Exchange Commission (SEC), **Sri Lanka;** Securities Commission of the Republic of Srpska, ("The Commission"), **Srpska, Republic of;** The Finansinspektionen (FI), **Sweden;** Swiss Financial Market Supervisory Authority (FINMA), **Switzerland;** The Syrian Commission on Financial Markets and Securities (SCFMS), **Syrian Arab Republic;** Financial Supervisory Commission (FSC), **Chinese Taipei;** The Capital Market and Securities Authority (CMSA), **Tanzania;** Securities and Exchange Commission of Thailand (SEC), **Thailand;** Conseil du Marché Financier(CMF), **Tunisia;** Capital Markets Board (CMB), **Turkey;** Financial Services Authority (FSA), **United Kingdom;** Commodity Futures Trading Commission (CFTC), **United States of America;** Securities and Exchange Commission (SEC), **United States of America;** The Central Bank of Uruguay (CBU), **Uruguay;** Conseil régional de l'épargne publique et des marchés financiers (CREPMF), **West African Monetary Union.**

permissible to secure compliance with the Laws and Regulations[3] of the respective Authorities.

III. Forms of co-operation (Art. 7 and Art 13)

Article 7(b) provides that assistance under the MMoU shall include: (i) providing information and documents held in the files of the requested Authority regarding the matters set forth in the request for assistance; (ii) obtaining information and documents regarding the matters set forth in the request for assistance, including: contemporaneous records sufficient to reconstruct all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions; as well as records that identify the beneficial owner and controller, and for each transaction, the account holder, the amount purchased or sold, the time of the transaction, the price of transaction, and the individual and the bank or broker and brokerage house that handled the transaction; and information identifying persons who beneficially own or control legal persons organised in the jurisdiction of the requested Authority; (iii) taking or compelling a person's statement, or where, permissible, testimony under oath, regarding the matters set forth in the request for assistance.

Article 13 provides for spontaneous exchange of information. It states that each authority shall make all reasonable efforts to provide, without prior request, the other Authorities with any information that it considers is likely to be of assistance to those other Authorities in securing compliance with Laws and Regulations applicable in their jurisdiction.

IV. Authorities that can use the instrument (Art. 7)

Transmission of requests under the MMoU shall be effected between the Authorities (Art. 7).

V. Conditions for requesting assistance (Art. 8 and Appendix C)

Article 8(a) provides that requests for assistance under the MMoU shall be made in writing and in such form as may be agreed by IOSCO. A form for drafting requests for information is provided in Appendix C to the MMoU. However, Article 8(c) specifies that requests for assistance may be effected by telephone or facsimile, in urgent circumstances, provided such communication is confirmed through an original, signed document.

According to Article 8(b), requests for assistance shall include the following elements: (i) a description of the facts underlying the investigation that are the subject of

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3. "Laws and Regulations" are defined by the MMoU as the provisions of the laws of the jurisdictions of the Authorities, the regulations promulgated thereunder, and other regulatory requirements that fall within the competence of the Authorities, concerning the following : (a) insider dealing, market manipulation, misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives, including solicitation practices, handling of investor funds and customer orders; (b) the registration, issuance, offer, or sale of securities and derivatives, and reporting requirements related thereto; (c) market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents; and (d) markets, exchanges, and clearing and settlement entities.

the request, and the purpose for which the assistance is sought; (ii) a description of the assistance sought by the requesting Authority and why the information sought will be of assistance; (iii) any information known to, or in the possession of, the requesting Authority that might assist the requested Authority in identifying either the persons believed to possess the information or documents sought or the places where such information may be obtained; (iv) an indication of any special precautions that should be taken in collecting the information due to investigatory considerations, including the sensitivity of the information; and (v) the Laws and Regulations that may have been violated and that relate to the subject matter of the request.

VI. Grounds for denying / postponing assistance (Art. 6 and Art. 7)

Article 6(e) states that requests for assistance may be denied by the requested Authority: (i) where the request would require the requested Authority to act in a manner that would violate domestic law; (ii) where a criminal proceeding has already been initiated in the jurisdiction of the requested Authority based upon the same facts and against the same persons, or the same persons have already been the subject of final punitive sanctions on the same charges by the competent authorities of the jurisdiction of the requested Authority, unless the requesting Authority can demonstrate that the relief or sanctions sought in any proceedings initiated by the requesting Authority would not be of the same nature or duplicative of any relief or sanctions obtained in the jurisdiction of the requested Authority; (iii) where the request is not made in accordance with the provisions of the MMoU; or (iv) on grounds of public interest or essential national interest.

Article 6(e) further specifies that where a request for assistance is denied, or where assistance is not available under domestic law, the requested Authority shall provide the reasons for not granting the assistance.

Article 7(c) provides that assistance shall not be denied based on the fact that the type of conduct under investigation would not be a violation of the Laws and Regulations of the requested Authority.

VII. Use of information received (Art. 10)

Article 10(a) limits the use of non-public information and non-public documents furnished in response to a request for assistance to the requesting Authority. It states, that such information and documents may be used solely for: (i) the purposes set forth in the request for assistance, including ensuring compliance with the Laws and Regulations related to the request; and (ii) a purpose within the general framework of the use stated in the request for assistance, including conducting a civil or administrative enforcement proceeding, assisting in a self-regulatory organisation’s surveillance or enforcement activities (insofar as it is involved in the supervision of trading or conduct that is the subject of the request), assisting in a criminal prosecution, or conducting any investigation for any general charge applicable to the violation of the Laws and Regulations administered by the requesting Authority. This use may include enforcement proceedings which are public.

For any other purpose, Article 10(b) specifies that the requesting Authority shall seek the consent of the requested Authority.

VIII. Sharing of information received with other local authorities (Art. 11)

Article 11(a) provides that each Authority shall keep confidential requests made under the MMoU, their contents and any matters arising in relation to them.

Moreover, according to Article 11(b), the requesting Authority shall not disclose non-public information and documents received under the MMoU, except as contemplated by Article 10(a) defined above or in response to a legally enforceable demand. Article 11(b) further specifies that in the event of a legally enforceable demand, the requesting Authority shall notify the requested Authority prior to complying with the demand.

IX. Sharing of information received with foreign authorities (Art. 11)

Article 11(a) provides that each Authority shall keep confidential requests made under the MMoU, their contents and any matters arising in relation to them.

Moreover, according to Article 11(b), the requesting Authority shall not disclose non-public information and documents received under the MMoU, except as contemplated by Article 10(a) defined above or in response to a legally enforceable demand. Article 11(b) further specifies that in the event of a legally enforceable demand, the requesting Authority shall notify the requested Authority prior to complying with the demand.

X. Relationship with other instruments (Art. 6 and FAQ)

Article 6(a) provides that the provisions of the MMoU are not intended to create legally binding obligations or supersede domestic laws. Paragraph 5 of the FAQ to the MMoU specifies that signatories can execute their responsibilities under the MMoU within their legal framework.

2. Basel Committee on Banking Supervision Core Principles for Effective Banking Supervision and Core Principles Methodology

Key Points

- The Core Principles for Effective Banking Supervision represent a voluntary framework of minimum standards that are needed for a banking supervisory system to be effective. They were developed together with the Core Principles Methodology which is a tool for assessing compliance with the Principles.
- The Principles aim at improving financial stability domestically and internationally and provide a basis for further development of effective supervisory systems. They provide for measures aimed to prevent the banking system from being abused, intentionally or unintentionally, for criminal purposes. National authorities should apply the Principles in the supervision of all banking organisations within their jurisdictions.
- The Principles generally provide for co-operation and exchange of information between financial sector supervisors, at both domestic and international level, under formal or informal arrangements (Principle 1). Further, they provide for sharing of information regarding transactions suspected of money laundering and terrorist financing from supervisors to FIUs and from supervisors to judicial authorities. In this respect, the Principles also allow supervisors to co-operate with the relevant domestic and foreign financial sector supervisory authorities or to share with them information.
- Supervisors may provide confidential information to another domestic or foreign financial sector supervisor. Reasonable steps need to be taken to ensure that any confidential information released to another supervisor will be used only for supervisory purposes and will be treated as confidential by the receiving party. The supervisor receiving confidential information from other supervisors is also required to take reasonable steps to ensure that the confidential information will be used only for supervisory purposes and will be treated as confidential.

I. Parties

The Core Principles for Effective Banking Supervision (hereinafter referred to as “the Core Principles”) represent a voluntary framework of minimum standards that are needed for a banking supervisory system to be effective and are considered universally applicable.[1] They were originally developed in 1997, together with the Core Principles Methodology (hereinafter referred as to “the Methodology”), by the Basel Committee on Banking Supervision as its contribution to strengthening the global financial system.[2] The

[1] The Core Principles are conceived as a voluntary framework of minimum standards for sound supervisory practices; national authorities are free to put in place supplementary measures that they deem necessary to achieve effective supervision in their jurisdictions. Further, the Principles are not designed to cover all the needs and circumstances of every banking system. Instead, specific country circumstances should be more appropriately considered in the context of the assessments and in the dialogue between assessors and country authorities.

[2] The Basel Committee on Banking Supervision provides a forum for regular co-operation on banking supervisory matters. Its objective is to enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide. It seeks to do so by exchanging information on national supervisory issues, approaches and techniques, with a view to promoting common understanding. As at April 2012, the Committee's members come from Argentina,

current version of the Core Principles was issued in 2006 as result of a review carried out by the Committee which acted in close consultation with senior representatives of Committee member countries, non-G10 supervisory authorities, the International Monetary Fund, the World Bank and other international standard-setting bodies.[3] One aim of the 2006 review was to enhance – where possible – consistency between the Principles and the corresponding standards for securities and insurance as well as for anti-money laundering and transparency. In December 2011 a revised version of the Core Principles was issued for consultation. The Methodology was developed as a tool for assessing compliance with the Principles by proposing a set of essential and additional assessment criteria for each Principle.

II. Scope

The Principles aim at improving financial stability domestically and internationally and provide a basis for further development of effective supervisory systems. They apply, *inter alia*, to the prevention and detection of criminal activity in the financial sector. In particular, they provide for measures aimed to prevent the banking system from being abused, intentionally or unintentionally, for criminal purposes. National authorities should apply the Principles in the supervision of all banking organisations within their jurisdictions (Principles, para 7).

III. Forms of co-operation

The Principles generally provide for co-operation and exchange of information between financial sector supervisors, at both domestic and international level, under formal or informal arrangements (Principle 1). Further, they provide for sharing of information regarding transactions suspected of money laundering and terrorist financing from supervisors to FIUs (Methodology for Principle 18, para 2) and from supervisors to judicial authorities (Methodology for Principle 18, para 11). In this respect, the Principles also allow supervisors to co-operate with the relevant domestic and foreign financial sector supervisory authorities or to share with them information (Methodology for Principle 18, para 12).

Exchange of information between supervisors under formal or informal arrangements (Principle 1)

The Principles state that arrangements for sharing information between supervisors and protecting the confidentiality of such information should be in place (Principle 1). The Methodology clarifies that arrangements, formal or informal, should be in place for co-operation and information sharing between all domestic authorities with responsibility for the soundness of the financial system, and there should be evidence that these arrangements work in practice, where necessary (Methodology for Principle 1(6), para 1). Arrangements, formal or informal, should be also in place, where relevant, for co-operation and information sharing with foreign financial sector supervisors of banks

Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

3. These are the International Association of Insurance Supervisors (IAIS), the International Organization of Securities Commissions (IOSCO), the Financial Action Task Force (FATF) and the Committee on Payment and Settlement Systems (CPSS).

and banking groups of material interest to the home or host supervisor[4], and there is evidence that these arrangements work in practice, where necessary (Methodology for Principle 1(6), para 2). The supervisor may provide confidential information to another domestic or foreign financial sector supervisor (Methodology for Principle 1(6), para 3).

Provision of information to FIUs or other designated authorities (Principle 18)

Consistent with international standards, the Principles provide for reporting obligations for banks regarding suspicious activities involving cases of potential money laundering or terrorist financing to the appropriate authorities (financial intelligence units or other designated authorities) (Methodology for Principle 18, para 2). In addition to this, banks are required to report to the banking supervisor suspicious activities and incidents of fraud when they are material to the safety, soundness or reputation of the bank (Methodology for Principle 18, para 3).[5] Under the Principles, supervisors are allowed to inform the FIU and, if applicable, other designated authorities of any suspicious transaction as above described (Methodology for Principle 18, para 11).

Provision of information to judicial authorities (Principle 18)

The Principles state that the supervisor should be able, directly or indirectly, to share with relevant judicial authorities information related to suspected or actual criminal activities (Methodology for Principle 18, para 11).

Provision of information and co-operation with relevant financial sector supervisory authorities (Principle 18)

The Principles state that the supervisor is able, directly or indirectly, to co-operate with the relevant domestic and foreign financial sector supervisory authorities or share with them information related to suspected or actual criminal activities where this information is for supervisory purposes (Methodology for Principle 18, para 12).

4. An essential element of banking supervision is that supervisors supervise the banking group on a consolidated basis, adequately monitoring and, as appropriate, applying prudential norms to all aspects of the business conducted by the group worldwide (Principle 24). For the purposes of such consolidated supervision, a banking group includes the bank and its offices, subsidiaries, affiliates and joint ventures, both domestic and foreign. Other entities, for example parent companies and non-bank (including non-financial) group entities, may also be relevant. This group-wide approach to supervision, whereby all risks run by a banking group are taken into account, wherever they are booked, goes beyond accounting consolidation. Cross-border consolidated supervision requires co-operation and information exchange between home supervisors and the various other supervisors involved, primarily host banking supervisors. Banking supervisors must require the local operations of foreign banks to be conducted to the same standards as those required of domestic institutions (Principle 25).

5. The Methodology makes it clear that, in some jurisdictions, other authorities, such as an FIU, rather than a banking supervisor, may have primary responsibility for assessing compliance with laws and regulations regarding criminal activities in banks, such as fraud, money laundering and terrorist financing. Thus, in this context, the term “supervisor” might refer to such other authorities. In such jurisdictions, the banking supervisor co-operates with such authorities to achieve adherence with the criteria mentioned in the Principles (Methodology for Principle 18, ref. 30).

IV. Authorities that can use the instrument

The Principles are generally addressed to financial sector supervisory authorities. However, the Methodology recognises that, in some jurisdictions, other authorities, such as an FIU, rather than a banking supervisor, may have primary responsibility for assessing compliance with laws and regulations regarding criminal activities in banks, such as fraud, money laundering and terrorist financing. Thus, in this context, the term "supervisor" might also refer to such other authorities. In such jurisdictions, the banking supervisor co-operates with such authorities to achieve adherence with the criteria mentioned in the Principles (Methodology for Principle 18, ref. 30).

V. Conditions for requesting assistance

(N.A)

VI. Grounds for denying/postponing assistance

The Methodology states that the supervisor is able to deny any demand, other than a court order or mandate from a legislative body, for confidential information in its possession (Methodology for Principle 1(6), para 4).

VII. Use of information received

The supervisor is required to take reasonable steps to ensure that any confidential information released to another supervisor will be used only for supervisory purposes. On its side, the supervisor receiving confidential information from other supervisors is also required to take reasonable steps to ensure that the confidential information will be used only for supervisory purposes (Methodology for Principle 1(6), para 3).

VIII. Sharing of information received with other local authorities

The supervisor is required to take reasonable steps to ensure that any confidential information released to another supervisor will be treated as confidential by the receiving party. On its side, the supervisor receiving confidential information from other supervisors is also required to take reasonable steps to ensure that the confidential information will be treated as confidential (Methodology for Principle 1(6), para 3).

IX. Sharing of information received with foreign authorities

The supervisor is required to take reasonable steps to ensure that any confidential information released to another supervisor will be treated as confidential by the receiving party. On its side, the supervisor receiving confidential information from other supervisors is also required to take reasonable steps to ensure that the confidential information will be treated as confidential (Methodology for Principle 1(6), para 3). In this respect, the Methodology does not distinguish between domestic and foreign supervisors receiving the information.

X. Relationship with other instruments

(N.A)

E. Other mutual legal assistance instruments

1. European Convention on Mutual Assistance in Criminal Matters as complemented by the 1978 First Additional Protocol and the 2001 Second Additional Protocol

Key points

- The Convention sets out rules for the enforcement of letters rogatory by the authorities of a Party which aim to procure evidence or to communicate the evidence in criminal proceedings undertaken by the judicial authorities of another Party.
- It provides for different forms of co-operation: search or seizure of property, service of writs and records of judicial verdicts, audition of witnesses, experts and persons in custody, communication and exchange of judicial records, and laying of information in connection with proceedings.
- Transmission of requests for mutual legal assistance under this Convention shall be effected either between the Ministers of Justice of the requesting Party and the requested Party or between their judicial authorities.
- The Convention has been supplemented by the 1978 First Additional Protocol and the 2001 Second Additional Protocol both of which aim at extending the scope of mutual assistance in criminal matters.

I. Parties

The European Convention on Mutual Assistance in Criminal Matters has been opened for signature by the member States of the Council of Europe and for accession by non-member States on 20 April 1959. The Convention entered into force on 12 June 1962. The Convention has been ratified / acceded by 50 States.[1]

The Convention has been supplemented by two Additional Protocols, namely the 1978 First Additional Protocol and the 2001 Second Additional Protocol. Unless otherwise indicated, details below refer to the European Convention on Mutual Assistance in Criminal Matters as complemented by the 1978 First Additional Protocol. The 2001 Second Additional Protocol will be dealt with separately.

II. Scope (Art. 1)

Parties undertake to afford each other mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party (Art. 1, para 1). Provision is thus made for minor offences as well as for other, serious, offences. Mutual

[1]. Status of ratifications as at April 2012: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom and non member States Chile, Israel, Korea.

assistance must also be accorded in cases where the offence comes under the jurisdiction of the requested Party. The Convention applies only to judicial proceedings as opposed to administrative proceedings (Comm. n. 1).

This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law (Art. 1, para 2).

III. Forms of co-operation

The Convention provides for different forms of co-operation: search or seizure of property (Art. 5), service of writs and records of judicial verdicts (Art. 7), audition of witnesses, experts and persons in custody (Art. 10 and 11), communication and exchange of judicial records (Art. 13 and 22), and laying of information in connection with proceedings (Art. 21).

Search or seizure of property (Art. 5)

The requesting Party can ask the requested Party to carry out search or seizure of property. However, any Party may reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions: (a) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party; (b) that the offence motivating the letters rogatory is an extraditable offence in the requested country; (c) that execution of the letters rogatory is consistent with the law of the requested Party (Art. 5, para 1).

Article 2 paragraph 1 of the First Additional Protocol states that in the case where a 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[2] under the law of the requested Party.

Service of writs and records of judicial verdicts (Art. 7)

The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party (Art. 7, para 1).

Mutual assistance concerning the enforcement of sentences and similar measures (Art. 3 of the 1978 First Additional Protocol)

Article 3 of the First Additional Protocol provides that assistance is to be granted (a) with regard to the service of documents concerning the enforcement of a sentence or similar measures, as the recovery of a fine or the payment of costs, as well as (b) with regard to certain measures concerning the enforcement of the sentence (suspension,

[2] Since the laws of Parties differ in respect of the constituent element of the various "fiscal offences", Article 2 of the First Additional Protocol provides that the condition of dual criminal liability laid down in Article 5.1*a* of the Convention is fulfilled if the offence corresponds to "an offence of the same nature" under the law of the requested Party (Explanatory report of the First Additional Protocol, para 14).

conditional release, deferment of the commencement, interruption of the enforcement, pardon).

Audition of witnesses, experts and persons in custody (Art. 8, Art. 10 and Art. 11)

If the requesting Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, it shall so mention in its request for service of the summons and the requested Party shall invite the witness or expert to appear (Art. 10, para 1). It should be noted that witnesses and experts are free not to go (Art. 8).

Moreover, the requesting Party can ask for the temporary transfer of a person in custody for the purposes of confrontation or appearance as a witness. However, it should be noted that transfer may be refused if: (a) the person in custody does not consent; (b) his presence is necessary at criminal proceedings pending in the territory of the requested Party; (c) transfer is liable to prolong his detention or (d) there are other overriding grounds for not transferring him to the territory of the requesting Party (Art. 11, para 1).

Communication and exchange of judicial records (Art. 13 and Art. 22)

Article 13 provides that "a requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case" (para 1).

Article 22 provides that each Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records.

Laying of information in connection with proceedings (Art. 21)

Article 21 enables any Party to request another Party to institute proceedings against an individual. It refers in particular to cases where a person, having committed an offence in the requesting country, takes refuge in the territory of the requested country and cannot be extradited (Comm. n. 21).

Article 21 paragraph 1 states that information laid by one Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministers of Justice concerned. The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced (Art. 21, para 2).

IV. Authorities that can use the instrument (Art. 1, Art. 15 and Art. 24)

Judicial authorities and Ministries of Justice can use the instrument.

Article 15 provides that letters rogatory shall, in principle, be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels. Nevertheless, in case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. In cases where direct transmission is permitted under the Convention, it may take place through Interpol (Art. 15, para 5).

Article 24 of the Convention provides that a Contracting Party may, when signing the Convention or depositing its instrument of ratification or accession, by a declaration

addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of the Convention, deem judicial authorities. For instance, Parties considered for the purposes of this Convention as judicial authorities among other authorities: criminal courts (Austria, France), departments of public prosecution (United Kingdom, Italy) or examining magistrates (Belgium, France).

V. Conditions for requesting assistance (Art. 14)

Requests for mutual assistance shall indicate: (a) the authority making the request, (b) the object of and the reason for the request, (c) where possible, the identity and the nationality of the person concerned and (d) where necessary, the name and address of the person to be served (Art. 14, para 1). Furthermore, letters rogatory shall state the offence and contain a summary of the facts (Art. 14, para 2).

VI. Grounds for denying / postponing assistance (Art. 2, Art. 5, Art. 11 and Art. 19)

Article 2 of the Convention provides that assistance may be refused: (a) if the request concerns an offence which the requested Party considers a political offence, or a fiscal offence; (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

Article 1 of the First Additional Protocol removed the possibility under Article 2.a of the Convention for States to refuse assistance simply because the request concerns a fiscal offence.[3] The Additional Protocol thus puts fiscal and "ordinary" offences on the same footing. Further, Article 2 paragraph 2 states that the request may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Party.

Whenever a Party has reserved the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the conditions provided in Article 5, then in case of non compliance, the requested Party can deny assistance.

Furthermore, the requested Party may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings (Art. 6, para 1).

Article 11 sets out certain circumstances in which the transfer of a person in custody can be refused by the requested Party.

The requested Party shall give reasons for any refusal of mutual assistance (Art. 19).

VII. Use of information received (Art. 1)

Information received can be used in judicial proceedings in respect of offences the punishment of which falls within the competence of the judicial authorities of the requesting Party (Art. 1).

3. Article 5 of the European Convention on Extradition describes fiscal offences as offences in connection with taxes, duties, customs and exchange

Moreover, some Parties made specific reservations to the Convention and the 1978 First Additional Protocol restricting the use of information transmitted.[4]

VIII. Sharing of information received with other local authorities

Since no information is provided in the Convention as complemented by the 1978 First Additional Protocol on the sharing of information received with other local authorities, reference should be made to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

Some Parties have made specific reservations to the Convention and the 1978 First Additional Protocol concerning the sharing of information (*refer to footnote 4).*

IX. Sharing of information received with foreign authorities

Since no information is provided in the Convention as complemented by the 1978 First Additional Protocol on the sharing of information received with foreign authorities, reference should be made to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

Some Parties have made specific reservations to the Convention and the 1978 First Additional Protocol concerning the sharing of information (*refer to footnote 4).*

X. Relationship with other instruments (Art. 26)

The Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between Parties (Art. 26, para 1). This Convention shall not affect obligations incurred under the terms of any other bilateral or multilateral international convention which contains or may contain clauses governing specific aspects of mutual assistance in a given field (Art. 26, para 2).

The Parties may conclude between themselves bilateral or multilateral international agreements on mutual assistance in criminal matters only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein (Art. 26, para 3).

The relations between the European Convention on Mutual Assistance in Criminal Matters and the two Additional Protocols are regulated by the Article 30 of the Vienna Convention of the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter. The Article states that when all the Parties to the earlier treaty are Parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty (Art. 30, para 3). However, when the Parties to the later treaty do not include all the Parties to the earlier one:

a) As between Parties to both treaties, the same rule applies as in paragraph 3;

b) As between a Party to both treaties and a Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

4. For instance, the Republic of San Marino reserved the right to grant legal assistance under the condition that the results of inquiries as well as information, acts and documents transmitted shall neither be used nor transmitted, without previous consent, by the Requesting Party for purposes different from those stated in the request.

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

Key points

- The Second Additional Protocol, which entered into force in 2004, has been ratified/acceded by 25 member States of the Council of Europe and non-member States so far.
- It supplements the 1959 European Convention on Mutual Assistance in Criminal Matters and its 1978 Additional Protocol, in particular by broadening the range of situations in which mutual assistance may be requested (cross-border observations, controlled delivery, joint investigation teams, etc) and making the provision of assistance easier, quicker and more flexible. It also takes account of the need to protect individual rights in the processing of personal data.
- Depending on the situations, transmission of requests for mutual assistance under this Protocol shall be effected between the Ministers of Justice of the Parties or between their judicial or administrative authorities.

I. Parties

The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters has been opened for signature by the member States of the Council of Europe and for accession by non-member States on 8 November 2001. The Second Additional Protocol entered into force on 2 February 2004. It has been ratified / acceded by 27 States.[1]

It supplements the 1959 European Convention on Mutual Assistance in Criminal Matters and the 1978 Additional Protocol to it. Unless otherwise indicated, details below refer to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

II. Scope (Art. 1)

The European Convention on Mutual Assistance in Criminal Matters only applied in respect of offences the punishment of which fell within the jurisdiction of the judicial authorities of the requesting Party.

The Second Additional Protocol extends the scope of the Convention to cover the whole field of administrative criminal law[2] (Art. 1, para 3). The Convention applies

1. Status of ratifications as at April 2012: Albania, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark Estonia, France, Ireland, Latvia, Lithuania, Malta, Montenegro, Netherlands, Poland, Portugal, Romania, Serbia, Slovakia Switzerland, The former Yugoslav Republic of Macedonia, Ukraine, United Kingdom and non member-States Chile and Israel.

2. The purpose of paragraph 3 is to bring under the same treaty provisions on mutual assistance applicable to two types of national proceedings, namely (a) proceedings in respect of criminal offences and (b) proceedings in respect of infringements (sometimes called regulatory offences) punishable under criminal / administrative law. The rationale lies in that the same facts are often the subject of criminal proceedings in one State and the subject of criminal / administrative proceedings in another State (Comm. n. 22).

regardless of whether initially the proceedings in question fall within the jurisdiction of an administrative or a criminal authority in one State or other, if only, at a later stage, it is legally possible to bring such proceedings before a court having jurisdiction in criminal matters (Comm. n. 24).

III. Forms of co-operation

The Second Additional Protocol improves the forms of co-operation already existing under the Convention but also provides for the following new forms of co-operation.

Audition of witnesses, experts and persons in custody (Art. 9 and Art. 10)

The Second Additional Protocol provides with new means of auditioning witnesses, experts and persons in custody: hearing by video conference and telephone conference. Article 9 states that if a person is in one Party's territory and has to be heard as witness or expert by the judicial authorities of another Party, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by video conference. This provision also applies to accused persons or suspects (Art. 9, para 8).

Article 10 provides that the hearing of witnesses or experts can take place by telephone conference.

Spontaneous information (Art. 11)

Article 11 of the Second Additional Protocol introduces the possibility for Parties, without prior request, to forward to each other information about investigations or proceedings which might contribute to the common aim of responding to crime.

Temporary transfer of detained persons (Art. 13)

The Convention enables the requesting Party to ask the requested Party for the temporary transfer of a person in custody for the purposes of confrontation or appearance as a witness. The Second Additional Protocol supplements the Convention in that it enables for the transfer to operate the other way round. As such, the requesting Party which has requested an investigation for which the presence of a person held in custody on its own territory is required may temporarily transfer that person to the territory of the requested Party in which the investigation is to take place (Art. 13, para 1).

Cross-border observations (Art. 17)

Police officers of one of the Parties who, within the framework of a criminal investigation, are keeping under observation in their country a person who is presumed to have taken part in a criminal offence to which extradition may apply[3], or a person who it is strongly believed will lead to the identification or location of the above-mentioned person, shall be authorised to continue their observation in the territory of another Party where the latter has authorised cross-border observation in response to a request for assistance which has previously been submitted (Art. 17, para 1).

3. Extraditable offences are offences with respect to which, *in abstracto*, extradition is possible either under a treaty or under domestic legislation. The concrete circumstances of the case may not be used in order to characterise an offence as extraditable or not (Comm. n. 139).

Controlled delivery (Art. 18)

Article 18 of the Second Additional Protocol enables a Contracting Party to request for controlled deliveries[4] to be carried out in the territory of another Party.

Covert investigations (Art. 19)

Article 19 paragraph 1 states that the requesting and the requested Parties may agree to assist each other in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations).

Joint investigation teams (Art. 20)

Article 20 paragraph 1 provides that two or more Parties may set up a joint investigation team for a specific purpose and a limited period to carry out criminal investigations in one or more of the Parties setting up the team.

Protection of witnesses (Art. 23)

Whenever a witness is at risk of intimidation or in need of protection, the requested Party can be asked to take measures for his protection.

Provisional measures (Art. 24)

Article 24 of the Second Additional Protocol provides that a Contracting Party can be requested to take, in accordance with its national law, measures for the purpose of preserving evidence, maintaining an existing situation or protecting endangered legal interests.

IV. Authorities that can use the instrument (Art. 4, Art. 6 and Art. 27)

Both judiciary and administrative authorities can use the instrument. Article 6 and 27 of the Second Additional Protocol state that Parties may at any time, by means of a declaration addressed to the Secretary General of the Council of Europe, define what authorities they will deem judiciary or administrative authorities for the purposes of the application of the Convention and the Protocols. For instance, most of the Parties considered for the purposes of the application of the Convention and the Protocols as judicial authorities among other authorities: ordinary courts (Estonia, Ukraine) or the Ministry of Justice (Czech Republic). Regarding administrative authorities, some Parties designated the departments of public prosecution (Netherlands), others did not designate any administrative authority.

In respect of the channels of communication, requests for mutual assistance as well as spontaneous information shall, in principle, be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels. Nevertheless, in certain cases such as urgency, letters

[4] Under Article 1 (g) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, “controlled delivery” means the technique of allowing illicit or suspect consignments of goods or money, or items substituted for them, to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences.

rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party (Art. 4, para 1).

Where requests concern administrative/criminal offences, letters rogatory may be forwarded directly from administrative authority to administrative authority.

In urgent cases, where direct transmission is permitted under this Convention, it may take place through Interpol (Art. 4, para 7).

V. Conditions for requesting assistance

Since no information is provided in the Second Additional Protocol on the conditions for requesting assistance, reference should be made to the European Convention on Mutual Assistance in Criminal Matters as complemented by the 1978 First Additional Protocol.

VI. Grounds for denying / postponing assistance (Art. 7)

The Second Additional Protocol complements the Convention in enabling the requested Party to postpone action on a request if such action would prejudice investigations, prosecutions or related proceedings by its authorities (Art. 7, para 1). The requested Party shall give reasons for the postponement (Art. 7, para 3).

VII. Use of information received (Art. 26)

Article 26 of the Second Additional Protocol provides that personal data transferred from one Party to another as a result of the execution of a request made under the Convention or any of its Protocols, may be used by the Party to which such data have been transferred, only: (a) for the purpose of proceedings to which the Convention or any of its Protocols apply; (b) for other judicial and administrative proceedings directly related to the proceedings mentioned under (a); (c) for preventing an immediate and serious threat to public security (Art. 26, para 1).

Article 26 paragraph 2 of the Second Additional Protocol states that such data may however be used for any other purpose provided that prior consent is given by either the Party from which the data had been transferred, or the data subject.

Moreover, some Parties made specific reservations to the Convention and its Protocols restricting the use of information transmitted.

VIII. Sharing of information received with other local authorities (Art. 25 and Art. 26)

The Second Additional Protocol specifies that the requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request (Art. 25).

Article 26 paragraph 3 states that any Party may refuse to transfer personal data obtained as a result of the execution of a request made under the Convention or any of its Protocols where: (a) such data is protected under its national legislation, and (b) the Party to which the data should be transferred is not bound by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, unless the latter Party undertakes to afford such protection to the data as is required by the former Party.

Any Party that transfers personal data obtained as a result of the execution of a request made under the Convention or any of its Protocols may require the Party to which the data have been transferred to give information on the use made with such data.

Article 26 paragraph 5 of the Second Additional Protocol provides that the requested Party may, by a declaration addressed to the Secretary General of the Council of Europe, require that, in proceedings for which it could have refused or limited the transfer or use of personal data in accordance with the provision of the Convention or its Protocols, personal data transmitted to the requesting Party cannot be used by the latter for the purposes of paragraph 1 unless with its previous consent.

Some Parties made specific reservations to the Convention and its Protocols concerning the sharing of information.

IX. Sharing of information received with foreign authorities (Art. 25 and Art. 26)

The Second Additional Protocol specifies that the requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request (Art. 25).

Article 26 paragraph 3 states that any Party may refuse to transfer personal data obtained as a result of the execution of a request made under the Convention or any of its Protocols where: (a) such data is protected under its national legislation, and (b) the Party to which the data should be transferred is not bound by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, unless the latter Party undertakes to afford such protection to the data as is required by the former Party.

Any Party that transfers personal data obtained as a result of the execution of a request made under the Convention or any of its Protocols may require the Party to which the data have been transferred to give information on the use made with such data.

Article 26 paragraph 5 of the Second Additional Protocol provides that the requested Party may, by a declaration addressed to the Secretary General of the Council of Europe, require that, in proceedings for which it could have refused or limited the transfer or use of personal data in accordance with the provision of the Convention or its Protocols, personal data transmitted to the requesting Party cannot be used by the latter for the purposes of paragraph 1 unless with its previous consent.

Some Parties made specific reservations to the Convention and its Protocols concerning the sharing of information.

X. Relationship with other instruments (Art. 28)

The provisions of this Protocol are without prejudice to more extensive regulations in bilateral or multilateral agreements concluded between Parties.

The relations between the Second Additional Protocol, the European Convention on Mutual Assistance in Criminal Matters and its First Additional Protocol are regulated by the Article 30 of the Vienna Convention of the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter. The Article states that when all the Parties to the earlier treaty are Parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty (Art. 30, para 3). However, when the Parties to the later treaty do not include all the Parties to the earlier one:

a) as between Parties to both treaties, the same rule applies as in paragraph 3;

b) as between a Party to both treaties and a Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

2. European Convention on Extradition as complemented by the 1975 First Additional Protocol, the 1978 Second Additional Protocol and the 2010 Third Additional Protocol

Key points

- The Convention provides for the extradition between Parties of persons wanted for criminal proceedings or for the carrying out of a sentence. It provides also for other forms of international co-operation such as provisional arrest and handing over of property.
- Under the Convention, the requests shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party or through diplomatic channels. Other means of communication may be arranged by direct agreement between the Parties.
- The Convention has been supplemented by the 1975 First Additional Protocol, the 1978 Second Additional Protocol and the 2010 Third Additional Protocol. They all aim at broadening the scope of the Convention and facilitating its application. The Third Additional Protocol has not yet entered into force.

I. Parties

The European Convention on Extradition has been opened for signature by the member States of the Council of Europe and for accession by non-member States on 13 December 1957. The Convention entered into force on 18 April 1960. It has been ratified/acceded by 50 States.[1]

The provisions of the Convention have been supplemented by three Additional Protocols, namely the 1975 First Additional Protocol, the 1978 Second Additional Protocol and the 2010 Third Additional Protocol. The Third Additional Protocol has not yet entered into force.

II. Scope (Art. 1 to Art. 5)

Extradition shall be granted in respect of offences which are punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty (Art. 2, para 1).

The Convention and its Protocols provide for certain restrictions to the scope of extradition. For instance, any Party whose law does not allow extradition for certain of the extraditable offences as defined by the Convention, may exclude such offences from the application of the Convention (Art. 2, para 3). Further, extradition shall not be granted

[1]. Status of ratifications as at April 2012: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, and non-member States Israel, Korea, South Africa.

if the offence is regarded by the requested Party as a political offence or as an offence connected with a political offence (Art. 3, para 1). However, it should be noted that the First Protocol has narrowed the scope of this provision stating for instance that crimes against humanity should not be considered as political offences (Article 1 of the First Additional Protocol).

Article 4 of the Convention also states that extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of the Convention.

Article 5 of the Convention provides that extradition shall be granted in respect of offences in connection with taxes, duties, customs and exchange[2] only if the Parties have so decided in respect of any such offence or category of offences. The 1978 Second Additional Protocol further states that extradition may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, custom or exchange regulation of the same kind as the law of the requesting Party (Art 2, para 2).

III. Forms of co-operation (Art. 1, Art. 16 and Art. 20)

The Convention and its protocols provide for different forms of co-operation: extradition, provisional arrest and handing over of property.

Extradition (Art. 1)

According to Article 1 of the Convention, Parties undertake to surrender to each other, on request, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.[3]

Provisional arrest (Art. 16)

In case of urgency, the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law (Art. 16, para 1).

Handing over of property (Art. 20)

The requesting Party can ask the requested Party to seize and hand over property: (a) which may be required as evidence, or (b) which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently (Art. 20, para 1).

When the said property is liable to seizure or confiscation in the territory of the requested Party, the latter may, in connection with pending criminal proceedings, temporarily retain it or hand it over on condition that it is returned (Art. 20, para 3).

2. Article 2 of the Second Additional Protocol states that extradition shall take place for fiscal offences, provided that the offence corresponds to an offence of the same nature, under the law of the requested Party.

3. For the purposes of the Convention, the expression « detention order » means any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence (Art. 25).

IV. Authorities that can use the instrument (Art. 12)

The requests shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party or through diplomatic channels. Other means of communication may be arranged by direct agreement between two or more Parties (Art. 12 of the Convention as complemented by Article 5 of the Second Additional Protocol).

A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or directly, or through the International Criminal Police Organisation (Art. 19, para 3).

V. Conditions for requesting assistance (Art. 12)

The request shall be in writing. It shall be supported by:

a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

b) a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

VI. Grounds for denying / postponing assistance

The Convention and its Protocols provide for several circumstances in which the requested Party can either deny or postpone extradition, for example:

a) parties have the right to refuse extradition of their nationals provided that they submit the case to their competent authorities in order that proceedings may be taken if they are considered appropriate (Art. 6).

b) Article 7 paragraph 1 of the Convention provides that the requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in its territory. When the offence has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned (Art. 7, para 2).

c) the requested Party may also refuse to extradite the person claimed if the competent authorities of such Party are already proceeding against him in respect of the offence or offences for which extradition is requested (Art. 8).

d) moreover, extradition shall not be granted if: (a) final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested, or (b) if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences (Art. 9). The First Additional

Protocol supplements this provision, extending the application of the *non bis in idem* rule to third States (Art. 2 of the First Additional Protocol).

e) in the event where the person claimed has become immune by reason of lapse of time from prosecution or punishment, extradition shall not be granted (Art. 10).

f) if the offence for which extradition is requested is punishable by death under the law of the requesting Party but not by the requested Party, then the latter shall not grant extradition (Art. 11).

g) the 1978 Second Additional Protocol provides that when the requesting Party requests the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence (Art. 3, para 1).

h) further, the 1978 Protocol states that extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State (Art. 4).

Article 18 paragraph 2 provides that reasons shall be given for any complete or partial rejection of extradition requests.

The Convention also provides the requested Party with the possibility to postpone the surrender of the person claimed in order that he may be proceeded against by that Party or, if he has already been convicted, in order that he may serve his sentence in the territory of that Party for an offence other than that for which extradition is requested (Art. 19, para 1). Instead of postponing surrender, the requested Party may also temporarily surrender the person claimed in accordance with conditions to be determined by mutual agreement with the requesting Party (Art. 19, para 2).

VII. Use of information received

(N.A)

VIII. Sharing of information received with other local authorities

(N.A)

IX. Sharing of information received with foreign authorities

(N.A)

X. Relationship with other instruments (Art. 28)

The Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties (Art. 28, para 1).

The Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein (Art. 28, para 2).

The relations between the European Convention on Extradition and its three Additional Protocols are regulated by the Article 30 of the Vienna Convention of the Law of Treaties, concerning the application of successive treaties relating to the same

subject-matter. The Article states that when all the Parties to the earlier treaty are Parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty (Art. 30, para 3). However, when the Parties to the later treaty do not include all the Parties to the earlier one:

a) as between Parties to both treaties, the same rule applies as in paragraph 3;

b) as between a Party to both treaties and a Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

3. Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme)

Key points

- The Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme) was adopted in 1986, to increase assistance between Commonwealth Governments in criminal matters.
- It provides for different forms of co-operation such as search and seizure, transfer of persons in custody, tracing, seizure and confiscation of the proceeds or instrumentalities of crime.
- Transmission of requests under the Harare Scheme shall be effected between Central Authorities designated by the Parties.
- The Harare Scheme provides for different grounds for denying/postponing assistance. For instance, the requested country may refuse to comply in whole or in part with a request for assistance where there is no dual criminal liability or if compliance with the request would be contrary to its public interest.
- The requesting country shall not use nor transmit any information or evidence obtained in response to a request for assistance under the Harare Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.

I. Parties

The Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme) was adopted in 1986. It applies to the Member States of the Commonwealth.[1]

II. Scope (Art. 1, Art. 3 and Art. 10)

The Harare Scheme provides for the giving of assistance by the competent authorities of the requested country in respect of criminal matters arising in the requesting country (Art. 1, para 2). A criminal matter is considered to arise in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted (Art. 3, para 1). Article 10 clearly stresses that the Harare Scheme does not provide for the extradition, or the arrest or detention with a view to extradition.

[1] Antigua and Barbuda, Australia, The Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, The Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand Nigeria, Pakistan, Papua New Guinea, Rwanda, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tonga, Trinidad and Tobago, Tuvalu , Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, Zambia.

III. Forms of co-operation

Requests for the preservation of computer data (Art. 15)

Article 15 paragraph 1 provides that a request for the preservation of computer data[2] under this Article made by an agency or authority competent to make such a request under the laws of the requesting country can be directly transmitted to an agency or authority competent to receive such a request under the laws of the requested country.

Identifying and locating persons (Art. 16)

Article 16 provides that the requesting country may seek assistance in identifying or locating persons believed to be within the requested country.

Service of documents (Art. 17)

Article 17 provides that the requesting country may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.

Examination of witnesses (Art. 18)

Article 18 provides that the requesting country may seek assistance in the examination of witnesses in the requested country.

Search and seizure (Art. 19)

Article 19 provides that the requesting country may seek assistance in the search for, and seizure of property or computer data in the requested country.

Other assistance in obtaining evidence (Art. 20)

Article 20 provides that the requesting country may seek other assistance in obtaining evidence.

Production of judicial or official records (Art. 22)

Article 22 provides that the requesting country may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.

Personal appearance of witnesses in the requesting country (Art. 25)

Article 25 provides that the requesting country may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.

Personal appearance of persons in custody (Art. 26)

Article 26 provides that the requesting country may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

2. "Preservation of computer data" means the protection of computer data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate (Art. 4, para 7).

Tracing the proceeds or instrumentalities of crime (Art. 28)

Article 28 provides that the requesting country may seek assistance in identifying, locating and assessing the value of property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.

Seizing and confiscating the proceeds of instrumentalities of crime (Art. 29)

Article 29 provides that the requesting country may seek assistance in securing: (a) the making in the requested country of an order relating to the proceeds of instrumentalities of crime; or (b) the recognition or enforcement in that country of such an order made in the requesting country.

Other assistance (Art. 32)

Article 32 provides that after consultation between the requesting and the requested countries, assistance not within the scope of the Harare Scheme may be given in respect of a criminal matter on such terms and conditions as may be agreed by those countries.

IV. Authorities that can use the instrument (Art. 5 and Art. 6)

Transmission of requests under the Harare Scheme shall be effected between Central Authorities designated by Member States (Art. 5). Member States generally designated their department of public prosecution.

Requests for assistance under the Harare Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country (Art. 6, para 1). Once the Central Authority of the requesting country is satisfied that the request can properly be made under the Harare Scheme, it transmits the request to the Central Authority of the requested country (Art. 6, para 2).

V. Conditions for requesting assistance (Art. 14)

Pursuant to Article 14, requests under the Harare Scheme shall: (a) specify the nature of the assistance requested; (b) contain the information appropriate to the assistance sought as specified in the provisions of the Harare Scheme; (c) indicate any time-limit within which compliance with the request is desired, stating reasons; (d) contain the identity of the agency or authority initiating the request, the nature of the criminal matter and information as whether or not criminal proceedings have been instituted; (e) where criminal proceedings have been instituted, information as to the court exercising jurisdiction in the proceedings and the identity of the accused person, the offences of which he stands accused, a summary of the facts, the stage reached in the proceedings and any date fixed for further stages in the proceedings; (f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts. Further conditions apply for each type of co-operation.

VI. Grounds for denying / postponing assistance (Art. 8 and Art. 26)

Article 8 paragraph 1 provides that the requested country may refuse to comply in whole or in part with a request for assistance under the Harare Scheme if the criminal matter appears to concern: (a) conduct which would not constitute an offence under the

law of that country; (b) an offence or proceedings of a political character[3]; (c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or (d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

Article 8 paragraph 2 further provides that the requested country may refuse assistance: (a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or (b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

Article 8 paragraph 3 also states that the requested country may refuse to provide assistance where the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.

Specific grounds for refusal are laid down in the Harare Scheme concerning certain type of co-operation such as requests for personal appearance of persons in custody. Article 26 paragraph 3 states that the requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer. Moreover, Article 26 paragraph 4 provides that the requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

VII. Use of information received (Art. 7, Art. 11 and Art. 12)

Article 11 states that the Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request, its contents and the information and materials supplied in compliance with a request, except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

Article 12 provides that the requesting country shall not use any information or evidence obtained in response to a request for assistance under the Harare Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.

Countries may subject the granting of assistance to certain conditions such as requiring the requesting country to give an undertaking that the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person (Art. 7, para 4).

3. According to Article 8 paragraph 4, an offence shall not be an offence of a political character if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

VIII. Sharing of information received with other local authorities (Art. 11 and Art. 12)

Article 11 states that the Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

The requesting country shall not use nor transmit any information or evidence obtained in response to a request for assistance under the Harare Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country (Art. 12).

IX. Sharing of information received with foreign authorities (Art. 11 and Art. 12)

Article 11 states that the Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

The requesting country shall not use nor transmit any information or evidence obtained in response to a request for assistance under the Harare Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country (Art. 12).

X. Relationship with other instruments (Art. 1)

The Harare Scheme augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora (Art. 1, para 1). As it is highlighted in a 2008 paper by the Commonwealth Secretariat[4], the Harare Scheme is a non-binding and voluntary Scheme. Despite the intention that the Harare Scheme acts as a legal basis for both making and receiving MLA requests, a number of Commonwealth member states are not reflecting this in practice. Following the British practice, most Commonwealth countries have dualist legal systems, whereby domestic legislation must be passed and implemented in order to give effect to their international obligations. As such, in a number of Commonwealth member states, if the Harare Scheme has not been implemented into domestic law, its voluntary nature might serve as an obstacle to providing an effective framework for MLA.

4. Paper by the Commonwealth Secretariat (2008): the Harare Scheme relating to mutual assistance in criminal matters within the Commonwealth: the way forward, Journal of Commonwealth law and legal education.

4. Model Treaty on Mutual Assistance in Criminal Matters

Key Points

- The Model Treaty on Mutual Assistance in Criminal Matters aims at providing a useful framework for States interested in negotiating and concluding bilateral agreements to improve co-operation in matters of crime prevention and criminal justice.
- It provides for different forms of co-operation such as service of judicial documents, search and seizure or transfer of persons in custody to give evidence or to assist in investigations.
- It recommends States to designate a central authority responsible for the issuing and the execution of requests under treaties on mutual assistance in criminal matters or other arrangements for such mutual assistance.
- The Model Treaty provides for different grounds for denying/postponing assistance. For instance, assistance may be refused if the requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order or other essential public interest
- The Model Treaty provides that the requesting State shall not, unless otherwise agreed, without the consent of the requested State, use or transfer information or evidence provided by the requested State for investigations other than those stated in the request.

I. Parties

The UN Model Treaty on Mutual Assistance in Criminal Matters was adopted by the General Assembly Resolution 45/117 on 14 December 1990. It was subsequently amended by General Assembly Resolution 53/112. Unless otherwise indicated, details below refer to the Model Treaty as amended by the General Assembly Resolution 53/112.

II. Scope (Art. 1)

According to Article 1 paragraph 1 of the Model Treaty, Parties shall afford to each other the widest possible measure of mutual assistance in investigations or court proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State.

The Model Treaty does not apply to: (a) the arrest or detention of any person with a view to the extradition of that person; (b) the enforcement in the requested State of criminal judgments imposed in the requesting State except to the extent permitted by the law of the requested State and Article 18 of the Model Treaty dealing with proceeds of crime; (c) the transfer of persons in custody to serve sentences; (d) the transfer of proceedings in criminal matters (Art. 1, para 3).

III. Forms of co-operation

Article 1 paragraph 2 provides that mutual assistance may include: (a) taking evidence or statements from persons; (b) assisting in the availability of detained persons or others to give evidence or assist investigations; (c) effecting service of judicial documents; (d) executing searches and seizures; (e) examining objects and sites;

(f) providing information and evidentiary items[1]; (g) providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.

The Model Treaty details some forms of co-operation:

Service of documents (Art. 10)

According to Article 10 paragraph 1, the requested State shall effect service of documents that are transmitted to it for this purpose by the requesting State.

Obtaining of evidence (Art. 11)

The requested State shall, in conformity with its law and upon request, take the sworn or affirmed testimony, or otherwise obtain statements of persons or require them to produce items of evidence for transmission to the requesting State (Art. 11, para 1).

Availability of persons in custody to give evidence or to assist in investigations (Art. 13)

Upon the request of the requesting State, and if the requested State agrees and its law so permits, a person in custody in the latter State may, subject to his or her consent, be temporarily transferred to the requesting State to give evidence or to assist in the investigations (Art. 13, para 1).

Availability of other persons to give evidence or assist in investigations (Art. 14)

The requesting State may request the assistance of the requested State in inviting a person: (a) to appear in proceedings in relation to a criminal matter in the requesting State unless that person is the person charged; or (b) to assist in the investigations in relation to a criminal matter in the requesting State (Art. 14, para 1). The requested State shall invite the person to appear as a witness or expert in proceedings or to assist in the investigations (Art. 14, para 2).

Search and seizure (Art. 17)

Article 17 provides that the requested State shall, in so far as its law permits, carry out requests for search and seizure and delivery of any material to the requesting State for evidentiary purposes, provided that the rights of *bona fide* third parties are protected.

[1] The requesting State would ask for information or things to be obtained and transferred to the requesting State. The legislation of the requested State should provide for the compulsory production of documents or things that might afford evidence about the offence in the requesting State. The legislation should allow for the information or objects so produced to be turned over to authorities in the foreign State, with or without conditions (paragraph 51 and 53 of the Revised Manual on the Model Treaty).

Proceeds of crime[2] (Art. 18)

The requested State shall, upon request, endeavour to ascertain whether any proceeds of the alleged crime are located within its jurisdiction and shall notify the requesting State of the results of its inquiries. In making the request, the requesting State shall notify the requested State of the basis of its belief that such proceeds may be located within its jurisdiction (Art. 18, para 2). In respect of such a request, the requested State shall endeavour to trace assets, investigate financial dealings, and obtain other information or evidence that may help to secure the recovery of proceeds of crime (Art. 18, para 3). In the event where suspected proceeds of crime are found, the requested State shall upon request take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the requesting State (Art. 18, para 4). Furthermore, Article 18 paragraph 5 provides that the requested State shall, to the extent permitted by its law, give effects to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting State or take other appropriate action to secure the proceeds following a request by the requesting State.

IV. Authorities that can use the instrument (Art. 3)

Each Party shall designate a central authority or authorities by or through which requests should be made or received (Art. 3). The comments on Article 3 provide that countries may wish to consider providing for direct communications between central authorities and for the central authorities to play an active role in ensuring the speedy execution of requests, controlling quality and setting priorities. Countries may also wish to agree that the central authorities are not the exclusive channel for assistance between the Parties and that the direct exchange of information should be encouraged to the extent permitted by domestic law or arrangements.

V. Conditions for requesting assistance (Art. 5)

Article 5 paragraph 1 of the Model Treaty provides that requests for assistance may include: (a) the name of the requesting office and the competent authority conducting the investigation or court proceedings to which the request relates; (b) the purpose of the request and a brief description of the assistance sought; (c) a description of the facts alleged to constitute the offence and a statement or text of the relevant laws, except in cases of a request for service of documents; (d) the name and address of the person to be served, where necessary; (e) the reasons for and details of any particular procedure or requirement that the requesting State wishes to be followed, including a statement as to whether sworn or affirmed evidence or statements are required; (f) specification of any time-limit within which compliance with the request is desired; and (g) such other information as is necessary for the proper execution of the request.

If the requested State considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information (Art. 5, para 3).

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2. “Proceeds of crime” means any property suspected, or found by a court, to be property directly or indirectly derived or realised as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence (Art. 18, para 1).

VI. Grounds for denying/postponing assistance (Art .4)

According to Article 4 paragraph 1, assistance may be refused if: (a) the requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order or other essential public interest; (b) the offence is regarded by the requested State as being of a political nature; (c) there are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or that that person's position may be prejudiced for any of those reasons; (d) the request relates to an offence the prosecution of which in the requesting State would be incompatible with the requested State's law on double jeopardy[3]; (e) the assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction; (f) the act is an offence under military law, which is not also an offence under ordinary criminal law. However, Article 4 paragraph 2 states that assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions.

The requested State may postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution in the requested State (Art. 4, para 3). Before refusing a request or postponing its execution, the requested State shall consider whether assistance may be granted subject certain conditions (Art. 4, para 3). Article 4 paragraph 5 further states that reasons shall be given for any refusal or postponement of mutual assistance.

The comments on Article 4 provide that some countries may wish to delete or modify some of the provisions or include other grounds for refusal, such as those related to the nature of the offence (*e.g.* fiscal), the nature of the applicable penalty, requirements of shared concepts or specific kinds of assistance. Countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State. The comments further provide that countries may also consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure.

VII. Use of information received (Art. 8)

According to Article 8, the requesting State shall not, unless otherwise agreed, without the consent of the requested State, use or transfer information or evidence provided by the requested State for investigations other than those stated in the request. The comments on Article 8 state that some countries may wish to omit Article 8 or modify it, *e.g.* restrict it to fiscal offences, or restrict use of evidence only where the requested State makes an express request to that effect.

[3]. Subparagraph (d) recognises that a State may choose to apply its law concerning *ne bis in dem* in the context of a mutual assistance request, although not all States will choose to do so. As laws relating to *ne bis in idem* vary considerably, the States may wish to discuss this to determine the precise parameters of their laws. Where the request in a mutual assistance context relates to evidence as opposed to the individual, States may also decide not to apply this ground for refusal at all (paragraph 87 of the Revised Manual on the Model Treaty).

VIII. Sharing of information received with other local authorities (Art. 8 and Art. 9)

According to Article 8, the requesting State shall not, unless otherwise agreed, without the consent of the requested State, use or transfer information or evidence provided by the requested State for investigations other than those stated in the request. Article 9b states that the requesting State shall keep confidential evidence and information provided by the requested State, except to the extent that the evidence and information is needed for the investigation and proceedings described in the request.

For its part, the requested State shall keep confidential the request for assistance, its contents and its supporting documents as well as the fact of granting of such assistance (Art. 9a).

IX. Sharing of information received with foreign authorities (Art. 8 and Art. 9)

According to Article 8, the requesting State shall not, unless otherwise agreed, without the consent of the requested State, use or transfer information or evidence provided by the requested State for investigations other than those stated in the request. Article 9b states that the requesting State shall keep confidential evidence and information provided by the requested State, except to the extent that the evidence and information is needed for the investigation and proceedings described in the request.

For its part, the requested State shall keep confidential the request for assistance, its contents and its supporting documents as well as the fact of granting of such assistance (Art. 9a).

X. Relationship with other instruments (Art. 2)

Article 2 states that the treaty does not affect other treaties, agreements or arrangements that may exist between the parties. Comments on Article 2 provide that many countries negotiating a mutual assistance treaty will have existing treaties on extradition or transfer of offenders, memoranda of understanding or arrangements between police or other investigative forces or other types of co-operation agreements. The treaty will not influence the operation of these other treaties or arrangements, unless specifically so agreed.

5. Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union as complemented by the 2001 Protocol

Key points

- The Convention concluded between the Member States of the European Union, entered into force on 2005.
- Its purpose is to encourage and modernise co-operation between judicial, police and customs authorities by supplementing the provisions and facilitating the application of a number of other instruments.
- It provides for different forms of international co-operation such as sending and service of procedural documents, audition of witnesses, experts and persons in custody, controlled deliveries or covert investigations.
- Depending on the circumstances, transmission of requests for mutual legal assistance under this Convention shall be effected between judicial, administrative or central authorities designated by Parties.

I. Parties (Art. 1)

The Council Act of May 29, 2000 established the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. It entered into force on August 23, 2005. The Convention is supplemented by a Protocol signed on October 16, 2001. It provides for supplementary measures such as requests for information on bank transactions.

Unless otherwise indicated, details below refer to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

II. Scope (Art. 3)

Under the 1959 European Convention on Mutual Assistance in Criminal Matters, Parties undertake to afford each other mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party (Art. 1, para 1).

This Convention goes further in that it extends mutual assistance to proceedings brought by the 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, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters (Art. 3, para 1).

III. Forms of co-operation

Sending and service of procedural documents (Art. 5)

In principle, each Member States shall send procedural documents intended for persons who are in the territory of another Member State to them directly by post.

However, under certain circumstances referred to in Article 5 paragraph 2 such as when the address of the person for whom the document is intended is unknown or uncertain, the procedural documents may be sent by the requested Member State.

Spontaneous exchange of information (Art. 7)

The Convention states that the competent authorities of the Member States may exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law, the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided (Art. 7).

Placement of articles obtained by criminal means (Art. 8)

At the request of a Member State, the requested Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners (Art 8, para 1).

Temporary transfer of persons held in custody for purpose of investigation (Art. 9)

Article 9 paragraph 1 states that a Member State which has requested an investigation for which the presence of the person held in custody on its own territory is required, may temporarily transfer that person to the territory of the Member State in which the investigation is to take place (Art. 9, para 1).

Audition of witnesses, experts and persons in custody (Art. 10 and Art. 11)

This Convention supplements the 1959 European Convention on Mutual Assistance in Criminal Matters in that it allows for the hearing by videoconference of witnesses/experts/accused persons (Art. 10, para 1 and 9) and by telephone conference of witnesses and experts (Art. 11, para 1).

Controlled deliveries (Art. 12)

Article 12 paragraph 1 provides that each Member State shall undertake to ensure that, at the request of another Member State, controlled deliveries[1] may be permitted on its territory in the framework of criminal investigations into extraditable offences.

Joint investigation teams (Art. 13)

Under the Convention, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period to carry out criminal investigations in one or more of the Member States setting up the team (Art. 13, para 1).

A joint investigation team may, in particular, be set up where:

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1. Under Article 1 (g) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, "controlled delivery" means the technique of allowing illicit or suspect consignments of goods or money, or items substituted for them, to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences.

a) a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States;

b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate co-ordinated, concerted action in the Member States involved.

Covert investigations (Art. 14)

Article 14 paragraph 1 of the Convention provides that the requesting and the requested Member State may agree to assist one another in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations).

Interception of telecommunications (Art. 18)

Article 18 paragraph 1 states that for the purpose of a criminal investigation, the requesting Member State may request another Member State for:

a) the interception and immediate transmission to the requesting Member State of telecommunications; or

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

The 2001 Protocol provides for new forms of co-operation, namely:

Requests for information on bank accounts (Art. 1)

Member States shall take the measures necessary to determine, in answer to a request sent by another Member State, 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 all the details of the identified accounts (Art. 1, para 1).

Under Article 1 paragraph 3 of the 2001 Protocol, it is stated that this obligation applies only if the investigation concerns:

a) an offence punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested State; or

b) an offence referred to in Article 2 of the 1995 Convention on the Establishment of a European Police Office (Europol Convention), or in the Annex to that Convention, as complemented; or

c) to the extent that it may not be covered by the Europol Convention, an offence referred to in the 1995 Convention on the Protection of the European Communities' Financial Interests, the 1996 Protocol thereto or the 1997 Second Protocol thereto.

Requests for information on banking transactions (Art. 2)

On request by the requesting State, the requested State shall provide the 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 (Art. 2 para 1).

Requests for the monitoring of banking transactions (Art. 3)

On request by the requesting State, each Member State shall undertake to ensure that it is able to monitor during a specified period, 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 Member State (Art. 3 para 1).

IV. Authorities that can use the instrument (Art. 3, Art. 6 and Art. 24)

This Convention supplements the 1959 European Convention on Mutual Assistance in Criminal Matters in that it extends the scope of the instrument to administrative authorities (Art. 3, para 1).

Under this Convention, both judiciary and administrative authorities as well as central authorities designed by Member States can use the instrument (Art. 6).

Article 24 paragraph 1 of the Convention states that each Member State shall make a statement naming the authorities which, in addition to those already indicated in the European Mutual Assistance Convention and the Benelux Treaty, are competent for the application of this Convention. Most Parties designated their department of public prosecution as administrative authority (Hungary, Netherlands) and their Ministry of Justice as central authority (France, Spain). Regarding the judicial authorities, most Parties designated their ordinary courts (Sweden, Denmark).

Article 6 of the Convention states that request shall be made in principle directly between judicial authorities and shall be returned through the same channels (Art. 6, para 1). However requests can also be made between central authorities (Art. 6, para 2) or administrative authorities (Art. 6, para 6).

In case of urgency, any request for mutual assistance may be made via the International Criminal Police Organisation (Interpol) or any body competent under provisions adopted pursuant to the Treaty on European Union (Art. 6, para 4).

V. Conditions for requesting assistance (Art. 18)

The conditions for requesting assistance are laid down in Article 14 paragraph 1 of the 1959 European Convention on Mutual Assistance in Criminal Matters which provides that requests for mutual assistance shall indicate as follows:

a) the authority making the request;

b) the object of and the reason for the request;

c) where possible, the identity and the nationality of the person concerned; and

d) where necessary, the name and address of the person to be served.

Furthermore, letters rogatory shall state the offence and contain a summary of the facts (Art. 14, para 2).

However, Article 18 paragraph 3 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union provides that by way of derogation from Article 14 of the 1959 European Convention on Mutual Assistance in Criminal Matters, requests for interception of telecommunications shall include the following:

a) an indication of the authority making the request;

b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;

c) information for the purpose of identifying the subject of this interception;

d) an indication of the criminal conduct under investigation;

e) the desired duration of the interception; and

f) if possible, the provision of sufficient technical data, in particular the relevant network connection number, to ensure that the request can be met.

Article 1 paragraph 4 of the 2001 Protocol states that, concerning requests for information on bank accounts, the authority making the request shall:

a) state why it considers that the requested information is likely to be of substantial value for the purpose of the investigation into the offence;

b) state on what grounds it presumes that banks in the requested Member State hold the account and, to the extent available, which banks may be involved;

c) include any information available which may facilitate the execution of the request.

Concerning requests for information on banking transactions and for the monitoring of banking transactions, Article 2 paragraph 3 and Article 3 paragraph 2 of the 2001 Protocol state that the requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence.

VI. Grounds for denying / postponing assistance

The grounds for denying / postponing assistance are provided in the 1959 European Convention on Mutual Assistance in Criminal Matters and its 1978 and 2001 Additional Protocols.

According to the 1959 European Convention on Mutual Assistance in Criminal Matters, assistance may be refused if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country (Art. 2). Article 1 of the 1978 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters removed the possibility under Article 2.a of the 1959 European Convention on Mutual Assistance in Criminal Matters for States to refuse assistance simply because the request concerns a fiscal offence.[2] Further, Article 9 paragraph 1 of the 2001 Protocol removes the possibility under Article 2.a of the 1959 European Convention on Mutual Assistance in Criminal Matters for States to refuse assistance because the offence is a political offence or is connected with a political offence.

Moreover, Article 11 of the 1959 European Convention on Mutual Assistance in Criminal Matters provides that transfer of persons held in custody may be refused if: (a) the person in custody does not consent; (b) his presence is necessary at criminal proceedings pending in the territory of the requested Party; (c) transfer is liable to prolong his detention or (d) there are other overriding grounds for not transferring him to the territory of the requesting Party.

2. Article 5 of the European Convention on Extradition describes fiscal offences as offences in connection with taxes, duties, customs and exchange.

Article 7 of the 2001 Protocol states that a Member State shall not invoke banking secrecy in order to refuse any co-operation regarding a request for mutual assistance from another Member State.

Article 19 of the 1959 European Convention on Mutual Assistance in Criminal Matters states that the requested Party shall give reasons for any refusal of mutual assistance.

At last, it should be noted that the 2001 Additional Protocol complementing the 1959 European Convention on Mutual Assistance in Criminal Matters, enables the requested Party to postpone action on a request if such action would prejudice investigations, prosecutions or related proceedings by its authorities (Art. 7, para 1). The requested Party shall give reasons for the postponement (Art. 7, para 3).

VII. Use of information received (Art 7 and Art. 23)

The Convention provides that personal data[3] communicated under this Convention may be used by the Member State to which they have been transferred: (a) for the purpose of proceedings to which this Convention applies; (b) for other judicial and administrative proceedings directly related to proceedings referred to under point (a); (c) for preventing an immediate and serious threat to public security; (d) for any other purpose, only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject (Art. 23, para 1).

Regarding spontaneous exchange of information, Article 7 paragraph 2 states that the providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority.

VIII. Sharing of information received with other local authorities (Art. 23)

Neither the Convention, nor the 1959 European Convention on Mutual Assistance in Criminal Matters or its Protocols provide for a regime of sharing of information whether with local or foreign authorities.

The 2001 Second Additional Protocol to the 1959 European Convention on Mutual Assistance in Criminal Matters provides that the requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request (Art. 25).

Regarding spontaneous exchange of information, Article 7 paragraph 2 states that the providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority.

IX. Sharing of information received with foreign authorities (Art. 23)

Neither the Convention, nor the 1959 European Convention on Mutual Assistance in Criminal Matters or its Protocols provide for a regime of sharing of information whether with local or foreign authorities.

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3. The expression "personal data" is used within the meaning of Article 2(a) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 28 January 1981. According to Article 2(a) "personal data" means any information relating to an identified or identifiable individual ("data subject").

The 2001 Second Additional Protocol to the 1959 European Convention on Mutual Assistance in Criminal Matters provides that the requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request (Art. 25).

Regarding spontaneous exchange of information, Article 7 paragraph 2 states that the providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority.

X. Relationship with other instruments (Art. 1)

As stated by Article 1, the purpose of this Convention is to supplement the provisions and facilitate the application between Member States of the European Union of: (a) the European Convention on Mutual Assistance in Criminal Matters; (b) its 1978 Additional Protocol; (c) the provisions on mutual assistance in criminal matters of the Convention of 19 June 1990 implementing the Schengen Agreement and (d) 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.

The Convention shall not affect the application of more favourable provisions in bilateral or multilateral agreements between Member States or, as provided for in Article 26 paragraph 4 of the European Mutual Assistance Convention, arrangements in the field of mutual assistance in criminal matters agreed on the basis of uniform legislation or of a special system providing for the reciprocal application of measures of mutual assistance in their respective territories (Art.1, para 1).

The relations between the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol are regulated by the Article 30 of the Vienna Convention of the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter. The Article states that when all the Parties to the earlier treaty are Parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty (Art. 30, para 3). However, when the Parties to the later treaty do not include all the Parties to the earlier one:

a) As between Parties to both treaties, the same rule applies as in paragraph 3;

b) As between a Party to both treaties and a Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

6. Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union

Key Points

- The Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union aims at establishing the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations.
- It provides for different forms of co-operation namely, exchange of information and intelligence upon request and spontaneous exchange of information and intelligence.
- Transmission of requests under this Framework Decision shall be effected between competent law enforcement authorities designated by Member States, via any existing channels for international law enforcement co-operation, and also with Europol and Eurojust if it falls within the scope of their respective mandates.
- The Framework Decision provides for different grounds for denying/postponing assistance. For instance, the competent law enforcement authority may refuse to provide the requested information or intelligence where the request pertains to an offence punishable by a term of imprisonment of one year or less under the law of the requested Member State.
- The information received under this Framework Decision may be used for the purpose of conducting criminal investigations or criminal intelligence operations.
- The information received under this Framework Decision may be shared with another Member State provided that the supplying Member State or third party gave its consent.

I. Parties

The Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities entered into force on 30 December 2006. It applies to the Member States of the European Union.

II. Scope (Art. 1)

The purpose of this Framework Decision is to establish the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations[1] or criminal intelligence operations[2] (Art. 1, para 1).

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1. A procedural stage within which measures are taken by competent law enforcement or judicial authorities, including public prosecutors, with a view to establishing and identifying facts, suspects and circumstances regarding one or several identified concrete criminal acts.

2. A procedural stage, not yet having reached the stage of a criminal investigation, within which a competent law enforcement authority is entitled by national law to collect, process and analyse

This Framework Decision covers all information and/or intelligence (*i.e.* any type of information or data which is held by law enforcement authorities; and any type of information or data which is held by public authorities or by private entities and which is available to law enforcement authorities without the taking of coercive measures). It does not impose any obligation on the part of the Member States to gather and store information and intelligence for the purpose of providing it to the competent law enforcement authorities of other Member States (Art. 1, para 3). Further, it does not impose any obligation on the part of the Member States to provide information and intelligence to be used as evidence before a judicial authority nor does it give any right to use such information or intelligence for that purpose (Art. 1, para 4) and it does not impose any obligation to obtain any information or intelligence by means of coercive measures in the Member State receiving the request for information or intelligence (Art. 1, para 5).

III. Forms of co-operation (Art. 3, Art. 4 and Art. 7)

Exchange of information and intelligence on request (Art. 3 and Art. 4)

Information and intelligence shall be provided at the request of a competent law enforcement authority, acting in accordance with the powers conferred upon it by national law, conducting a criminal investigation or a criminal intelligence operation (Art. 3, para 2).

Article 4 paragraph 1 provides that Member States shall ensure that they have procedures in place so that they can respond within at most eight hours to urgent requests for information and intelligence regarding offences referred to in Article 2 paragraph 2 of Framework Decision 2002/584/JHA[3] when the requested information or intelligence is held in a database directly accessible by a law enforcement authority. Regarding non-urgent cases, requests for information and intelligence regarding offences referred to in Article 2 paragraph 2 of the aforementioned Framework Decision should be responded to within one week if the requested information or intelligence is held in a database directly accessible by a law enforcement authority (Art. 4, para 3). In all other cases, Member States shall ensure that the information sought is communicated to the requesting competent law enforcement authority within 14 days (Art 4, para 4).

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information about crime or criminal activities with a view to establishing whether concrete criminal acts have been committed or may be committed in the future.

3. Participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, laundering of the proceeds of crime, counterfeiting currency, computer-related crime, environmental crime, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage (Art. 2 para. 2 of Framework Decision 2002/584/JHA).

Spontaneous exchange of information and intelligence (Art. 7)

The competent law enforcement authorities shall, without any prior request being necessary, provide to the competent law enforcement authorities of other Member States concerned information and intelligence in cases where there are factual reasons to believe that the information and intelligence could assist in the detection, prevention or investigation of offences referred to in Article 2 paragraph 2 of Framework Decision 2002/584/JHA (Art. 7, para 1).

IV. Authorities that can use the instrument (Art. 1 and Art 6)

Article 1 paragraph 1 provides that information and intelligence under this Framework Decision shall be exchanged between Member States' law enforcement authorities (*i.e.* a national police, customs or other authority that is authorised by national law to detect, prevent and investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities. Agencies or units dealing especially with national security issues are not covered by the concept of competent law enforcement authority). Most of the Member States designated in particular their national police and their customs authority. The exchange of information and intelligence may take place via any existing channels for international law enforcement co-operation, and also with Europol and Eurojust if it falls within the scope of their respective mandates (Art. 6, para 1 and 2).

V. Conditions for requesting assistance (Art. 3 and Art. 5)

Member States shall ensure that conditions not stricter than those applicable at national level for providing and requesting information and intelligence are applied for providing information and intelligence to competent law enforcement authorities of other Member States. In particular, a Member State shall not subject the exchange, by its competent law enforcement authority with a competent law enforcement authority of another Member State, of information or intelligence which in an internal procedure may be accessed by the requested competent law enforcement authority without a judicial agreement or authorisation, to such an agreement or authorisation (Art. 3, para 3).

Where the information or intelligence sought may, under the national law of the requested Member State, be accessed by the requested competent law enforcement authority only pursuant to an agreement or authorisation of a judicial authority, the requested competent law enforcement authority shall be obliged to ask the competent judicial authority for an agreement or authorisation to access and exchange the information sought (Art. 3, para 4).

Requests for information or intelligence under this Framework Decision shall (a) set out the factual reasons to believe that relevant information and intelligence is available in the requested Member State; (b) also explain the purpose for which the information and intelligence is sought; (c) the connection between the purpose; and (d) the person who is the subject of the information and intelligence (Art. 5, para 1).

Furthermore, requests for information or intelligence shall contain other information set out in Annex B to the Framework Decision such as time limits, type of crime(s) or criminal activity(ies) being investigated, nature of the offence(s), restrictions on the use of information contained in the request (Art. 5, para 3).

VI. Grounds for denying / postponing assistance (Art. 10)

As provided by Article 10 paragraph 1, a competent law enforcement authority may refuse to provide information or intelligence only if there are factual reasons to assume that the provision of the information or intelligence would: (a) harm essential national security interests of the requested Member State; (b) jeopardise the success of a current investigation or a criminal intelligence operation or the safety of individuals; or (c) clearly be disproportionate or irrelevant with regard to the purposes for which it has been requested.

Further, where the request pertains to an offence punishable by a term of imprisonment of one year or less under the law of the requested Member State, the competent law enforcement authority may refuse to provide the requested information or intelligence (Art. 10, para 2). The competent law enforcement authority shall also refuse to provide information or intelligence where pursuant to Article 3 paragraph 4, the exchange of information is subject to the agreement or authorisation of the competent judicial authority and access has been refused by the latter (Art. 10, para 3).

VII. Use of information received (Art. 1 and Art. 8)

The information received under this Framework Decision may be used by competent law enforcement authorities for the purpose of conducting criminal investigations or criminal intelligence operations (Art. 1, para 1).

As stated by Article 1 paragraph 4, this Framework Decision does not impose any obligation on the part of the Member States to provide information and intelligence to be used as evidence before a judicial authority nor does it give any right to use such information or intelligence for that purpose. Where a Member State has obtained information or intelligence in accordance with this Framework Decision, and wishes to use it as evidence before a judicial authority, it has to obtain consent of the Member State that provided the information or intelligence.

The use of information and intelligence which has been exchanged under this Framework Decision shall be subject to the national data protection provisions of the receiving Member States, where the information and intelligence shall be subject to the same data protection rules as if they had been gathered in the receiving Member State (Art. 8, para 2). Information and intelligence provided under this Framework Decision may be used by the competent law enforcement authorities of the Member State to which it has been provided solely for the purposes for which it has been supplied in accordance with this Framework Decision or for preventing an immediate and serious threat to public security. Processing for other purposes shall be permitted solely with the prior authorisation of the communicating Member State and subject to the national law of the receiving Member State. The authorisation may be granted insofar as the national law of the communicating Member State permits (Art. 8, para 3).

When providing information and intelligence in accordance with this Framework Decision, the providing competent law enforcement authority may pursuant to its national law impose conditions on the use of the information and intelligence by the receiving competent law enforcement authority. Conditions may also be imposed on reporting the result of the criminal investigation or criminal intelligence operation within which the exchange of information and intelligence has taken place (Art. 8, para 3).

VIII. Sharing of information received with other local authorities (Art. 8 and Art. 9)

The competent law enforcement authorities shall, in accordance with their national law, guarantee the confidentiality of all provided information and intelligence determined as confidential (Art. 9).

Information and intelligence provided under this Framework Decision may be used by the competent law enforcement authorities of the Member State to which it has been provided solely for the purposes for which it has been supplied in accordance with this Framework Decision or for preventing an immediate and serious threat to public security. Sharing of information for other purpose with other local authorities shall be permitted solely with the prior authorisation of the communicating Member State and subject to the national law of the receiving Member State. The authorisation may be granted insofar as the national law of the communicating Member State permits (Art. 8, para 3).

IX. Sharing of information received with foreign authorities (Art. 3 and Art. 9)

The competent law enforcement authorities shall, in accordance with their national law, guarantee the confidentiality of all provided information and intelligence determined as confidential (Art. 9).

Where the information or intelligence sought has been obtained from another Member State or from a third country and is subject to the rule of speciality, its transmission to the competent law enforcement authority of another Member State may only take place with the consent of the Member State or third country that provided the information or intelligence (Art. 3, para 5).

X. Relationship with other instruments (Art. 12)

Article 12 paragraph 3 states that Member States may continue to apply bilateral or multilateral agreements or arrangements in force in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended and help to simplify or facilitate further the procedures for exchanging information and intelligence falling within the scope of this Framework Decision.

Moreover, Member States may conclude or bring into force bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended and help to simplify or facilitate further the procedures for exchanging information and intelligence falling within the scope of this Framework Decision (Art. 12, para 4).

7. ICPO-Interpol Constitution and Rules governing the processing of information

Key Points

- Interpol aims (a) to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights" and (b) to establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.
- Interpol provides for a number of co-operation instruments, namely (a) exchange of information through the General Secretariat; (b) notices and diffusions; (c) specialised teams and police trainings; (d) criminal intelligence analysis; (e) police trainings. Interpol has also established several bodies for the purposes of further fostering the above described international co-operation among member countries. These include, *inter alia*, the "Command & Coordination Center" (CCC) and the "Interpol Group of Experts on Corruption". Relevant for anti-corruption purposes is also the "UMBRA" initiative which provides for the development of an information exchange platform for National Anti-Corruption Entities and of a Technical and Strategic Anti-Corruption Information Database.
- The General Secretariat, the National Central Bureaus, the authorised national institutions and the authorised international entities are authorised to use the police information system and the information transmitted thereon, provided they observe the provisions of the Rules and the texts to which they refer.
- Information shall be processed by Interpol or through its channels for international police co-operation purposes in order to prevent, investigate and prosecute ordinary-law crimes, to assist with such investigations and for other specific reasons. The General Secretariat is also allowed to process information, outside of the police information system, for any other legitimate purpose, as defined by the Rules.
- Information sources shall retain control over the processing rights to their items of information, in conformity with the procedures set out in the Rules and subject to any additional restrictions which may be imposed by the General Secretariat.
- The source of an item of information, whether it be a National Central Bureau, authorised national institution, or authorised international entity shall determine its level of confidentiality, thereby classifying the information. The General Secretariat may attribute a confidentiality level to the information which is higher than that attributed by the source.

I. Parties

The International Criminal Police Organization (hereinafter referred to as "Interpol" or "the Organization") is the world's largest international police organisation, with 190 member countries.[1] It was founded in 1923. Interpol's structure, aims and objectives

[1] Status of membership as at April 2012: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua & Barbuda, Argentina, Armenia, Aruba, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina-Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros,

are outlined in its Constitution, the Organization's main legal document, which came into force in 1956. In addition to the Constitution, a number of other fundamental texts make up Interpol's legal framework.[2] For the purposes of this work, particularly relevant is the document "Rules governing the processing of information" (hereinafter referred to as "the Rules"), entered into force on 1st January 2006, which provide for some conditions and basic procedures for processing information by Interpol itself or through its channels for the purposes of international police co-operation. The Organization also issued several resolutions addressing issues related to specific topics, such as money laundering and corruption.[3]

II. Scope

Interpol aims (a) to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights"[4] and (b) to establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes (Art. 2 of the Constitution). Any

Congo, Congo (Democratic Rep.), Costa Rica, Croatia, Cuba, Curaçao, Cyprus, Czech Republic, Côte d'Ivoire, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, Former Yugoslav Republic of Macedonia, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea (Rep. of), Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Rwanda, Samoa, San Marino, Sao Tome & Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Sint Maarten, Slovakia, Slovenia, Somalia, South Africa, South Sudan (Rep. of), Spain, Sri Lanka, St Kitts & Nevis, St Lucia St Vincent & Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Timor Leste, Togo, Tonga, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Vatican City State, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

[2.] These include (a) The General Regulations; (b) Rules of the Procedure of the General Assembly; (c) Rules of the Procedure of the Executive Committee; (d) Financial regulations; (e) Rules governing the processing of information; (f) Rules on the Control of Information and access to Interpol's Files.

[3.] On corruption, see Resolutions: AGN/68/RES/4 Supporting the initiatives of the Interpol Group of Experts on Corruption; AGN/69/RES/5 Supporting further anti-corruption initiatives of the Interpol Group of Experts on Corruption; AG-2001-RES-04 Global Standards to Combat Corruption in Police Forces/Services; AG-2002-RES-01 Adopting the global standards to combat corruption in police forces/services; AG-2009-RES-06 Development of an information exchange platform for National Anti-Corruption Entities and of a Technical and Strategic Anti-Corruption Information Database (UMBRA). On money laundering, see Resolutions: AGN/55/RES/18 Economic and financial crime; co-operation between the police and the banking and financial institutions and associations; AGN/66/RES/15 Money laundering: Legislation; AGN/66/RES/17 Money laundering: Investigations and international police co-operation.

[4.] Reference is made to the Universal Declaration of Human Rights as proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

intervention or activities of a political, military, religious or racial character are strictly forbidden for Interpol (Art. 3 of the Constitution).

III. Forms of co-operation

Interpol provides for a wide number of co-operation instruments, namely (a) exchange of information through the General Secretariat; (b) notices and diffusions; (c) specialised teams and police trainings; (d) criminal intelligence analysis; (e) police trainings.

Interpol has also established several bodies for the purposes of further fostering the above described international co-operation among member countries. These include, *inter alia*, the "Command & Coordination Center" (CCC) and the "Interpol Group of Experts on Corruption". Relevant for anti-corruption purposes is also the "UMBRA" initiative which provides for the development of an information exchange platform for National Anti-Corruption Entities and of a Technical and Strategic Anti-Corruption Information Database.

Exchange of Information, spontaneous or upon request, through the General Secretariat

One of Interpol's priorities is to enable the world's police to exchange information securely and rapidly. To this end, central is the role of the General Secretariat, which is constituted by the permanent departments of the Organization and shall serve as an international centre in the fight against ordinary crime responsible for processing information it receives and collects (Art. 26 of the Constitution and Art. 4.1, let. a, num. 1 of the Rules).[5] Indeed, the General Secretariat is authorised to collect information, either upon request, spontaneously or under co-operation agreements, from certain institutions or entities (national or international), and then to provide such information, either in response to a reasoned request or on its own initiative, to other institutions or entities located in other member countries, according to the provisions set out below:

a) request for information from the General Secretariat to authorised national authorities (Art. 4.2 of the Rules): Interpol's General Secretariat may request information to authorised national institutions, when (i) it has reasons to believe that it is necessary to achieve the objectives of the Organization and in keeping with the aims pursued, (ii) the request is made in the context of a case or specific project, (iii) its request is motivated by a desire to ensure that an item of information is processed in conformity with the Rules, or to ensure the quality of that information. In principle, the General Secretariat may not request information from an authorised national institution without having obtained prior authorisation from the National Central Bureau (NCB) of the member country concerned (Art. 4.2, let. b).

b) request for information from the General Secretariat to international organisations under co-operation agreements (Art. 4.3 of the Rules): whenever it deems fit, having regard to the aims and objects provided in the Constitution, Interpol shall establish relations and collaborate with other intergovernmental or non-governmental international organisations (Art. 41 of the Constitution). Before an international

[5] "Processing of information" includes any operation or set of operations (automated or manual) applied to information in any form or on any medium, from the moment it is accessed to the moment it is destroyed, and any exchange in between (Art. 1, let. j of the Rules).

organisation may provide information, or be requested to do so, on a regular basis, the General Secretariat shall conclude a co-operation agreement for that purpose with the said entity, under specific conditions (see Art. 4.3, let. b and let. c). The provisions of any co-operation agreement dealing with a processing of information shall be in conformity with the provisions of the Rules and the text to which they refer (Art. 4.3, let. f).

c) direct supply of information to Interpol's autonomous databases (Art. 21 of the Rules): NCBs, authorised national institutions and authorised international entities may be authorised to record an item of information themselves in one of the Organization's autonomous databases[6], as properly created by the General Secretariat[7], it being understood that: (i) in the case of an authorised national institution, the NCB responsible for it must have expressly accepted that such a possibility may be granted to it; (ii) in the case of an authorised international entity, the entity must have given a contractual undertaking to observe the provisions of the present Rules; (iii) this authorisation is subject to the said entities (1) observing, and ensuring that the users they designate observe the provisions of the Rules and of the texts to which they refer; (2) allowing only persons who are expressly authorised by the General Secretariat to enter information directly in the database concerned; (3) allowing the Organization and the Commission for the Control of Interpol's Files to check the information they have recorded in the database; for that purpose, they must be able to provide any item on the basis of which information has been recorded or which justifies retaining the information in the database; (4) modifying, blocking or deleting an item of information at the Organization's request, on the basis of the provisions of the present Rules, or allowing the Organization to do so.

d) provision of information by the General Secretariat to NCBs and authorised entities (Art. 17 of the Rules): the General Secretariat may provide an item of information to further the purposes of international police co-operation (Art. 17.1, let. a, num. 1 of the Rules). It may provide information either in response to a reasoned request, or on its own initiative, to a NCB, an authorised national institution or an authorised international entity (Art. 17.1, let. a, num. 2 of the Rules). The General Secretariat may also authorise the above mentioned entities to access the police information system directly, to download an item of information from one of the Organization's databases, or to make interconnections between the network and the Organization's databases provided that certain conditions have been fulfilled (Art. 20.1, let. a of the Rules).

Notices and diffusions

Interpol Notices are international alerts allowing police in member countries to share critical crime-related information. Notices are published by Interpol's General Secretariat at the request of National Central Bureaus (NCBs) and authorised entities. Notices are also used by other international organisations, such as the United Nations, the International Criminal Tribunals and the International Criminal Court to seek persons wanted for committing crimes within their jurisdiction. Notices are processed in line with

6. Main databases include the following: Technical and Strategic Anti-Corruption Information, Nominal Data, DNA Profiles, Fingerprints, Stolen and Lost Travel Documents, Stolen Administrative Documents, Fusion Task Force, Firearms.

7. See Art. 21, let. a of the Rules.

the provisions of the Rules which ensure the legality and quality of information, and the protection of personal data (see the appropriate section of this summary).

It should be noted that Interpol is recognised as an official channel for transmitting requests for provisional arrest in a number of bilateral and multilateral extradition treaties, including the European Convention on Extradition, the Economic Community of West African States (ECOWAS) Convention on Extradition, and the United Nations Model Treaty on Extradition.

Similar to the notice is another alert mechanism known as "diffusion". This is less formal than a notice but is also used to request the arrest or location of individual or additional information in relation to a police investigation. A diffusion is circulated directly by an NCB to the member countries of their choice, or to the entire Interpol membership.

Specialised teams and police trainings

At the request of member countries, Interpol can provide specialised teams to assist national police. There are two types of team, each made up of experts in the relevant fields: "Incident Response Teams" (IRTs) and "Interpol Major Events Support Teams" (IMEST).

It should be noted that Interpol has also created a Corruption Response Team (CRT) capability, able to be deployed at short notice and work hand in hand with investigators and prosecutors to provide them with strong mentoring and technical support in fighting corruption.

Criminal intelligence analysis

Criminal intelligence analysis (also referred to as "crime analysis", *i.e.* the identification of and provision of insight into the relationship between crime data and other potentially relevant data with a view to police and judicial practice) is a recognised law enforcement support tool. The central tasks of analysis are to: (a) help officials - law enforcers, policy makers, and decision makers - deal more effectively with uncertainty; (b) provide timely warning of threats, and (c) support operational activity by analysing crime.

Criminal intelligence analysis is divided into operational (or tactical) and strategic analysis. On the one hand, operational analysis aims to achieve a specific law enforcement outcome. This might be arrests, seizure or forfeiture of assets or money gained from criminal activities, or the disruption of a criminal group. Operational analysis usually has an immediate benefit. On the other hand, strategic analysis is intended to inform higher level decision making and the benefits are realised over the longer term. It is usually aimed at managers and policy-makers rather than individual investigators. The intention is to provide early warning of threats and to support senior decision-makers in setting priorities to prepare their organisations to be able to deal with emerging criminal issues. This might mean allocating resources to different areas of crime, increased training in a crime fighting technique, or taking steps to close a loophole in a process. Interpol's criminal analysts provide both operational and strategic analytical support - to units focusing on specialised crime areas (including financial crimes and corruption), and to our member countries - as well as providing training and consultancy in analytical matters.

Interpol Group of Experts on Corruption

To strengthen the law enforcement response in the fight against corruption Interpol has established the Interpol Group of Experts on Corruption (IGEC) which develops and implements new anti-corruption initiatives. Representing all of Interpol's regions, the IGEC is a multi-disciplinary group which facilitates the co-ordination and harmonisation of the different national and regional approaches to combating corruption.

The IGEC provides essential information and feedback to Interpol on matters pertaining to all aspects of corruption, and is mandated to advise Interpol on how best to combat this phenomenon, both operationally and strategically.

Importantly, the IGEC has put in place a number of best practice guidelines and references for the law enforcement community worldwide, including a set of "Global Standards to Combat Corruption in Police Forces/Services" and a "Library of Best Practice" designed to aid investigators in corruption cases.

UMBRA initiative

In 2009 Interpol adopted the Resolution AG-2009-RES-06 which provided for the development of an information exchange platform for National Anti-Corruption Entities and of a Technical and Strategic Anti-Corruption Information Database, altogether referred to as the "UMBRA" initiative. This initiative groups Interpol's anti-corruption and asset recovery initiatives. UMBRA's overall aim is to promote and increase the exchange of corruption information and anti-corruption methodologies globally, from all law enforcement agencies and national anti-corruption entities responsible for the fight against corruption. UMBRA will also deploy technical assistance to Interpol member countries to assist with operational support and capacity building.

A key tool within the UMBRA concept is the Global Focal Point platform, supported by Interpol and StAR.[8] This is a secure contacts database of law enforcement officials to respond to emergency requests for assistance. Such a service is crucial in asset recovery cases where lack of immediate action may cause law enforcement to lose a money trail. This communication tool includes comprehensive data from around 100 Interpol member countries so far regarding: (a) contact details for initial enquiries; (b) key offices involved in foreign stolen asset recovery; (c) the different types of requests required to initiate assistance; (d) the types of assistance available for Mutual Legal Assistance requests (MLA); (e) evidence needed to open criminal investigations or initiate civil action regarding stolen or embezzled assets; (f) the type of information needed to obtain assistance in identifying, tracing, or seizing stolen assets; (g) the countries that have the authority to enforce foreign forfeiture judgments.

IV. Authorities that can use the instrument

The General Secretariat, the National Central Bureaus, the authorised national institutions and the authorised international entities are authorised to use the police information system and the information transmitted thereon, provided they observe the provisions of the Rules and the texts to which they refer (Art. 1, let. c of the Rules).

8. StAR Initiative, run jointly by the World Bank and United Nations Office on Drugs and Crime (UNODC). StAR supports international efforts to fight corruption and especially to put an end to safe havens for corrupt funds. They work with developing countries and major financial markets to prevent proceeds from being laundered, and to help return stolen assets as quickly as possible.

General Secretariat (Art. 25 to Art. 30 of the Constitution)

The permanent departments of the Organization shall constitute the General Secretariat (Art. 25 of the Constitution). The General Secretariat shall, *inter alia*, serve as an international centre in the fight against ordinary crime, serve as a technical and information centre and maintain contact with national and international authorities, whereas questions relative to the search for criminals shall be dealt with through the NCBs (Art. 26 of the Constitution).

National Central Bureaus (Art. 31 to Art. 33 of the Constitution)

In order to further its aims, the Organization needs the constant and active co-operation of its Members, who should do all within their power which is compatible with the legislations of their countries to participate diligently in its activities (Art. 31 of the Constitution). In order to ensure the above co-operation, each country shall appoint a body which will serve as the NCB. It shall ensure liaison with the various departments in the country, those bodies in other countries serving as NCBs and the Organization's General Secretariat (Art. 32 of the Constitution). In particular, in carrying out their liaison function between the General Secretariat and the authorised national institutions, the NCBs shall be responsible vis-à-vis the General Secretariat for the entities and persons they have authorised to consult, or supply information for, the police information system. With regard to their responsibility, prior to authorising them to consult, or to provide information through, the Organization police information system, the NCBs shall first establish that procedures conforming to their national laws have been put in place to ensure and to continue to ensure that the said entities respect the Rules and the texts to which they refer (Art. 5.2 of the Rules).

Authorised national institutions (Art. 1, let. f of the Rules)

"Authorized national institution" is defined as any official public national institution or any entity legally authorised to fulfill the role of a public institution in enforcing the criminal law and which has received the express authorisation of its country's NCB to consult or provide information via the Organization's channels within the limits set by the said NCB (Art. 1, let. f of the Rules).

Authorised international entities (Art. 1, let. g of the Rules)

"Authorized international entity" means any entity which has concluded an agreement with the Organization authorising it to process information directly through the Organization's channels, as provided by the Constitution[9] (Art. 1, let. g of the Rules).

V. Conditions for requesting assistance

The Rules set out strict conditions for processing information through Interpol's channels. This may only be carried out if all the following conditions are met (Art. 10.1, let. a of the Rules): (a) it complies with the Constitution and relevant provisions in the Organization's rules; (b) it is in accordance with the purpose of international police co-operation; (c) it is relevant and connected with cases of specific international interest to the police; the information is considered, *a priori*, to be accurate and relevant, if it has been provided by an NCB, an authorised national institution, or authorised international

9. See Art. 41 of the Constitution.

entity (Art. 10.1, para b of the Rules); (d) it is not such that it might prejudice the Organization's aims, image or interests, or the confidentiality or security of the information; (e) it is carried out by its source in the context of the laws existing in its country, in conformity with the international conventions to which it is a party, and with the Organization's Constitution. Special general conditions are set out for the processing of particularly sensitive information (Art. 10.2 of the Rules) and for the processing of notices (Art. 10.5 of the Rules).

With specific regard to the provision of information from the General Secretariat to NCBs, authorised national institutions and authorised international entities, the Rules state that (Art. 17.1, let. a, num. 2 of the Rules):

a) in the case of a reasoned request, the General Secretariat may nevertheless require the requesting entity to provide a descriptive summary of the facts justifying the request;

b) in the case of direct access, reasons are reputed to have been given; and

c) to provide information on its own initiative to the entities referred to above, the General Secretariat must consider their interventions to be necessary in the light of the Organization's aims, in which case the Secretariat shall specify the purposes for which it is communicating the information.

Further, when the General Secretariat provides an item of information, it shall indicate: (a) the source; (b) any restrictions on processing of the information; (c) any conditions regarding retention of the information; (d) the date of receipt; (e) the latest date after which the need to retain the information should be assessed; (f) the main corrigenda and updates to the information; (g) the status of the person concerned, where personal information is concerned (Art. 18, para b of the Rules).

VI. Grounds for denying/postponing assistance

The Rules also provide for specific conditions and instances in which an item of information may be provided. For instance, any provision of information by the General Secretariat is subject to any restrictions imposed by the source of the information (Art. 17.1, let. a, num. 1). The express prior authorisation of the NCB or the authorised international entity which is the source of the information is necessary before the information is forwarded to an entity other than a NCB, an authorised national institution or an authorised international entity (Art. 17.1, let. a, num. 4 of the Rules). Further, the General Secretariat may only provide an item of particularly sensitive information when it is relevant and of a particular criminalistic value for the pursuit of the Organization's aims and for the purposes for which the said information is being processed subject to any restrictions imposed by the source of the information (Art. 17.1, let. b of the Rules).

The provision of information through the Organization's channels must be carried out: (a) in the context of the relevant national and regional laws, (b) in conformity with the international conventions to which the sources of the information are party, (c) in conformity with the Organization's Constitution and its appendices (Art. 17.1, let. f of the Rules).

The Rules state that nothing shall prevent the General Secretariat from providing an item of information, even without having obtained prior authorisation from the authorised entity which originally supplied it, in the following cases: (a) when the information has come into the public domain; (b) it is a matter of urgency; (c) its provision is necessary to defend the interests of the Organization, its Members or its agents (Art. 17.1, let. c of the

Rules). When an urgent situation exists, the General Secretariat shall be empowered to communicate any item of information relating to a threat to any National Central Bureau, after having notified the source of the information and unless express opposition to that communication has been received from the source of the information within the time limit stipulated by the General Secretariat in the light of the said threat (Art. 22, let b of the Rules).

No provision shall hinder the possibility, when justified by exceptional circumstances, of providing police information from one of the Organization's member countries to institutions or authorities of the same country to which the services of that State, involved in the enforcement of the criminal law, must account for their actions by virtue of the law (Art. 17.1, let d of the Rules). When the General Secretariat is not empowered to provide an item of information to a requesting entity by virtue of restriction imposed by the source of that information, it may transmit the request to the source of the information which may be able to answer the request (Art. 17.1, let e of the Rules).

VII. Use of information received

According to the Rules, information[10] shall be processed by the Organization or through its channels for international police co-operation purposes in order to prevent, investigate and prosecute ordinary-law crimes, to assist with such investigations and for the following reasons (Art. 3.1, let. a of the Rules): (a) a search for a person with a view to his arrest; (b) to obtain information about a person who has committed or is likely to commit, or has participated or is likely to have participated (directly or indirectly) in an ordinary-law crime; (c) to warn police authorities about a person's criminal activities; (d) to locate a missing person; (e) to locate a witness or victim; (f) to identify a person or a dead body; (g) to locate or identify objects; (h) to describe or identify modus operandi, offences committed by unidentified persons, the characteristics of counterfeits or forgeries, and seizures of items connected with trafficking operations. Information may also be processed for the purpose of identifying threats and criminal networks (Art. 3.1, let. b of the Rules).

It should be noted that the Rules allow the Interpol's General Secretariat to process information, outside of the police information system[11], "for any other legitimate purpose", *i.e.* for administrative reasons, scientific research and publications (historical, statistical, or journalistic) or to defend the interests of the Organization, its members or staff in the context of a trial, a settlement, pre-litigation procedures, post-trial or appellate

[10] "Information" means any item of information or set of items of information (personal or otherwise, and irrespective of the sources) pertaining to constituent elements of ordinary law crimes, as defined by the Constitution, the investigation and prevention of such crimes, the prosecution and punishment of offences, and any information pertaining to missing persons and unidentified dead bodies (Art. 1, let. b of the Rules).

[11] "Police information system" means all the Organization's databases and networks which can be used for processing information, through its channels, for the purposes of international police co-operation (Art. 1, let. d of the Rules). Networks include the secured global police network (called I-24/7) as a system to connect law enforcement officers in all the member countries. It enables authorised users to access Interpol's range of criminal databases. The I-24/7 network underpins all Interpol's operational activity, including targeted operations against different crime areas and the deployment of specialised response teams to the search for international fugitives. It is the foundation of information exchange between the world's police.

proceedings. In such instance, specific storage conditions and retention period for information thus processed shall apply (Art. 3, para 2 of the Rules). This information may not be used for the purposes of police co-operation (Art. 10.4, let a of the Rules).

Prior to the use of any information obtained through the Organization's police information system, the NCBs, authorised national institutions and authorised international entities must check with the General Secretariat and the source of that information to ensure that the information is still accurate and relevant (Art. 5.5, let. a of the Rules).

Further, it is understood that: (a) authorised national institutions shall conduct the necessary checks and additional investigations via their NCBs; (b) authorised international entities shall conduct the necessary checks and additional information requests in consultation with the source of the information via the General Secretariat (Art. 5.5., let. b of the Rules).

VIII. Sharing of information received with other local authorities

Under the Rules, information sources shall retain control over the processing rights to their items of information, in conformity with the procedures set out in the Rules and subject to any additional restrictions which may be imposed by the General Secretariat (Art. 5.4, para a).

Further, the source of an item of information, whether it be a National Central Bureau, authorised national institution, or authorised international entity shall determine its level of confidentiality, thereby classifying the information (Art. 8, para a). The General Secretariat may attribute a confidentiality level to the information which is higher than that attributed by the source, in the light of the risks to international police co-operation, or to the Organization, its staff, and its member countries of processing, and more particularly of disclosing, the information (Art. 8, para b). The General Secretariat shall determine the level of confidentiality of the value it adds to an item of information, notably when it carries out analysis work or issues a notice, it being understood that, on retransmission, it must respect the restrictions the source referred to in the analysis has imposed on the said item of information (Art. 8, para c).

The General Secretariat shall also take all necessary measures to protect the security, *i.e.* integrity, and confidentiality of information provided and processed through the police information system (Art. 9, para a). To this effect, it shall *inter alia* develop the appropriate technical, legal and procedural means to ensure that only duly authorised persons are able to process an item of information (Art. 9, para b). It shall take all appropriate steps to (Art. 9, para c): (a) grant access to an item of information or to a database solely to those persons whose functions or duties are connected with the purpose for which the said information is processed; (b) protect the information it processes from any unauthorised or accidental form of processing such as alteration (modification, deletion or loss) or unauthorised access and use of that information; (c) check and ensure that only those persons authorised to access the information had done so; (d) be able to restore its databases as quickly as possible in the event of damage to the police information system.

In case of direct supply of information to Interpol's autonomous databases, an NCB, an authorised national institution or an authorised international may only impose restrictions on the processing of personal information which it records in such a database (Art. 21, para c of the Rules).

IX. Sharing of information received with foreign authorities

Under the Rules, information sources shall retain control over the processing rights to their items of information, in conformity with the procedures set out in the Rules and subject to any additional restrictions which may be imposed by the General Secretariat (Art. 5.4, para a).

Further, the source of an item of information, whether it be a National Central Bureau, authorised national institution, or authorised international entity shall determine its level of confidentiality, thereby classifying the information (Art. 8, para a). The General Secretariat may attribute a confidentiality level to the information which is higher than that attributed by the source, in the light of the risks to international police co-operation, or to the Organization, its staff, and its member countries of processing, and more particularly of disclosing, the information (Art. 8, para b). The General Secretariat shall determine the level of confidentiality of the value it adds to an item of information, notably when it carries out analysis work or issues a notice, it being understood that, on retransmission, it must respect the restrictions the source referred to in the analysis has imposed on the said item of information (Art. 8, para c).

The General Secretariat shall also take all necessary measures to protect the security, *i.e.* integrity, and confidentiality of information provided and processed through the police information system (Art. 9, para a). To this effect, it shall *inter alia* develop the appropriate technical, legal and procedural means to ensure that only duly authorised persons are able to process an item of information (Art. 9, para b). It shall take all appropriate steps to (Art. 9, para c): (a) grant access to an item of information or to a database solely to those persons whose functions or duties are connected with the purpose for which the said information is processed; (b) protect the information it processes from any unauthorised or accidental form of processing such as alteration (modification, deletion or loss) or unauthorised access and use of that information; (c) check and ensure that only those persons authorised to access the information had done so; (d) be able to restore its databases as quickly as possible in the event of damage to the police information system.

In case of direct supply of information to Interpol’s autonomous databases, an NCB, an authorised national institution or an authorised international may only impose restrictions on the processing of personal information which it records in such a database (Art. 21, para c of the Rules).

X. Relationship with other instruments

The provision of information by the General Secretariat through the Organization's channels must be carried out in conformity with the international conventions to which the sources of the information are party (Art. 17.1, let. f of the Rules).

Co-operation Agreements between Interpol and other international organisations

The Constitution empowers Interpol to conclude international agreements (Art. 41 of the Constitution). In order to provide a clear legal basis for working together with other subjects of international law, in application of this Article, Interpol has concluded more than 40 agreements relating to Interpol's privileges and immunities on the territory of different States, either for the establishment of a bureau, for the organisation of a General Assembly session or a Regional Conference, or for the deployment of personnel in the field for police operations. Each agreement is specific for the scope of co-operation established, and contains provisions relative

to the practical work of the organisations concerned. They can include such provisions as conditions for the exchange of information, reciprocal representation within the other organisation or means of technical assistance. In practice, the co-operation can take the form or information exchange, mutual investigative projects or by direct or indirect access to the each others databases.

Below the full list of co-operation agreements concluded by the Organization (as at April 2012):

- Memorandum of understanding between the General Secretariat of the International Police Organization - INTERPOL and The public Security Department of the Ministry of the Interior of the Italian Republic
- Co-operation agreement between the International Criminal Police Organization - INTERPOL and the Special Tribunal for Lebanon (Came into force on 17 December 2009)
- Interim agreement between the Special Tribunal for Lebanon and the International Criminal Police Organization-INTERPOL (Signed on 24 August 2009)
- Co-operation Agreement between The International Criminal Police Organization - INTERPOL and Naif Arab University for Security Sciences in the area of police training (Signed on 20 June 2011)
- Accord de coopération entre l'Organisation Internationale de Police Criminelle - INTERPOL et L'Institut International de Recherche, de Documentation et de Formation pour la Prévention et la lutte Contre la Falsification des produits de Sante (Signed on 16 June 2011)
- Co-operation agreement the International Criminal Police Organization – INTERPOL and The Health Sciences Authority of Singapore (Signed on 8 June 2011)
- Co-operation agreement the International Criminal Police Organization – INTERPOL and Underwriters Laboratories Inc. in the area of training (Signed on 29 March 2010)
- License agreement between the International Criminal Police Organization – INTERPOL and Underwriters Laboratories Inc.
- Memorandum of understanding between International Criminal Police Organization – INTERPOL and the Integrity Vice Presidency of the World Bank Group (INT) (Signed on 1 October 2010)
- Memorandum of understanding between the Commission of the African Union and the International Criminal Police Organization – INTERPOL
- Agreement between the General Secretariat of the International Criminal Police Organization – INTERPOL and Ministry of Interior of the Russian Federation on the establishment of the International training Centre under the auspices of INTERPOL
- Co-operation agreement the International Criminal Police Organization – INTERPOL and the Commission of Chiefs of Police of Central America, Mexico and the Caribbean (Came into force on 12 June 2009)
- Co-operation agreement the International Criminal Police Organization – INTERPOL and Crime Stoppers International (Signed on 10 November 2010)
- Memorandum of understanding between International Criminal Police Organization – INTERPOL and the Regional Centre on Small Arms in the Great Lakes Region, the Horn of Africa and Bordering States (RESCA) (signed on 10 November 2010)

- Executive Agreement between the International Criminal Police Organization – INTERPOL and the Basel Institute of Governance (Signed on 22 October 2009)
- Memorandum of understanding between the General Secretariat of the International Criminal Police Organization – INTERPOL and the Malaysian Anti-Corruption Academy (Signed on 19 October 2009)
- Working arrangement between the International Criminal Police Organisation - INTERPOL and the European Agency for the management of operational co-operation at the external borders of the member States of the European Union - FRONTEX (Signed on 27 May 2009)
- Co-operation agreement between the International Criminal Police Organization (ICPO-INTERPOL) and the Caribbean Community (CARICOM) (Signed on 19 March 2009)
- Co-operation agreement between the International Criminal Police Organization (ICPO-INTERPOL) and the World Anti-Doping Agency (WADA) (Signed on 2 February 2009)
- Anti-Terrorism Centre of the Commonwealth of Independent States (ATC-CIS) (Signed on 17 December 2008)
- Co-operation agreement between CEPOL and the ICPO-INTERPOL General Secretariat (Signed on 12 December 2008)
- Co-operation agreement between the International Criminal Police Organization ('ICPO-INTERPOL') and the Republic of Austria regarding the Seat of the INTERPOL Anti-Corruption Academy in Austria (Signed on 17 July 2007)
- Supplementary arrangement to the Co-operation Agreement between the United Nations and the International Criminal Police Organization (INTERPOL) (1997) (Signed on 13 October 2008)
- Co-operation agreement between the International Criminal Police Organization – INTERPOL and the International Commission on Missing Persons (Signed on 7 November 2007 pursuant to the Resolution AG-2007-RES-10. Came into force on 6 January 2008)
- Co-operation agreement between the International Criminal Police Organization – INTERPOL and the Regional Security System (Came into force on 16 March 2007)
- Co-operation agreement between the International Criminal Police Organization-INTERPOL and the Lusaka Agreement Task Force (Came into force on 22 December 2006)
- Co-operation agreement between the International Atomic Energy Agency and the International Criminal Police Organization (Came into force on 11 April 2006)
- Agreement of Co-operation between the International Maritime Organization and International Criminal Police Organization - INTERPOL (Came into force on 20 February 2006)
- Co-operation agreement between the office of the prosecutor of the International Criminal Court and the International Criminal Police Organization-INTERPOL (Came into force on 22 March 2005)
- Co-operation agreement on communication connectivity for the exchange of information between the ICPO-INTERPOL and the SECI center for combating trans-border crime (Came into force on 14th December 2004)

- Co-operation agreement between the International Criminal Police Organization - INTERPOL and the Caribbean Customs Law Enforcement Council (Came into force on 22nd October 2004)
- Co-operation agreement between the International Criminal Police Organization - INTERPOL and the World Intellectual Property Organization (Came into force on 6th September 2004)
- Co-operation agreement between the European Central Bank - ECB and the International Criminal Police Organization - INTERPOL (Came into force on 30th March 2004)
- UNESCO-INTERPOL Special arrangement in accordance with Article 4 (4) of the co-operation agreement 8 July 2003, become effective upon approval by the INTERPOL General Assembly
- Co-operation agreement between the International Criminal Police Organization - INTERPOL and the Special Court for Sierra Leone
- UNESCO-INTERPOL Special arrangement in accordance with Article 4 (4) of the co-operation agreement (8 July 2003, become effective upon approval by the INTERPOL General Assembly)
- Arab Interior Ministers' Council (AGN/67/RAP/6 -Came into force on 22nd September 1999)
- Memorandum of Understanding with the CITES Secretariat (Convention on International Trade in Endangered Species of Wild Fauna and Flora, UNEP - Came into force on 15th October 1998)
- Economic and Monetary Community of Central Africa (Came into force on 26th March 2001)
- European Monitoring Centre for Drug and Drug Addiction (EMCDDA) (Came into force on 25th September 2001)
- Europol general co-operation agreement (Came into force on 5th November 2001)
- Joint initiative of the Secretary General of INTERPOL and the Director of Europol on combating the counterfeiting of currency, in particular the Euro (Came into force on 5th November 2001)
- International Centre for Migration Policy Development (AGN/68/RAP/16 - Came into force on 18th February 2000)
- International Chamber of Commerce (AGN/69/RAP/16 - Came into force on 2nd May 2001)
- International Civil Aviation Organization - Approved by the Executive Committee at its 124th session (November 1999 - Came into force on 22nd May 2000)
- International Council of Museums on countering the theft and trafficking in cultural property (AGN/68/RAP/5 - Came into force on 11th April 2000)
- Organization of American States Approved by the Executive Committee at its 125th session (March 2000 - Came into force on 2nd May 2000)
- Agreement between ICPO Interpol, the Government of Romania and SECI Center for combating the trans border crime on communication connectivity for exchange of information (Came into force on 25th February 2002)

- Secretariat of the Basel Convention (Convention on the control of transboundary movements of hazardous wastes and their disposal, UNEP) (Came into force on 4th November 1999)
- Co-operation Agreement between the United Nations and Interpol and supplementary arrangements to the co-operation agreement (Signed on 8 July 1997)
- Investigations section of the Office of Internal Oversight Services (Came into force on 23th September 1998)
- United Nations interim administration Mission In Kosovo on co-operation in crime prevention and criminal justice
- Supplementary Arrangement on Co-operation between INTERPOL and the United Nations in relation to the Activities of Peacekeeping Operations and Special Political Missions (Signed on 11 October 2009)
- Supplementary Arrangement on Co-operation between INTERPOL and the United Nations in relation to the United Nations Security Council Sanctions Committees (Signed on 11 October 2009)
- United Nations Educational, Scientific and Cultural Organization (UNESCO) Approved by the Executive Committee at its 123rd session (June 1999) (Came into force on 5th October 1999)
- Universal Postal Union (UPU) (AGN/65/RAP/8 - Came into force on 29th April 1997)
- World Customs Organization (AGN/67/RAP/6 - Came into force on 9th November 1998)

8. ICPO-Interpol Model [bilateral] police co-operation agreement

Key Points

- The aims of the Model Agreement are to create a privileged police co-operation space between the Parties and set up machinery to facilitate co-operation and to create specific operational structures for that purpose.
- The Model Agreement provides for several forms of police co-operation, namely exchange of information, upon request or spontaneous; right of observation and pursuit; missions, participation in investigations and special investigative techniques and other forms of co-operation.
- Requests for information under the Model Agreement and replies to such requests shall be communicated through the Parties' National Central Bureaus (NCBs) which shall ensure liaison with the various departments in the country, those bodies in other countries serving as NCBs and the Organization's General Secretariat and shall also act as a liaison channel between the various law enforcement services of the Parties. Where the request cannot be made in good time by the above procedure or where circumstances so demand, it may be addressed by the competent service of the requesting Party directly to the competent service of the requested Party, which may reply directly.
- The Model Agreement provides for specific rules regarding the protection of personal data, under which any personal data transmitted in application of the Model Agreement may be used by the recipient Party solely for the purposes for which the actual agreement stipulates that such data may be transmitted; such data may be used for other purposes only with the prior authorisation of the Party which transmitted the data and in compliance with the legislation of the recipient Party. Data may only be used by judicial or police authorities or any other law enforcement authority designated by the Party concerned, a list of which shall be communicated to the other Party. The requesting Party shall guarantee the level of confidentiality attributed to information by the requested Party.

I. Parties

The International Criminal Police Organization (hereinafter referred to as “Interpol” or “the Organization”) is the world’s largest international police organisation, with 190 member countries.[1] It was founded in 1923. Interpol’s structure, aims and objectives

[1] Status of membership as at April 2012: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua & Barbuda, Argentina, Armenia, Aruba, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin,Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina-Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Congo (Democratic Rep.), Costa Rica, Croatia, Cuba, Curaçao, Cyprus, Czech Republic, Côte d'Ivoire, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, Former Yugoslav Republic of Macedonia, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea (Rep. of), Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco,

are outlined in its Constitution, the Organization's main legal document which came into force in 1956. In addition to the Constitution, a number of other fundamental texts make up Interpol's legal framework,[2] among which are the "Rules governing the processing of information" (hereinafter referred as to "the Rules"), entered into force on 1st January 2006, which provide for some conditions and basic procedures according to which information is processed by Interpol itself or through its channels for the purposes of international police co-operation.

In order to provide its member countries with the legal tools they need to facilitate co-operation they initiate bilaterally, Interpol has also developed a model police co-operation agreement (hereinafter referred to as "the Model Agreement"). So far, around 20 police co-operation agreements mention Interpol.[3]

Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Rwanda, Samoa, San Marino, Sao Tome & Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Sint Maarten, Slovakia, Slovenia, Somalia, South Africa, South Sudan (Rep. of), Spain, Sri Lanka, St Kitts & Nevis, St Lucia St Vincent & Grenadines, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Timor Leste, Togo, Tonga, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Vatican City State, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

[2.] These include (a) The General Regulations; (b) Rules of the Procedure of the General Assembly; (c) Rules of the Procedure of the Executive Committee; (d) Financial regulations; (e) Rules governing the processing of information; (f) Rules on the Control of Information and access to Interpol's Files.

[3.] See: Agreement between Benin, Ghana, Nigeria and Togo on criminal police co-operation (Lagos, 1984); Agreement between Spain and Sweden on police co-operation in combating terrorism, drug trafficking and organised crime (11 May 1989); Agreement between France and Sweden on police co-operation in combating terrorism, drug trafficking and organised crime (15 December 1989); Convention on applying the Schengen Agreement of 14th June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Title III, Police and security) (19 June 1990); Agreement between Bulgaria and Germany on co-operation in combating organised crime and drug trafficking (14th September 1992); Agreement between the Ministers of the Interior of Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Moldova, Russia, Tadjikistan, Turkmenistan, Uzbekistan, Ukraine and Estonia on co-operation in controlling illegal trafficking in narcotic drugs and psychotropic substances (1992); Memorandum between the Belgian Gendarmerie and the National Police of Hungary (27 May 1994); Exchange of Letters between France and Belgium relating to cross-border police co-operation (16 March 1995); Memorandum of Understanding on co-operation in police matters, justice and immigration between the Ministers of Justice of Belgium, the Netherlands and Luxembourg, the Ministers of the Interior of Belgium, the Netherlands and Luxembourg (4 June 1996); Agreement between the Minister of Justice and the Minister of the Interior of the Grand Duchy of Luxembourg and the Minister of the Interior and the Minister of Justice of the Kingdom of Belgium on cross-border police co-operation between Belgium and Luxembourg (4 June 1996); Joint Declaration by the Belgian Gendarmerie and the Hungarian National Police (5 July 1996); Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Hungary on co-operation in combating organised crime, illegal trafficking in narcotic drugs and psychotropic substances, terrorism and other forms of serious crime (23 April 1997); SARPCCO multilateral co-operation agreement and mutual assistance in the field of crime combating (Harare, 30 October 1997); Agreement between the Swiss Federal Council and the French Government on cross-border co-operation in judicial, police and customs matters (11 May 1998); Police co-operation agreement

II. Scope

Interpol aims (a) to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights"[4] and (b) to establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes (Art. 2 of the Constitution). Any intervention or activities of a political, military, religious or racial character are strictly forbidden for Interpol (Art. 3 of the Constitution). The aims of the Model Agreement, which comes within the framework of the co-operation system set up by Interpol, are to create a privileged police co-operation space between the Parties and set up machinery to facilitate co-operation and to create specific operational structures for that purpose (Art. 2, para 2 of the Model Agreement).

III. Forms of co-operation

The Model Agreement provides for several forms of police co-operation, namely exchange of information, upon request or spontaneous (Art. 4 to Art. 6 of the Model Agreement); right of observation and pursuit[5] (Art. 8 to Art. 12 of the Model Agreement); missions, participation in investigations and special investigative techniques (Art. 13 to Art. 15 of the Model Agreement) and other forms of co-operation (Art. 16 to Art. 18 of the Model Agreement).

Exchange of Information

Under the Model Agreement, the Parties undertake to ensure that, when requested, their police authorities shall, in compliance with national legislation and within the limits of their responsibilities, communicate to each other information for preventing ordinary law crime, locating offenders and bringing them to justice. This shall not apply where the national legislation of the requested Party stipulates that the request has to be made to the judicial authorities (Art. 4, para 1 of the Model Agreement). The Model Agreement also

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between France and South Africa (26 June 1998); Co-operation agreement between the Government of the Republic of Bulgaria, the Government of Romania and the Government of the Republic of Turkey on combating terrorism, organised crime, illicit trafficking in narcotic drugs and psychotropic substances, money laundering, trafficking in arms and human beings and other major crimes (16 April 1998); Agreement on co-operation in criminal police matters between the Central African States (29 April 1999); Draft police co-operation convention between the Government of the Kingdom of Belgium and the Governments of Central European and Eastern European countries (2 July 1997); Draft Agreement on co-operation in criminal police matters between countries of the sub-region of West Africa (1998); Draft police co-operation convention between the Government of the Kingdom of Belgium and the Government of the Republic of Bulgaria (1998).

4. Reference is made to the Universal Declaration of Human Rights as proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

5. For the purposes of the Model Agreement: "right of observation" shall mean the possibility available to police officers of one Party to observe, in the territory of the other Party and in accordance with the conditions defined in Article 10 of the Model Agreement, the movements of an individual who is the subject of a police investigation; "right of pursuit" shall mean the possibility available to police officers of one Party to pursue an individual with a view to his apprehension in the territory of the other Party, under the conditions defined in Article 11 of the Model Agreement (Definitions).

provides that the Parties, in compliance with their national legislation, are allowed to communicate to each other, on their own initiative, potentially useful information, particularly in the interests of maintaining law and order or protecting victims (Art. 4, para 2 of the Model Agreement).

Missions, participation in investigations and special investigative techniques

The Model Agreement states that officers from one Party may enter the territory of the other Party in order to assist in investigations being carried out in that territory (Art. 13, para 1). When officers are on mission in application of this provision, they shall act as observers (Art. 13, para 2).

Officers on mission shall be authorised to be present during: (a) searches of premises, (b) searches of persons, (c) questioning and hearings, (d) autopsies (Art. 13, para 3 of the Model Agreement). Officers on mission may be authorised to ask questions during questioning and hearings. However, only officers from the territory in which the procedure is taking place shall be authorised to decide what action to take (Art. 13, para 4 of the Model Agreement). Missions shall be organised by the Parties' NCBs (Art. 13, para 5 of the Model Agreement).

Parties shall take the necessary measures to co-ordinate the implementation of special investigative techniques, such as controlled deliveries, surveillance and undercover operations, for the purpose of gathering evidence so that the competent authorities may take legal action against persons involved in an offence targeted by these techniques (Art. 14, para 1 of the Model Agreement). Officers of one Party involved in this type of investigation shall respect the conditions agreed on with the Party in whose territory that investigation is taking place (Art. 14, para 2 of the Model Agreement).

To implement the above provisions, the Parties shall consult each other on the creation of mixed teams (Art. 15, para 1 of the Model Agreement). Officers of the Parties who are members of such teams shall comply with the instructions of the competent authorities of the Party in whose territory the operation is taking place (Art. 15, para 2 of the Model Agreement).

Other forms of co-operation

The Model Agreement provides for other forms of police co-operation, such as, *inter alia*, co-operation in technical matters. In this respect, the Model Agreement allows Parties to organise reciprocal visits between their respective border units (Art. 17, para 1 of the Model Agreement). A Party may invite officers selected by the other Party to attend its seminars and in-house training courses in subject areas such as (a) methods used to prevent, detect and combat offences; (b) routes and modus operandi used by individuals suspected of committing offences; (c) control of import/export of contraband; (d) gathering evidence; (e) law enforcement equipment and techniques (electronic surveillance, controlled deliveries, undercover operations, etc.). This is a non-exhaustive list (Art. 17, para 2 of the Model Agreement). The Parties shall consider associating all those involved in law enforcement, including judges and customs officers, in the above-mentioned visits and training (Art. 17, para 3 of the Model Agreement).

Further, a Party shall send officers as interns to the other Party in order to familiarise them with the latter's structure and practices (Art. 17, para 4 of the Model Agreement). The Parties shall encourage appropriate language training for officers likely to be in

contact with officers from the other Party (particularly NCB officers) (Art. 18 of the Model Agreement).

IV. Authorities that can use the instrument

Generally, any requests for information under the Model Agreement and replies to such requests shall be communicated through the Parties' National Central Bureaus (NCBs) (Art. 5, para 1 of the Model Agreement). According to Interpol's Constitution, each country shall appoint a body which will serve as the NCB and which shall ensure liaison with the various departments in the country, those bodies in other countries serving as NCBs and the Organization's General Secretariat (Art. 32 of the Constitution).[6] NCBs shall also act as a liaison channel between the various law enforcement services of the Parties (Art. 3, para 1 of the Model Agreement).[7] However, where the request cannot be made in good time by the above procedure or where circumstances so demand, it may be addressed by the competent service of the requesting Party directly to the competent service of the requested Party, which may reply directly.[8] In such cases, the requesting authority shall as soon as possible inform its country's NCB of its direct application (Art. 5, para 2 of the Model Agreement). In this case, requests for information and replies to such requests shall be communicated to the NCB of each Party (Art. 5, para 3 of the Model Agreement).

V. Conditions for requesting assistance

The Model Agreement does not provide for specific conditions for requesting assistance under its provisions. However, it should be noted that the Rules highlight that the processing of information through Interpol's channels may only be carried out if all the following conditions are met (Art. 10.1, let. a of the Rules):

a) it complies with the Constitution and relevant provisions in the Organization's rules;

b) it is in accordance with the purpose of international police co-operation;

c) it is relevant and connected with cases of specific international interest to the police; the information is considered, *a priori*, to be accurate and relevant, if it has been provided by an NCB, an authorised national institution, or authorised international entity (Art. 10.1, para b of the Rules).

d) it is not such that it might prejudice the Organization's aims, image or interests, or the confidentiality or security of the information;

6. The permanent departments of the Organization shall constitute the General Secretariat (Art. 25 of the Constitution). The General Secretariat shall, *inter alia*, serve as an international centre in the fight against ordinary crime, serve as a technical and information centre and maintain contact with national and international authorities, whereas questions relative to the search for criminals shall be dealt with through the NCBs (Art. 26 of the Constitution).

7. In order to facilitate the co-operation covered by the Model Agreement, each Party may, if necessary, request the assistance of Sub-Regional Bureaus (Art. 3, para 3 of the Model Agreement).

8. As indicated in Art. 4 of the Model Agreement, exchange of information generally takes place between police authorities (NCBs or other law enforcement service). However, it could be required under the national legislation of the requested Party that the requests of information have to be made to judicial authorities.

e) it is carried out by its source in the context of the laws existing in its country, in conformity with the international conventions to which it is a party, and with the Organization's Constitution.

Special general conditions are set out for the processing of particularly sensitive information (Art. 10.2 of the Rules).

VI. Grounds for denying/postponing assistance

(N.A)

VII. Use of information received

The Model Agreement provides for specific rules regarding the protection of personal data. Based on such rules, the processing[9] of personal data shall be subject to the national legislation of each Party and to the relevant rules in force within Interpol (Art. 7, para 1 of the Model Agreement). Without prejudice to the above, any personal data transmitted in application of the Model Agreement may be used by the recipient Party solely for the purposes for which the actual agreement stipulates that such data may be transmitted; such data may be used for other purposes only with the prior authorisation of the Party which transmitted the data and in compliance with the legislation of the recipient Party. Data may only be used by judicial or police authorities or any other law enforcement authority designated by the Party concerned, a list of which shall be communicated to the other Party (Art. 7, para 2, let. a) and let. b) of the Model Agreement). Each Party shall monitor the use made of information communicated by the other Party in order to prevent and sanction any abuse which could infringe on individual rights. For this purpose, Parties may designate a specific independent supervisory authority (Art. 7, para 3 of the Model Agreement).

VIII. Sharing of information received with other local authorities

The requesting Party (the NCB or some other competent law enforcement service) shall guarantee the level of confidentiality attributed to information by the requested Party (the NCB or other competent law enforcement service) (Art. 6 of the Model Agreement). With regard to personal data, the Model Agreement states that the transmission of such data shall be subject to the national legislation of each Party and to the relevant rules in force within Interpol (Art. 7, para 1 of the Model Agreement).

IX. Sharing of information received with foreign authorities

The requesting Party (the NCB or some other competent law enforcement service) shall guarantee the level of confidentiality attributed to information by the requested Party (the NCB or other competent law enforcement service) (Art. 6 of the Model Agreement). With regard to personal data, the Model Agreement states that the transmission of such data shall be subject to the national legislation of each Party and to the relevant rules in force within Interpol (Art. 7, para 1 of the Model Agreement).

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[9]. For the purposes of international police co-operation according to Interpol's rules, processing of information includes any operation or set of operations (automated or manual) applied to information in any form or on any medium, from the moment it is accessed to the moment it is destroyed, and any exchange in between (Art. 1, let. j of the Rules).

X. Relationship with other instruments (Art.48 and Art.59)

The provisions of the Model Agreement shall not affect the application of agreements already in force between the Parties (Art. 21 of the Model Agreement).

9. EU Council Decision establishing the European Police Office (Europol)

Key points

- The EU Council Decision of 6 April 2009 replaces the provisions of the Convention based on Article K.3 of the Treaty on European Union, establishing the European Police Office (Europol Convention). The objective of Europol shall be to support and strengthen action by the competent authorities of the Member States and their mutual co-operation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States.
- It provides for different forms of co-operation, namely: participation in joint investigation teams, request for the initiation of criminal investigations and exchange of information.
- Transmission of requests under the Council Decision shall be effected between National Units designated by Member States and Europol.
- The Council Decision provides for different grounds for denying/postponing assistance. For instance, a National Unit may refuse to supply information or intelligence if that would entail jeopardising the success of a current investigation or the safety of individuals.
- Personal data retrieved from any of Europol's data processing files or communicated by any other appropriate means shall be transmitted or used only by the competent authorities of the Member States in order to prevent and combat crimes in respect of which Europol is competent, and to prevent and combat other serious forms of crime. Europol shall use the data only for the performance of its tasks.
- Information or intelligence received may under certain conditions laid down in the Council Decision be transmitted to local or foreign authorities.

I. Parties

The Council Decision of 6 April 2009 establishing the European Police Office (Europol), entered into force on 1 January 2010. It applies to the Member States of the European Union.

II. Scope (Art. 4)

Europol is the law enforcement agency of the European Union. It aims at supporting the law enforcement agencies of Member States in their fight against international serious crime and terrorism. More than 700 staff at Europol headquarters in The Hague, the Netherlands, work closely with law enforcement agencies in the 27 European Member States and in other non-EU Partner States such as Australia, Canada, the USA and Norway. As Europol officers have no direct powers of arrest, they support law enforcement agencies of Member States by gathering, analysing and disseminating information and co-ordinating operations.

Europol's competence shall cover organised crime, terrorism and other forms of serious crime as listed in the Annex of the Council Decision[1] affecting two or more

[1] The Annex to the Council Decision provides for a list of other forms of serious crime which Europol is competent to deal with : unlawful drug trafficking, illegal money-laundering activities,

Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences (Art. 4, para 1). Further, Article 4 paragraph 3 provides that Europol's competence shall also cover related criminal offences: (a) criminal offences committed in order to procure the means of perpetrating acts in respect of which Europol is competent; (b) criminal offences committed in order to facilitate or carry out acts in respect of which Europol is competent; and (c) criminal offences committed to ensure the impunity of acts in respect of which Europol is competent.

III. Forms of co-operation

Participation in joint investigation teams (Art. 6)

Europol may participate in joint investigation teams in so far as those teams are investigating criminal offences in respect of which Europol is competent. Europol staff may assist in all activities and exchange information with all members of the joint investigation team. They shall not, however, take part in the taking of any coercive measures (Art. 6, para 1).

Requests by Europol for the initiation of criminal investigations (Art. 7)

Member States shall deal with any request by Europol to initiate, conduct or co-ordinate investigations in specific cases and shall give such requests due consideration (Art. 7, para 1). Before making a request for the initiation of criminal investigations, Europol shall inform Eurojust accordingly (Art. 7, para 2).

Europol Information System (Art. 11, Art. 12 and Art. 13)

Europol shall maintain the Europol Information System (Art. 11, para 1). The Europol Information System may be used to process only such data as are necessary for the performance of Europol's tasks. The data input shall relate to: (a) persons who are suspected of having committed or having taken part in a criminal offence in respect of which Europol is competent or who have been convicted of such an offence; and (b) persons regarding whom there are factual indications or reasonable grounds to believe that they will commit criminal offences in respect of which Europol is competent (Art. 12, para 1). National units, liaison officers and Europol staff shall have the right to input data directly into the Europol Information System and retrieve them from it. Data may be retrieved by Europol where that is necessary for the performance of its tasks in a particular case. Retrieval by the National Units and liaison officers shall be effected in accordance with the laws, regulations, administrative provisions and procedures of the accessing party (Art. 13, para 1).

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crime connected with nuclear and radioactive substances, illegal immigrant smuggling, trafficking in human beings, motor vehicle crime, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage taking, racism and xenophobia, organised robbery, illicit trafficking in cultural goods, including antiquities and works of art, swindling and fraud, racketeering and extortion, counterfeiting and product piracy, forgery of administrative documents and trafficking therein, forgery of money and means of payment, computer crime, corruption, illicit trafficking in arms, ammunition and explosives, illicit trafficking in endangered animal species, illicit trafficking in endangered plant species and varieties, environmental crime, illicit trafficking in hormonal substances and other growth promoters.

Duty to notify (Art. 17)

Article 17 provides that Europol shall promptly notify the National Units and, if the National Units so request, their liaison officers of any information concerning their Member State and of connections identified between criminal offences in respect of which Europol is competent. Information and intelligence concerning other serious crime of which Europol becomes aware in the course of its duties may also be communicated.

IV. Authorities that can use the instrument (Art. 3 and Art. 8)

Each Member State shall establish or designate a National Unit responsible for liaising with Europol (Art. 8, para 1). Some Member States designated their Ministry of Interior, others have established special National Units such as France. The National Units shall according to Article 8 paragraph 4: (a) supply Europol on their own initiative with the information and intelligence necessary for it to carry out its tasks; (b) respond to Europol's requests for information, intelligence and advice; (c) keep information and intelligence up to date; (d) evaluate information and intelligence in accordance with national law for the competent authorities and transmit their material to them; (e) issue requests for advice, information, intelligence and analysis to Europol; (f) supply Europol with information for storage in its databases; and (g) ensure compliance with the law in every exchange of information between themselves and Europol.

The National Unit shall be the only liaison body between Europol and the competent authorities of the Member States (Art. 8, para 2). « Competent authorities » shall mean all public bodies existing in the Member States which are responsible under national law for preventing and combating criminal offences (Art. 3).

V. Conditions for requesting assistance (Art. 18, Art. 33 and Art. 34)

Article 18 provides that control mechanisms shall be established by Europol to allow the verification of the legality of retrievals from any of its automated data files used to process personal data and to allow Member States access to the audit logs on request. The data thus collected shall be deleted after 18 months, unless the data are further required for ongoing control (Art. 18).

Both a National Supervisory Body and a Joint Supervisory Body shall be set up. Each Member State shall designate a National Supervisory Body with the task to monitor the permissibility of the input, the retrieval and any communication to Europol of personal data by the Member State concerned (Art. 33, para 1). A Joint Supervisory Body shall be set up to monitor the permissibility of the transmission of data originating from Europol (Art. 34, para 1).

VI. Grounds for denying/postponing assistance (Art. 7 and Art. 8)

Article 8 paragraph 5 provides that a National Unit shall not in any particular case be obliged to supply information or intelligence if that would entail: (a) harming essential national security interests; (b) jeopardising the success of a current investigation or the safety of individuals; or (c) disclosing information relating to organisations or specific intelligence activities in the field of State security.

Regarding requests by Europol for the initiation of criminal investigations, Article 7 paragraph 3 states that in the event where the competent authorities of the Member State decide not to comply with the request, they shall inform Europol of their decision and of the reasons therefor unless they are unable to give their reasons because: (a) to do so

would harm essential national security interests; or (b) to do so would jeopardise the success of investigations under way or the safety of individuals.

VII. Use of information received (Art. 19)

Personal data retrieved from any of Europol's data processing files or communicated by any other appropriate means shall be used only by the competent authorities of the Member States in order to prevent and combat crimes in respect of which Europol is competent, and to prevent and combat other serious forms of crime. Europol shall use the data only for the performance of its tasks (Art. 19, para 1). Use of the data for other purposes or by authorities other than the national competent authorities shall be possible only after consultation of the Member State which transmitted the data in so far as the national law of that Member State permits (Art. 19, para 3).

VIII. Sharing of information received with other local authorities (Art. 19, Art. 22, Art. 24 and Art. 40)

Europol and the Member States shall take appropriate measures to protect information subject to the requirement of confidentiality which is obtained by or exchanged with Europol (Art. 40, para 1).

Personal data retrieved from any of Europol's data processing files or communicated by any other appropriate means shall be transmitted only by the competent authorities of the Member States in order to prevent and combat crimes in respect of which Europol is competent, and to prevent and combat other serious forms of crime (Art. 19, para 1). Further, use of the data by authorities other than the national competent authorities shall be possible only after consultation of the Member State which transmitted the data in so far as the national law of that Member State permits (Art. 19, para 3).

Europol may establish and maintain co-operative relations with the institutions, bodies, offices and agencies set up by, or on the basis of, the Treaty on European Union and the Treaties establishing the European Communities, in particular: (a) Eurojust; (b) the European Anti-Fraud Office (OLAF); (c) the European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union; (d) the European Police College; (e) the European Central Bank; and (f) the European Monitoring Centre for Drugs and Drug Addition (Art. 22, para 1). Europol shall conclude with these entities agreements or working arrangements concerning exchange of information, including personal data and classified information (Art. 22, para 2).[2] Article 24 paragraph 1 provides that if the data concerned were transmitted to Europol by a Member State, Europol shall, before transmitting them to the entities mentioned above, secure the consent of the Member State. However if the data were not transmitted by a Member State, Europol shall satisfy itself that transmission of those data is not liable to: (a) obstruct the proper performance of the tasks in respect of which a Member State is competent; and (b) jeopardise the security or public order of a Member State or otherwise prejudice its general welfare.

2. See below a summary of the agreement concluded between Eurojust and Europol.

IX. Sharing of information received with foreign authorities (Art. 19, Art. 23, Art. 24 and Art. 40)

Europol and the Member States shall take appropriate measures to protect information subject to the requirement of confidentiality which is obtained by or exchanged with Europol (Art. 40, para 1).

Personal data retrieved from any of Europol's data processing files or communicated by any other appropriate means shall be transmitted only by the competent authorities of the Member States in order to prevent and combat crimes in respect of which Europol is competent, and to prevent and combat other serious forms of crime (Art. 19, para 1). Further, use of the data by authorities other than the national competent authorities shall be possible only after consultation of the Member State which transmitted the data in so far as the national law of that Member State permits (Art. 19, para 3).

Europol may establish and maintain co-operative relations with: (a) third States[3]; and (b) organisations such as international organisations and their subordinate bodies governed by public law, other bodies governed by public law which are set up by, or on the basis of, an agreement between two or more States and Interpol (Art. 23, para 1). Europol shall conclude with these entities agreements concerning exchange of information, including personal data and classified information (Art. 23, para 2).[4] Article 24 paragraph 1 provides that if the data concerned were transmitted to Europol by a Member State, Europol shall, before transmitting them to the entities mentioned above, secure the consent of the Member State. However if the data were not transmitted by a Member State, Europol shall satisfy itself that transmission of those data is not liable to: (a) obstruct the proper performance of the tasks in respect of which a Member State is competent; and (b) jeopardise the security or public order of a Member State or otherwise prejudice its general welfare.

X. Relationship with other instruments (Art. 55 and Art. 62)

The Council Decision replaces the Europol Convention and the Protocol on the privileges and immunities of Europol, the members of its organs, the Deputy Directors and employees of Europol (Art. 62). The Council Decision shall not affect the legal force of agreements concluded by Europol as established by the Europol Convention before the date of application of this Decision (Art. 55, para 1).

3. List of Third States and Organisations with which Europol shall conclude agreements, in compliance with Article 26 paragraph 1: Albania, Australia, Bolivia, Bosnia and Herzegovina, Canada, China, Colombia, Croatia, former Yugoslav Republic of Macedonia, Iceland, India, Israel, Liechtenstein, Moldova, Monaco, Montenegro, Morocco, Norway, Peru, Russia, Serbia, Switzerland, Turkey, Ukraine, United States and ICPO-Interpol, United Nations Office on Drugs and Crime, World Customs Organization.

4. See below a summary of the agreements concluded between Interpol and Europol and between the United States and Interpol.

Agreement between Eurojust and Europol

Pursuant to Article 22 of the Council Decision establishing Europol, an agreement was concluded between Eurojust and Europol. The purpose of this agreement is to establish and maintain close co-operation between the Parties in order to increase their effectiveness in combating serious forms of international crime which fall in the respective competence of both Parties and to avoid duplication of work. In particular, this will be achieved through the exchange of operational, strategic, and technical information, as well as the co-ordination of activities. For instance, Europol shall, spontaneously, provide Eurojust with the findings of an analysis of a general nature and of a strategic type. Moreover, Europol shall, spontaneously or upon a request of Eurojust related to a specific investigation, provide Eurojust with analysis data and analysis results. For its part, Eurojust shall provide, spontaneously, Europol with the findings of an analysis of a general nature and of a strategic type. It shall also provide, on a regular basis, Europol with relevant data for the purpose of its analysis works files, as well as other information, including information on cases, provided that they fall within the competence of Europol and advice which may be required for the objectives and tasks of Europol. To facilitate co-operation as laid down in the agreement, the Parties shall designate contact points.

Agreement between Interpol and Europol

Pursuant to Article 23 of the Council Decision establishing Europol, an agreement was concluded between Interpol and Europol. The purpose of this agreement is to establish and maintain co-operation between the Parties in combating serious forms of organised international crime within the field of competence of each Party, according to their constitutional acts. In particular, this will be achieved through the exchange of operational, strategic and technical information, the co-ordination of activities, including the development of common standards, action plans, training and scientific research and the secondment of liaison officers. Information exchanged under the agreement may be transmitted either spontaneously or on motivated request. To facilitate co-operation as laid down in the agreement, the Parties shall designate liaison officers.

Agreement between Europol and the United States

Pursuant to Article 23 of the Council Decision establishing Europol, an agreement was concluded between the United States and Europol. The purpose of this agreement is to enhance the co-operation of the Member States of the European Union, acting through Europol, and the United States in preventing, detecting, suppressing, and investigating serious forms of international crime, in particular through the exchange of strategic and technical information. This agreement does not authorise the transmission of data related to an identified individual or identifiable individuals. Each contracting Party shall identify a point of contact to co-ordinate the application of this agreement. Exchange of information, expertise and mutual consultation shall be effected between the points of contact designated thereby.

10. Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by the 2003 and 2009 Council Decisions

Key points

- The Council Decision of 28 February 2002 set up Eurojust as a body of the European Union with legal personality to stimulate and to improve co-ordination and co-operation between competent judicial authorities of the Member States. It was amended in 2003 and 2009.
- It provides for different forms of co-operation between Eurojust and Member States such as: exchange of information, setting up joint investigation teams and setting up a database.
- Transmission of requests under the Council Decision shall be effected between competent national authorities and national members composing Eurojust.
- The Council Decision provides for different grounds for denying / postponing assistance. For instance, competent national authorities shall not be obliged to supply information to Eurojust if this would mean harming essential national security interests or jeopardising the safety of individuals.
- Information or intelligence received may under certain conditions laid down in the Council Decision be transmitted to other local or foreign authorities.

I. Parties

The Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, entered into force on 6 March 2002. It was subsequently amended by a 2003 and 2009 Council Decisions. It applies to the Member States of the European Union.

II. Scope (Art. 4)

Eurojust is an agency of the European Union dealing with judicial co-operation in criminal matters. The seat of Eurojust is in The Hague. Eurojust aims at improving the co-ordination of investigations and prosecutions between the national competent authorities in the Member States and to improve the co-operation between these authorities in relation to serious cross-border and organised crime, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust is composed of 27 national members, one from each EU Member State. The national members are senior and experienced judges, prosecutors, or police officers of equivalent competence, who are seconded in accordance with their respective legal systems and hold permanent seats in The Hague.

Eurojust’s competence covers the types of crime and offences for which Europol has competence at all times.[1] Moreover, it covers other offences committed together with the

[1]. In accordance with Article 4 of the EU Council Decision establishing the European Police Office and its Annex, Europol’s competence shall cover organised crime, terrorism and other forms of serious crime affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences.

types of crime and offences referred above (Art. 4, para 1). Article 4 provides further that Eurojust may, in accordance with its objectives, assist in investigations and prosecutions at the request of a competent authority of a Member State, for other types of offences.

III. Forms of co-operation

Requests of Eurojust acting through its national members or as a College (Art. 6 and Art. 7)

According to Article 6 and Article 7, Eurojust acting through its national members of as a College, may ask the competent authorities of the Member States concerned, giving its reasons, to: undertake an investigation or prosecution of specific acts; set up a joint investigation team in keeping with the relevant co-operation instruments; take special investigative measures or take any other measure justified for the investigation or prosecution.

Participation of national members in joint investigation teams (Article 9f)

Article 9f provides that national members shall be entitled to participate in joint investigation teams, including in their setting up, in accordance with Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.[2]

Exchange of information (Art. 13 and Art. 13a)

Article 13 provides that the competent authorities of the Member States shall exchange with Eurojust any information necessary for the performance of its task, including information: (a) on the setting up of a joint investigation team, whether it is set up under Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union or under the Framework Decision on Joint Investigation Teams, and of the results of the work of such teams; (b) about any case in which at least three Member States are directly involved and for which requests for or

Further, it shall also cover the following related criminal offences: (a) criminal offences committed in order to procure the means of perpetrating acts in respect of which Eurojust is competent; (b) criminal offences committed in order to facilitate or carry out acts in respect of which Eurojust is competent; and (c) criminal offences committed to ensure the impunity of acts in respect of which Europol is competent. The other forms of serious crime covered by the competence of Europol and Eurojust include: unlawful drug trafficking, illegal money-laundering activities, crime connected with nuclear and radioactive substances, illegal immigrant smuggling, trafficking in human beings, motor vehicle crime, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage taking, racism and xenophobia, organised robbery, illicit trafficking in cultural goods, including antiquities and works of art, swindling and fraud, racketeering and extortion, counterfeiting and product piracy, forgery of administrative documents and trafficking therein, forgery of money and means of payment, computer crime, corruption, illicit trafficking in arms, ammunition and explosives, illicit trafficking in endangered animal species, illicit trafficking in endangered plant species and varieties, environmental crime, illicit trafficking in hormonal substances and other growth promoters.

2. Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union provides that the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period to carry out criminal investigations in one or more of the Member States setting up the team (Art. 13, para 1).

decisions on judicial co-operation, including regarding instruments giving effect to the principle of mutual recognition, have been transmitted to at least two Member States; and (c) about cases where conflicts of jurisdiction have arisen or are likely to arise, controlled deliveries affecting at least three States, at least two of which are Member States and repeated difficulties or refusals regarding the execution of requests for, and decisions on, judicial co-operation, including regarding instruments giving effect to the principle of mutual recognition.

For its part, Eurojust shall provide competent national authorities with information and feedback on the results of the processing of information, including the existence of links with cases already stored in the Case Management System (Art. 13a, para 1). Moreover, Eurojust shall transmit information upon request to competent national authorities (Art. 13a, para 2).

Case Management System (Art. 16 and Art. 16b)

Article 16 provides that a Case Management System composed of temporary work files and of an index containing personal and non-personal data, shall be established by Eurojust (Art. 16, para 1). According to Article 16 paragraph 2, the Case Management System aims at: (a) supporting the management and co-ordination of investigations and prosecutions for which Eurojust is providing assistance, in particular by the cross-referencing of information; (b) facilitating access to information on ongoing investigations and prosecutions; and (c) facilitating the monitoring of lawfulness and compliance with the provisions of the Council Decision concerning the processing of personal data. Member States have access to the Case Management System under certain conditions (Art. 16b).

Requests for judicial co-operation to and from third States (Art. 27b)

Eurojust may, with the agreement of the Member States concerned, co-ordinate the execution of requests for judicial co-operation issued by a third State where these requests are part of the same investigation and require execution in at least two Member States (Art. 27b, para 1).

IV. Authorities that can use the instrument (Art. 9)

Transmission of requests under the Council Decision shall be effected between competent national authorities and national members composing Eurojust (Art. 9, para 2 and para 4).

V. Conditions for requesting assistance (Art. 12 and Art. 16)

Access to the Case Management System shall be made through national co-ordination systems set up by Member States (Art. 12, para 2). Access is limited to: (a) the index, unless the national member who has decided to introduce the data in the index expressly denied such access; (b) temporary work files opened or managed by the national member of their Member States; and (c) temporary work files opened or managed by national members of other Member States and to which the national member of their Member States has received access unless the national member who opened or manages the temporary work file expressly denied such access (Art. 16b, para 1).

VI. Grounds for denying / postponing assistance (Art. 8 and Art. 13)

Article 8 provides that if the competent authority of a Member State concerned decides not to comply with a request of Eurojust acting through its national members or as a College in compliance with Article 6 or 7, it shall inform Eurojust without undue delay of its decision and of the reasons for it. Where it is not possible to give the reasons for refusing to comply with a request because to do so would harm essential national security interests or would jeopardise the safety of individuals, the competent authorities of the Member States may cite operational reasons.

Regarding the exchange of information from the Members States to Eurojust, Article 13 paragraph 8 states that competent national authorities shall not be obliged in a particular case to supply information if this would mean: (a) harming essential national security interests; or (b) jeopardising the safety of individuals.

VII. Use of information received (Art. 3 and Art. 4)

Information received under the Council Decision shall be used for purposes of investigation or prosecution in relation to cross-border serious crimes falling within Eurojust's competence (Art. 3, para 1 and Art. 4).

VIII. Sharing of information received with other local authorities (Art. 25 and Art. 26)

An obligation of confidentiality shall apply to all persons and to all bodies called upon to work with Eurojust (Art. 25, para 2).

Eurojust may establish and maintain co-operative relations with the institutions, bodies and agencies set up by, or on the basis of, the Treaties establishing the European Communities or the Treaty on European Union, in particular with: (a) Europol; (b) OLAF; (c) the European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union (Frontex); and (d) the Council, in particular its Joint Situation Centre (Art. 26, para 1). Eurojust may conclude with these entities agreements or working arrangements which may concern, *inter alia*, the exchange of information, including personal data (Art. 26, para 2).[3]

IX. Sharing of information received with foreign authorities (Art. 25, Art. 26a and Art. 27)

An obligation of confidentiality shall apply to all persons and to all bodies called upon to work with Eurojust (Art. 25, para 2).

Eurojust may establish and maintain co-operation relations with: (a) third States; (b) organisations such as international organisations and their subordinate bodies, other bodies governed by public law which are based on an agreement between two or more States, and Interpol (Art. 26a, para 1). Eurojust may conclude agreements with these entities which may concern, *inter alia*, the exchange of information, including personal data (Art. 26a, para 2).[4]

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3. See below a summary of the agreement concluded between Eurojust and Europol.

4. See below a summary of the agreement concluded between Eurojust and the United States.

Personal data may be transmitted by Eurojust to these entities provided that: (a) this is necessary in individual cases for the purposes of preventing or combating criminal offences for which Eurojust is competent, and; (b) Eurojust has concluded an agreement as referred above, which has entered entered into force and which permits the transmission of such data. Furthermore, before Eurojust exchanges any information, the national member of the Member State which submitted the information shall give his consent to the transfer of that information (Art. 27, para 1).

X. Relationship with other instruments (Art. 25a)

Eurojust and the European Judicial Network (EJN)[5] shall maintain privileged relations with each other. In order to ensure efficient co-operation, competent national members shall in particular, on a case-by-case basis, inform the EJN contact points of all cases which they consider the Network to be in a better position to deal with.

Agreement between Eurojust and Europol

Pursuant to Article 26 of the Council Decision establishing Eurojust, an agreement was concluded between Eurojust and Europol. The purpose of this agreement is to establish and maintain close co-operation between the Parties in order to increase their effectiveness in combating serious forms of international crime which fall in the respective competence of both Parties and to avoid duplication of work. In particular, this will be achieved through the exchange of operational, strategic, and technical information, as well as the co-ordination of activities. For instance, Europol shall, spontaneously, provide Eurojust with the findings of an analysis of a general nature and of a strategic type. Moreover, Europol shall, spontaneously or upon a request of Eurojust related to a specific investigation, provide Eurojust with analysis data and analysis results. For its part, Eurojust shall provide, spontaneously, Europol with the findings of an analysis of a general nature and of a strategic type. It shall also provide, on a regular basis, Europol with relevant data for the purpose of its analysis works files, as well as other information, including information on cases, provided that they fall within the competence of Europol and advice which may be required for the objectives and tasks of Europol. To facilitate co-operation as laid down in the agreement, the Parties shall designate contact points.

[5] The European Judicial Network (EJN) is a network of national contact points for the facilitation of judicial co-operation in criminal matters. The network was created by the Joint Action 98/428 JHA of 29 June 1998 in order to fulfil recommendation n°21 of the Action Plan to Combat Organised Crime adopted by the Council on 28 April 1997. National contact points are designated by each Member State among Central authorities in charge of international judicial co-operation, judicial authorities and other competent authorities with specific responsibilities in the field of international judicial co-operation, both in general and for certain forms of serious crime, such as organised crime, corruption, drug trafficking or terrorism.

Agreement between Eurojust and the United States

Pursuant to Article 26 of the Council Decision establishing Eurojust, an agreement was concluded between Eurojust and the United States. The purpose of this agreement is to enhance the co-operation between the United States and Eurojust in combating serious forms of transnational crime including terrorism. In particular, this will be achieved through operational and strategic meetings between both Parties as well as through exchange of information whether spontaneous or upon request. To facilitate co-operation as laid down in the agreement, the United States may second a liaison prosecutor to Eurojust and also put in place or appoint at least one contact point. Information shall be exchanged under the agreement: either between the liaison prosecutor or, if no liaison prosecutor is appointed, the contact point to Eurojust and the national members concerned or the College; or directly between the prosecutorial authority in charge of investigating and/or prosecuting the case and the national members concerned or the College.

11. *Convention Implementing the Schengen Agreement*

Key Points

- The Convention is concerned with harmonising provisions relating to entry into and short stays in the Schengen area by non-EU citizens, asylum matters, measures to combat cross-border drugs-related crime, police co-operation, and co-operation among Schengen states on judicial matters.
- It provides for the following forms of co-operation: police co-operation (Chapter 1), mutual assistance in criminal matters (Chapter 2), extradition (Chapter 4) and transfer of the enforcement of criminal judgment (Chapter 5).
- Requests for police international assistance and the replies to such requests may be exchanged between the central bodies responsible in each Contracting Party for international police co-operation. Requests for mutual assistance in criminal matters may be made directly between judicial authorities and returned via the same channels. Such requests may also be sent and returned between Ministries of Justice or through national central bureaux of the International Criminal Police Organisation.
- Written information exchanged for police co-operation purposes may not be used by the requesting Contracting Party as evidence of the offence charged other than with the consent of the competent judicial authorities of the requested Contracting Party. The Contracting Party requesting mutual assistance under the Convention shall not use or forward information or evidence obtained from the requested Contracting Party for investigations, prosecutions or proceedings other than those referred to in its request without the prior consent of the requested Contracting Party.

I. Parties

On 14 June 1985 the Federal Republic of Germany, France, Belgium, Luxembourg and the Netherlands signed the Schengen Agreement on the gradual abolition of checks at their common borders. On 19 June 1990 the Convention Implementing the Schengen Agreement (hereinafter referred as to the "Convention") was signed. It entered into force on 1 September 1993. Its provisions could not take practical effect, however, until the necessary technical and legal prerequisites such as data banks and the relevant data protection authorities were in place. The Convention thus took practical effect on 26 March 1995. With the entry into force on 1 May 1999 of the Schengen Protocol to the Treaty of Amsterdam of 2 October 1997, Schengen co-operation – initially based only on an international agreement – was incorporated into EU law. Currently the parties to the Convention are 25.[1]

II. Scope

The Convention introduces measures designed to create, following the abolition of internal border checks, a common area of security and justice. Specifically it is concerned with harmonising provisions relating to entry into and short stays in the Schengen area by

[1] Status of ratifications as at April 2012: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Liecthestein, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland.

non-EU citizens (uniform Schengen visa), asylum matters (determining in which Member State an application for asylum may be submitted), measures to combat cross-border drugs-related crime. It importantly introduces police co-operation and mutual assistance in criminal matters.

III. Forms of co-operation

The Convention provides for several forms of co-operation, namely police co-operation (Chapter 1), mutual assistance in criminal matters (Chapter 2), extradition (Chapter 4) and transfer of the enforcement of criminal judgment (Chapter 5).

Police Co-operation (Art. 39 to Art. 47)

Under the Convention, the Contracting Parties undertake to ensure that their police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offences. Where the requested police authorities do not have the power to deal with a request, they shall forward it to the competent authorities (Art. 39, para 1).

Mutual Assistance in Criminal Matters (Art. 48 to Art. 53)

The Convention's provisions on mutual assistance in criminal matters are intended to supplement the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 as well as, in relations between the Contracting Parties which are members of the Benelux Economic Union, Chapter II of the Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, as amended by the Protocol of 11 May 1974, and to facilitate the implementation of those Agreements (Art. 48, para 1).

The Convention states that mutual assistance shall also be afforded:

a) in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of one of the two Contracting Parties, or of both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

b) in proceedings for claims for damages arising from wrongful prosecution or conviction;

c) in clemency proceedings;

d) in civil actions joined to criminal proceedings, as long as the criminal court has not yet taken a final decision in the criminal proceedings;

e) in the service of judicial documents relating to the enforcement of a sentence or a preventive measure, the imposition of a fine or the payment of costs for proceedings;

f) in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure.

Under the Convention, Contracting Parties also undertake to afford each other, in accordance with the Convention and the Treaty referred to in Article 48, mutual assistance as regards infringements of their laws and regulations on excise duties, value added tax and customs duties (Art. 50, para 1).

The Convention allows judicial co-operation between the Contracting Parties through letters rogatory (Art. 51).

IV. Authorities that can use the instrument (Art.53)

Requests for international police assistance under Chapter 1 and the replies to such requests may be made through the central bodies responsible in each Contracting Party for international police co-operation. Where the request cannot be made in good time using the above procedure, the police authorities of the requesting Contracting Party may address it directly to the competent authorities of the requested Party, which may reply directly. In such cases, the requesting police authority shall at the earliest opportunity inform the central body responsible for international police co-operation in the requested Contracting Party of its direct request (Art. 39, para 3). In border areas, co-operation may be covered by arrangements between the competent Ministers of the Contracting Parties (Art. 39, para 4).

Requests for mutual assistance in criminal matters under Chapter 2 may be made directly between judicial authorities and returned via the same channels. This shall not prejudice the possibility of requests being sent and returned between Ministries of Justice or through national central bureaux of the International Criminal Police Organisation (Art. 53).

V. Conditions for requesting assistance (Art. 50)

Police co-operation under Article 39 of the Convention takes place in so far as national law does not stipulate that the request has to be made and channelled via the judicial authorities and provided that the request or the implementation thereof does not involve the application of measures of constraint by the requested Contracting Party (Art. 39, para 1).

VI. Grounds for denying/postponing assistance (Art. 50 and 51)

Mutual legal assistance provided in relation to infringements of laws and regulations on excise duties, value added tax and customs duties as provided by Art. 50 may be refused where the alleged amount of duty underpaid or evaded does not exceed EUR 25 000 or where the presumed value of the goods exported or imported without authorisation does not exceed EUR 100 000, unless, given the circumstances or the identity of the accused, the case is deemed to be extremely serious by the requesting Contracting Party (Art. 50, para 4). However, requests of mutual assistance regarding evasion of excise duties may not be rejected on the grounds that the requested country does not levy excise duties on the goods referred to in the request (Art. 50, para 2).[2]

The Contracting Parties may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than the following: (a) the act giving rise to the letters rogatory is punishable under the law of both Contracting Parties by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Contracting Parties by an equivalent penalty and under the law of the other Contracting Party by virtue of being an

[2.] The provisions of Article 50 shall also apply when the mutual assistance requested concerns acts punishable only by a fine by virtue of being infringements of the rules of law in proceedings brought by the administrative authorities, where the request for assistance was made by a judicial authority (Art. 50, para 5).

infringement of the rules of law which is being prosecuted by the administrative authorities, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters; (b) execution of the letters rogatory is consistent with the law of the requested Contracting Party (Art. 51).

VII. Use of information received (Art.50)

Written information provided by the requested Contracting Party according to paragraph 1 of Article 39 (*i.e.* police co-operation provisions) may not be used by the requesting Contracting Party as evidence of the offence charged other than with the consent of the competent judicial authorities of the requested Contracting Party (Art. 39, para 2).

The Contracting Party requesting mutual assistance under Chapter 2 shall not use information or evidence obtained from the requested Contracting Party for investigations, prosecutions or proceedings other than those referred to in its request without the prior consent of the requested Contracting Party (Art. 50, para 3).

VIII. Sharing of information received with other local authorities (Art. 50)

The Contracting Party requesting mutual legal assistance under Chapter 2 shall not forward information or evidence obtained from the requested Contracting Party for investigations, prosecutions or proceedings other than those referred to in its request without the prior consent of the requested Contracting Party (Art. 50, para 3).

IX. Sharing of information received with foreign authorities (Art. 50)

The Contracting Party requesting mutual legal assistance under Chapter 2 shall not forward information or evidence obtained from the requested Contracting Party for investigations, prosecutions or proceedings other than those referred to in its request without the prior consent of the requested Contracting Party (Art. 50, para 3).

X. Relationship with other instruments (Art. 48 and Art. 59)

The provisions of Article 39 regarding international police co-operation shall not preclude more detailed present or future bilateral agreements between Contracting Parties with a common border. The Contracting Parties shall inform each other of such agreements (Art. 39, para 5).

The provisions on mutual assistance in criminal matters (Chapter 2) are intended to supplement the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 as well as, in relations between the Contracting Parties which are members of the Benelux Economic Union, Chapter II of the Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, as amended by the Protocol of 11 May 1974, and to facilitate the implementation of those Agreements (Art. 48, para 1). This shall not affect the application of the broader provisions of the bilateral agreements in force between the Contracting Parties (Art. 48, para 2).

The provisions of the Convention shall apply only in so far as they are compatible with Community law (Art. 134).

12. ASEAN Treaty on Mutual Legal Assistance in Criminal Matters

Key Points

- The purpose of the Treaty is to improve the effectiveness of the law enforcement authorities of the Parties in the prevention, investigation and prosecution of offences through co-operation and mutual legal assistance in criminal matters. To this end, the Parties shall, in accordance with the Treaty and subject to their respective domestic laws, render to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings.
- The Treaty allows for a number of forms of co-operation, namely obtaining voluntary statement, obtaining evidence, provision of publicly available documents and other records, attendance of person in the Requesting Party, attendance of person in custody in the Requested Party, transit of person in custody, search and seizure, location or identification of persons, service of documents and assistance in forfeiture proceedings.
- Each Party shall designate a Central Authority to make and receive requests pursuant to the Treaty. The Central Authorities shall communicate directly with one another but may, if they choose, communicate through the diplomatic channel. In urgent situations and where permitted by the law of the Requested Party, requests and any communication related thereto may be transmitted through the International Criminal Police Organization (INTERPOL) or the Southeast Asian Police Organization (ASEANAPOL).
- The Requesting Party shall not, without the consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary, use or disclose or transfer information or evidence provided by the Requested Party for purposes other than those stated in the request. Notwithstanding the above, in cases where the charge is amended, the information or evidence provided may be used, with the prior consent of the Requested Party, in so far as the offence, as charged, is an offence in respect of which mutual legal assistance could be provided under the Treaty, and which is made out by the facts on which the request was made.
- The Requested Party shall, subject to its domestic laws, take all appropriate measures to keep confidential the request for assistance, its content and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request.
- The Requesting Party shall, subject to its domestic laws, take all appropriate measures to: (a) keep confidential information and evidence provided by the Requested Party, except to the extent that the evidence and information is needed for the purposes described in the request; and (b) ensure that the information and evidence is protected against loss and unauthorised access, use, modification, disclosure or other misuse (Art. 9, para 2).

I. Parties

The Treaty on Mutual Legal Assistance in Criminal Matters (hereinafter referred to as the “Treaty”) was adopted by the Association of Southeast Asian Nations (ASEAN)[1] in November 2004. Currently there are 8 parties to the Treaty.[2]

[1] The Association of Southeast Asian Nations was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding

II. Scope (Art. 1 and Art. 2)

The purpose of the Treaty is to improve the effectiveness of the law enforcement authorities of the Parties in the prevention, investigation and prosecution of offences through co-operation and mutual legal assistance in criminal matters. To this end, the Parties shall, in accordance with the Treaty and subject to their respective domestic laws, render to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings (Art. 1, para 1).

Mutual assistance to be rendered in accordance with the Treaty may include (Art. 1, para 2): (a) taking of evidence or obtaining voluntary statements from persons; (b) making arrangements for persons to give evidence or to assist in criminal matters; (c) effecting service of judicial documents; (d) executing searches and seizures; (e) examining objects and sites; (f) providing original or certified copies of relevant documents, records and items of evidence; (g) identifying or tracing property derived from the commission of an offence and instrumentalities of crime[3]; (h) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated; (i) the recovery, forfeiture or confiscation of property derived from the commission of an offence; (j) locating and identifying witnesses and suspects; and (k) the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.

The Treaty applies solely to the provision of mutual assistance among the Parties. The provisions of the Treaty shall not create any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of any request for assistance (Art. 1, para 3).

The Treaty does not apply to (Art. 2, para 1): (a) the arrest or detention of any person with a view to the extradition of that person; (b) the enforcement in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the law of the Requested Party; (c) the transfer of persons in custody to serve sentences; and (d) the transfer of proceedings in criminal matters. Nothing in the Treaty entitles a Party to undertake in the territory of another Party the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other Party by its domestic laws (Art. 2, para 2).

III. Forms of co-operation (Art.10 to Art. 22)

The Treaty allows for a number of forms of co-operation, namely obtaining voluntary statement (Art. 10), obtaining evidence (Art. 11), provision of publicly available documents and other records (Art. 13), attendance of person in the Requesting Party (Art. 14), attendance of person in custody in the Requested Party (Art. 15), transit of person in custody (Art. 17), search and seizure (Art. 18), location or identification of

Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam joined on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, Cambodia on 30 April 1999.

2. Status of membership as at March 2012: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore and Vietnam.

3. For the purposes of this Treaty, the expression "instrumentalities of crime" means property used in connection with the commission of an offence or the equivalent value of such property.

persons (Art. 20), service of documents (Art. 21) and assistance in forfeiture proceedings (Art. 22).

Provision of publicly available documents and other records (Art. 13)

The Requested Party shall provide to the Requesting Party copies of publicly available documents or records in the possession of government departments and agencies (Art. 13, para 1). The Requested Party may, subject to its domestic laws and practices, provide the Requesting Party with copies of any documents or records in the possession of government departments and agencies that are not publicly available. The Requested Party may in its discretion deny, entirely or in part, a request pursuant to this paragraph (Art. 13, para 2).

Search and seizure (Art.18)

The Requested Party shall, subject to its domestic laws, execute a request for the search, seizure and delivery of any documents, records or items to the Requesting Party if there are reasonable grounds for believing that the documents, records or items are relevant to a criminal matter in the Requesting Party (Art. 18, para 1). The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized documents, records or items which may be delivered to the Requesting Party that are considered necessary by the Requested Party to protect the documents, records or items to be transferred (Art. 18, para 2). The Requested Party shall as soon as practicable inform the Requesting Party of the result of any search, the place and circumstances of seizure, and the subsequent custody of the documents, records or items seized (Art. 18, para 3).

Service of documents (Art. 21)

The Requested Party shall, subject to its domestic laws, use its best endeavors to effect service of any document in respect of a criminal matter issued by any court in the Requesting Party (Art. 21, para 1). The Requesting Party shall transmit any request for the service of a document which requires a response or appearance in the Requesting Party not later than thirty days before the scheduled response or appearance (Art. 21, para 2). The Requested Party shall return a proof of service in the manner mutually agreed by the Parties concerned (Art. 21, para 3).[4]

Assistance in forfeiture proceedings (Art.22)

The Requested Party shall, subject to its domestic laws, endeavor to locate, trace, restrain, freeze, seize, forfeit or confiscate property derived from the commission of an offence and instrumentalities of crime for which such assistance can be given provided that the Requesting Party provides all information which the Requested Party considers necessary (Art. 22, para 1). Where a request is made under paragraph 1, the request shall be accompanied by the original signed order, or a duly authenticated copy of it (Art. 22, para 2). A request for assistance under this Article shall be made only in respect of orders

4. For the purposes of paragraph 3 of Article 21, the expression "proof of service" includes information in the form of an affidavit on when and how the document was served and, where possible, a receipt signed by the person on whom it was served and if the serving officer has not been able to cause the document to be served, that fact and the reason for the failure (Art. 21, para 4).

and judgments that are made after the coming into force of the Treaty (Art. 22, para 3). Subject to the domestic laws of the Requested Party, property forfeited or confiscated pursuant to this Article may accrue to the Requesting Party unless otherwise agreed in each particular case (Art. 22, para 4). The Requested Party shall, subject to its domestic laws, pursuant to any agreement with the Requesting Party, transfer to the Requesting Party the agreed share of the property recovered under this Article subject to the payment of costs and expenses incurred by the Requested Party in enforcing the forfeiture order (Art. 22, para 5).

IV. Authorities that can use the instrument (Art.4 and Art. 5)

For the purposes of mutual assistance under the Treaty, each Party shall designate a Central Authority to make and receive requests pursuant to the Treaty (Art. 4, para 1). The designation of the Central Authority shall be made at the time of the deposit of the instrument of ratification, acceptance, approval or accession to the Treaty (Art. 4, para 2). Each Party shall expeditiously notify the others of any change in the designation of its Central Authority (Art. 4, para 3). The Central Authorities shall communicate directly with one another but may, if they choose, communicate through the diplomatic channel (Art. 4, para 4).

Central Authorities shall deal with the transmission of all requests of mutual assistance and any communication related thereto. In urgent situations and where permitted by the law of the Requested Party, requests and any communication related thereto may be transmitted through the International Criminal Police Organization (INTERPOL) or the Southeast Asian Police Organization (ASEANAPOL) (Art. 5, para 2).

V. Conditions for requesting assistance (Art. 5)

The Treaty sets out specific conditions for filing requests for mutual legal assistance. Such requests shall be made in writing or, where possible, by any means capable of producing a written record under conditions allowing the Requested Party to establish authenticity. In urgent situations and where permitted by the law of the Requested Party, requests may be made orally, but in such cases the requests shall be confirmed in writing within five days (Art. 5, para 1).

Further, any request for mutual legal assistance shall contain such information as the Requested Party requires to execute the request, including (Art. 6, para 1): (a) the name of the requesting office and the competent authority conducting the investigation or criminal proceedings to which the request relates; (b) the purpose of the request and the nature of the assistance sought; (c) a description of the nature of the criminal matter and its current status, and a statement setting out a summary of the relevant facts and laws; (d) a description of the offence to which the request relates, including its maximum penalty; (e) a description of the facts alleged to constitute the offence and a statement or text of the relevant laws; (f) a description of the essential acts or omissions or matters alleged or sought to be ascertained; (g) a description of the evidence, information or other assistance sought; (h) the reasons for and details of any particular procedure or requirement that the Requesting Party wishes to be followed; (i) specification of any time limit within which compliance with the request is desired; (j) any special requirements for confidentiality and the reasons for it; and (k) such other information or undertakings as may be required under the domestic laws of the Requested Party or which is otherwise necessary for the

proper execution of the request. Requests for assistance may also, to the extent necessary, contain other information.[5]

The Treaty states that requests, supporting documents and other communications made pursuant to the Treaty shall be in the English language and, if necessary, accompanied by a translation into the language of the Requested Party or another language acceptable to the Requested Party (Art. 6, para 3). If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, the Requested Party may request additional information. The Requesting Party shall supply such additional information as the Requested Party considers necessary to enable the request to be fulfilled (Art. 6, para 4).

VI. Grounds for denying/postponing assistance (Art. 3)

The Requested Party shall refuse assistance if, in its opinion (Art. 3, para 1):

a) the request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;

b) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would have constituted a military offence under the laws of the Requested Party which is not also an offence under the ordinary criminal law of the Requested Party;

c) there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions;

d) the request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person (i) has been convicted, acquitted or pardoned by a competent court or other authority in the Requesting or Requested Party; or (ii) has undergone the punishment provided by the law of that Requesting or Requested Party, in respect of that offence or of another offence constituted by the same act or omission as the first-mentioned offence;

e) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would not have constituted an offence against the laws of the Requested Party except that the Requested

5. As provided by Art. 6, para 2, requests for assistance may also contain the following information: (a) the identity, nationality and location of the person or persons who are the subject of the investigation or criminal proceedings; (b) the identity and location of any person from whom evidence is sought; (c) the identity and location of a person to be served, that person's relationship to the criminal proceedings, and the manner in which service is to be made; (d) information on the identity and whereabouts of a person to be located; (e) a description of the manner in which any testimony or statement is to be taken and recorded; (f) a list of questions to be asked of a witness; (g) a description of the documents, records or items of evidence to be produced as well as a description of the appropriate person to be asked to produce them and, to the extent not otherwise provided for, the form in which they should be reproduced and authenticated; (h) a statement as to whether sworn or affirmed evidence or statements are required; (i) a description of the property, asset or article to which the request relates, including its identity and location; and (j) any court order relating to the assistance requested and a statement relating to the finality of that order.

Party may provide assistance in the absence of dual criminality if permitted by its domestic laws;

f) the provision of the assistance would affect the sovereignty, security, public order, public interest or essential interests of the Requested Party;

g) the Requesting Party fails to undertake that it will be able to comply with a future request of a similar nature by the Requested Party for assistance in a criminal matter;

h) the Requesting Party fails to undertake that the item requested for will not be used for a matter other than the criminal matter in respect of which the request was made and the Requested Party has not consented to waive such undertaking;

i) the Requesting Party fails to undertake to return to the Requested Party, upon its request, any item obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;

j) the provision of the assistance could prejudice a criminal matter in the Requested Party; or

k) the provision of the assistance would require steps to be taken that would be contrary to the laws of the Requested Party.

The Requested Party may also refuse assistance if, in its opinion (Art. 3, para 2):

a) the Requesting Party has, in respect of that request, failed to comply with any material terms of the Treaty or other relevant arrangements;

b) the provision of the assistance would, or would be likely to prejudice the safety of any person, whether that person is within or outside the territory of the Requested Party; or

c) the provision of the assistance would impose an excessive burden on the resources of the Requested Party.

The Requested Party may postpone the execution of the request if its immediate execution would interfere with any ongoing criminal matters in the Requested Party (Art. 3, para 6).

The Treaty states that assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters (Art. 3, para 5).

Before refusing a request or postponing its execution pursuant to the Treaty, the Requested Party shall consider whether assistance may be granted subject to certain conditions (Art. 3, para 7). If the Requesting Party accepts assistance subject to the terms and these conditions, it shall comply with such terms and conditions (Art. 3, para 8).

If the Requested Party refuses or postpones assistance, it shall promptly inform the Requesting Party of the grounds of refusal or postponement (Art. 3, para 9). The Parties shall, subject to their respective domestic laws, reciprocate any assistance granted in respect of an equivalent offence irrespective of the applicable penalty (Art. 3, para 10).

VII. Use of information received (Art. 8 and Art. 9)

The Treaty states that the Requesting Party shall not, without the consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary, use information or evidence provided by the Requested Party for purposes other than those stated in the request (Art. 8, para 1). Notwithstanding the

above, in cases where the charge is amended, the information or evidence provided may be used, with the prior consent of the Requested Party, in so far as the offence, as charged, is an offence in respect of which mutual legal assistance could be provided under the Treaty, and which is made out by the facts on which the request was made (Art. 8, para 2).

The Requesting Party shall, subject to its domestic laws, take all appropriate measures to: (a) keep confidential information and evidence provided by the Requested Party, except to the extent that the evidence and information is needed for the purposes described in the request; and (b) ensure that the information and evidence is protected against loss and unauthorised access, use, modification, disclosure or other misuse (Art. 9, para 2).

VIII. Sharing of information received with other local authorities (Art. 8 and Art. 9)

The Requesting Party shall not, without the consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary, disclose or transfer information or evidence provided by the Requested Party for purposes other than those stated in the request (Art. 8, para 1).

The Requested Party shall, subject to its domestic laws, take all appropriate measures to keep confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching confidentiality requirements, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be executed (Art. 9, para 1).

The Requesting Party shall, subject to its domestic laws, take all appropriate measures to: (a) keep confidential information and evidence provided by the Requested Party, except to the extent that the evidence and information is needed for the purposes described in the request; and (b) ensure that the information and evidence is protected against loss and unauthorised access, use, modification, disclosure or other misuse (Art. 9, para 2).

IX. Sharing of information received with foreign authorities (Art. 8 and Art. 9)

The Requesting Party shall not, without the consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary, disclose or transfer information or evidence provided by the Requested Party for purposes other than those stated in the request (Art. 8, para 1).

The Requested Party shall, subject to its domestic laws, take all appropriate measures to keep confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching confidentiality requirements, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be executed (Art. 9, para 1).

The Requesting Party shall, subject to its domestic laws, take all appropriate measures to: (a) keep confidential information and evidence provided by the Requested Party, except to the extent that the evidence and information is needed for the purposes described in the request; and (b) ensure that the information and evidence is protected

against loss and unauthorised access, use, modification, disclosure or other misuse (Art. 9, para 2).

X. Relationship with other instruments (Art. 23)

Nothing in the Treaty shall prevent the Parties from providing assistance to each other pursuant to other treaties, arrangements or the provisions of their national laws (Art. 23).

13. Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters

Key Points

- The Southern African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters aims at providing a framework for mutual legal assistance in criminal matters to the Member States of the SADC.
- It provides for different forms of co-operation such as exchange of information, search and seizure or transfer of persons in custody.
- Transmission of requests under this Protocol shall be effected between Central Authorities designated by the Parties.
- The Protocol provides for different grounds for denying / postponing assistance. For instance, assistance may be refused if the request relates to a political offence or an offence of a political character.
- The information received may be used for purposes of investigation, prosecution or proceedings in the requesting Party in a criminal matter. However the requested Party may require that the requesting Party does not use any information or evidence obtained under this Protocol in any investigation, prosecution, or proceeding other than that described in the request without its prior consent.
- The requested Party shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Requesting Party. For its part, the requested Party may request that information or evidence furnished under the Protocol be kept confidential or be used only subject to terms and conditions it may specify.

I. Parties

The Southern African Development Community (SADC) Protocol on Mutual legal Assistance in Criminal Matters was adopted on 3 October 2002. It entered into force on 1 March 2007. It has been ratified / acceded by 10 States.[1]

II. Scope (Art. 2)

Pursuant to Article 2 paragraph 1, the Parties shall provide each other with the widest possible measure of mutual legal assistance in criminal matters. Mutual legal assistance is to be understood as any assistance given by the requested Party in respect of investigations, prosecutions or proceedings in the requesting Party in a criminal matter (Art. 2, para 2). Criminal matters include investigations, prosecutions or proceedings relating to offences concerning transnational organised crime, corruption, taxation, custom duties and foreign exchange control (Art. 2, para 3).

1. Status of ratification / accession as at July 2011: Angola, Botswana, Lesotho, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

Assistance shall be provided without regard to whether the conduct which is the subject of investigation, prosecution, or proceedings in the requesting Party would constitute an offence under the laws of the requested Party.

Article 2 paragraph 7 specifies the limits of the Protocol's scope. The Protocol shall not apply to: (a) the arrest or detention of a person with a view to the extradition of that person; (b) the enforcement in the requested Party of criminal judgments imposed in the requesting Party except to the extent permitted by the laws of the requested Party; or (c) the transfer of persons in custody to serve sentences.

III. Forms of co-operation (Art. 2)

Article 2 paragraph 5 states that assistance to be provided under the Protocol includes: (a) locating and identifying persons, property, objects and items; (b) serving documents, including documents seeking the attendance of persons and providing returns of such service; (c) providing information, documents and records; (d) providing objects and temporary transfer of exhibits; (e) search and seizure; (f) taking evidence or obtaining statements or both; (g) authorising the presence of persons from the requesting Party at the execution of requests; (h) ensuring the availability of detained persons to give evidence or to assist in possible investigations; (i) facilitating the appearance of witnesses or the assistance of persons in investigations; (j) taking possible measures of location, restraint, seizure, freezing or forfeiture of the proceeds of crime.

IV. Authorities that can use the instrument (Art. 3)

Article 3 paragraph 1 provides that transmission of requests under this Protocol shall be effected between Central Authorities designated by the Parties. Communication may also be effected through diplomatic channels or through Interpol (Art. 3, para 2).

V. Conditions for requesting assistance (Art. 5)

Article 5 paragraph 1 provides that requests for assistance shall indicate: (a) the competent authority in the requesting Party conducting the investigation, prosecution or proceedings to which the request relates; (b) the nature of the investigation, prosecution or proceedings, and include a summary of the facts and a copy of the applicable laws; (c) the purpose of the request and the nature of the assistance sought; (d) the degree of confidentiality required and the reasons therefore; and (e) any time limit within which the request should be executed.

Where possible, requests for assistance shall include: (a) the identity, nationality and location of a person who is the subject of the investigation, prosecution or proceedings; (b) details of any particular procedure or requirement that the requesting Party wishes to be followed and the reasons therefore (Art. 5, para 3).

Additional conditions apply in certain cases. Article 5 paragraph 2 provides that requests for assistance shall also include: (a) in the case of requests for the taking of evidence, search and seizure, or the location, restraint or forfeiture of proceeds of crime, a statement indicating the basis for belief that evidence or proceeds may be found in the requested Party; (b) in the case of requests to take evidence from a person, an indication as to whether sworn or affirmed statements are required and a description of the subject matter of the evidence or statement sought; (c) in the case of temporary transfer of exhibits, the current location of the exhibits in the requested Party and an indication of the person or class of persons who will have custody of the exhibits in the requesting Party,

the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned; and (d) in the case of ensuring the availability of detained persons, an indication of the person or class of persons who will have custody during the transfer, the place to which the detained person is to be transferred and the date of that person's return.

VI. Grounds for denying / postponing assistance (Art. 4 and Art. 6)

Article 6 paragraph 1 lays down the grounds for denying assistance. It states that assistance may be refused, if in the opinion of the requested Party: (a) the request relates to a political offence or an offence of a political character; (b) the request relates to an offence under military law which would not be an offence under ordinary criminal law; (c) the execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person; or (d) the request is not made in conformity with this Protocol. Article 6 paragraph 2 specifies that reasons shall be given for any refusal of mutual assistance.

Article 4 paragraph 4 states that if the Central Authority of the requested Party determines that the execution of the request would interfere with an ongoing criminal investigation, prosecution or proceeding in that State, it may postpone execution.

VII. Use of information received (Art. 2 and Art. 11)

Information received under the Protocol may be used for purposes of investigation, prosecution or proceedings in the requesting Party in a criminal matter (Art. 2, para 2). However, the requested Party may require that the requesting Party does not use any information or evidence obtained under this Protocol in any investigation, prosecution, or proceeding other than that described in the request without its prior consent (Art. 11, para 1).

VIII. Sharing of information received with other local authorities (Art. 4 and Art. 11)

The requested Party shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the requesting Party. If the request cannot be executed without breaching such confidentiality, the Central Authority of the requested Party shall so inform the requesting Party which shall then determine whether the request should nevertheless be executed (Art. 4, para 5). For its part, the requested Party may request that information or evidence furnished under this Protocol be kept confidential or be used only subject to terms and conditions it may specify (Art. 11, para 2).

IX. Sharing of information received with foreign authorities (Art. 4 and Art. 11)

The requested Party shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the requesting Party. If the request cannot be executed without breaching such confidentiality, the Central Authority of the requested Party shall so inform the requesting Party which shall then determine whether the request should nevertheless be executed (Art. 4, para 5). For its part, the requested Party may request that information or evidence furnished under this Protocol be kept confidential or be used only subject to terms and conditions it may specify (Art. 11, para 2).

X. Relationship with other instruments (Art. 23)

Article 23 provides that the provisions of any treaty or bilateral agreement governing mutual legal assistance between any two Parties shall be complementary to the provisions of this Protocol and shall be construed and applied in harmony with this Protocol. It is further specified that in the event of any inconsistency, the provisions of this Protocol shall prevail.

14. Inter-American Convention on Mutual Assistance in Criminal Matters

Key Points

- The Inter-American Convention on Mutual Assistance in Criminal Matters aims at providing a framework for mutual legal assistance in criminal matters to the Parties.
- It provides for different forms of co-operation such as exchange of information, search and seizure or freezing of assets.
- Transmission of requests under this Convention shall be effected between Central Authorities designated by the Parties.
- This Convention provides for different grounds for denying / postponing assistance. For instance, assistance may be refused if the request refers to a crime that is political or under the *non bis in idem* principle.
- Information received under this Convention shall be used for purposes of investigations, prosecutions, and proceedings that pertain to crimes over which the requesting State has jurisdiction at the time the assistance is requested.
- The requesting State may not disclose or use any information or evidence obtained under this Convention for purposes other than those specified in the request for assistance without prior consent from the Central Authority of the requested State. In exceptional cases, if the requesting State needs to disclose and use, in whole or in part, the information or evidence for purposes other than those specified, it shall request authorisation therefor from the requested State, which, at its discretion, may accede to or deny that request in whole or in part.

I. Parties

The Inter-American Convention on Mutual Assistance in Criminal Matters was adopted on 23 May 1992. It entered into force on 14 April 1996. It has been ratified/acceded by 27 States.[1]

II. Scope (Art. 2, Art. 6, Art. 8)

Article 2 provides that States Parties shall render to one another mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over which the requesting State has jurisdiction at the time the assistance is requested (Art. 2, para 1).

Article 6 specifies that the act giving rise to the request must be punishable by one year or more of imprisonment in the requesting State and Article 8 states that the Convention shall not apply to crimes subject exclusively to military legislation.

III. Forms of co-operation (Art. 7)

Article 7 provides that assistance to be provided under the Convention shall include the following procedures: (a) notification of rulings and judgments; (b) taking of

[1.] Status of ratifications as at April 2012: Antigua & Barbuda, Argentina, Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad & Tobago, United States, Uruguay, Venezuela.

testimony or statements from persons; (c) summoning of witnesses and expert witnesses to provide testimony; (d) immobilisation and sequestration of property, freezing of assets, and assistance in procedures related to seizures; (e) searches or seizures; (f) examination of objects and places; (g) service of judicial documents; (h) transmittal of documents, reports, information, and evidence; (i) transfer of detained persons for the purpose of this Convention; and (j) any other procedure provided there is an agreement between the requesting State and the requested State.

IV. Authorities that can use the instrument (Art. 3)

Transmission of requests under this Convention shall be effected between Central Authorities designated by Parties (Art. 3, para 1 and 2). They shall communicate directly with one another for all purposes of this Convention (Art. 3, para 3). Most Parties designated their Ministry of Justice as Central Authority.

V. Conditions for requesting assistance (Art. 10 and Art. 26)

Article 10 provides that requests for assistance shall be made in writing and shall be executed in accordance with the domestic law of the requested State (Art. 10, para 1). Article 10 further states that the procedures specified in the request for assistance shall be fulfilled in the manner indicated by the requesting State insofar as the law of the requested State is not violated (Art. 10, para 2).

Requests for assistance shall, according to Article 26 paragraph 1, contain the following details: (a) the crime to which the procedures refers; a summary description of the essential facts of the crime, investigation, or criminal proceeding in question; and a description of the facts to which the request refers; (b) proceeding giving rise to the request for assistance, with a precise description of such proceeding; (c) where pertinent, a description of any proceeding or other special requirement of the requesting State; and (d) a precise description of the assistance requested and any information necessary for the fulfillment of that request.

It is specified that the requested State may request additional information when necessary for fulfillment of the request under its domestic law or to facilitate such fulfillment (Art. 26, para 3).

VI. Grounds for denying / postponing assistance (Art. 5, Art. 9, Art. 11 and Art. 20)

In principle, assistance shall be rendered even if the act that gives rise to it is not punishable under the legislation of the requested State (Art. 5, para 1). However, when the request for assistance pertains to: (a) immobilisation and sequestration of property, and (b) searches and seizures, including house searches, the requested State may decline to render the assistance where there is no double criminality (Art. 5, para 2).

According to Article 9, the requested State may refuse assistance when it determines that: (a) the request for assistance is being used in order to prosecute a person on a charge with respect to which that person has already been sentenced or acquitted in a trial in the requesting or requested State; (b) the investigation has been initiated for the purpose of prosecuting, punishing, or discriminating in any way against an individual or group of persons for reason of sex, race, social status, nationality, religion, or ideology; (c) the request refers to a crime that is political or related to a political crime, or to a common crime prosecuted for political reasons; (d) the request has been issued at the request of a

special or ad hoc tribunal; (e) public policy (*ordre public*), sovereignty, security, or basic public interests are prejudiced; and (f) the request pertains to a tax crime, nevertheless, the assistance shall be granted if the offence is committed by way of an intentionally incorrect statement, whether oral or written, or by way of an intentional failure to declare income derived from any other offence covered by this Convention for the purpose of concealing such income.

In relation to transfer of persons subject to criminal proceedings where their presence in the requesting State is needed for purposes of assistance under this Convention, transfer may be denied for the following reasons, among others: (a) the individual in custody or serving a sentence refuses to consent to the transfer; (b) as long as his presence is necessary in an investigation or criminal proceeding that is under way in the jurisdiction to which he is subject at the time; or (c) there are other considerations, whether legal or of another nature, as determined by the competent authority of the requested or requesting State (Art. 20, para 3).

Finally, the requested State may postpone the execution of a request, with an explanation of its grounds for doing so, if it is necessary to continue an investigation or proceeding in progress in the requesting State (Art. 11).

VII. Use of information received (Art. 2 and Art. 25)

Information received under this Convention shall be used for purposes of investigations, prosecutions, and proceedings that pertain to crimes over which the requesting State has jurisdiction at the time the assistance is requested (Art. 2, para 1).

Some limitations are laid down as to the use of information received under the Convention. Article 25 provides that the requesting State may not use any information or evidence obtained in the course of application of this Convention for purposes other than those specified in the request for assistance without prior consent from the Central Authority of the requested State (Art. 25, para 1). It is further provided that in exceptional cases, if the requesting State needs to use, in whole or in part, the information or evidence for purposes other than those specified, it shall request authorisation therefor from the requested State, which, at its discretion, may accede to or deny that request in whole or in part (Art. 25, para 2).

VIII. Sharing of information received with other local authorities (Art. 25)

Article 25 provides that the requesting State may not disclose any information or evidence obtained in the course of application of this Convention for purposes other than those specified in the request for assistance without prior consent from the Central Authority of the requested State (Art. 25, para 1). It is further provided that in exceptional cases, if the requesting State needs to disclose, in whole or in part, the information or evidence for purposes other than those specified, it shall request authorisation therefor from the requested State, which, at its discretion, may accede to or deny that request in whole or in part (Art. 25, para 2).

Article 25 paragraph 3 states that when necessary, the requested State may ask that the information or evidence provided remain confidential according to conditions specified by the Central Authority.

IX. Sharing of information received with foreign authorities (Art. 25)

Article 25 provides that the requesting State may not disclose any information or evidence obtained in the course of application of this Convention for purposes other than those specified in the request for assistance without prior consent from the Central Authority of the requested State (Art. 25, para 1). It is further provided that in exceptional cases, if the requesting State needs to disclose, in whole or in part, the information or evidence for purposes other than those specified, it shall request authorisation therefor from the requested State, which, at its discretion, may accede to or deny that request in whole or in part (Art. 25, para 2).

Article 25 paragraph 3 states that when necessary, the requested State may ask that the information or evidence provided remain confidential according to conditions specified by the Central Authority.

X. Relationship with other instruments (Art. 36)

The relationship of this Convention with other instruments is defined by Article 36 which provides that this Convention shall not be interpreted as affecting or restricting obligations in effect under any other international, bilateral, or multilateral Convention that contains or might contain clauses governing specific aspects of international criminal judicial assistance, wholly or in part, or more favorable practices which those States might observe in the matter.

International Co-operation against Tax Crimes and Other Financial Crimes

A CATALOGUE OF THE MAIN INSTRUMENTS

International co-operation is essential in the fight against financial crimes. This report aims at improving the understanding and use of international co-operation mechanisms. After describing the different agencies involved in the fight against financial crimes, the report provides an overview of the international instruments available and summarises current initiatives to improve inter-agency co-operation. The core of the report is a catalogue describing the basic features of the main instruments for international co-operation in combating financial crimes.

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Chapter 4. Catalogue of the main instruments

www.oecd.org/ctp/taxcrimes