
The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

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Approach

- > 2nd Additional Protocol (ETS 182 – 08/11/01)
- > additional to 1959 CoE Mutual Assistance Convention
- > closely/often literally following EU/Schengen acquis
- > swift implementing legislation and ratification required
- > maximized anticipation EU/Schengen desirable
- > therefore
 - > overview ETS 182 + differences in drafting highlighted
 - > issues insufficiently or not reflected: separately presented
 - > Schengen Implementation Convention (19/06/90) (SIC)
 - > EU 2000 Convention on Mutual Assistance (29/05/00)
 - > EU 2001 Protocol to 2000 Convention (16/10/01)
 - > other EU MLA-related developments

2nd Additional Protocol (ETS 182)

- > Scope + grounds for refusal
- > promptness in affording assistance
- > compliance with formalities and procedures requesting state
- > spontaneous exchange of information
- > provisional measures
- > restitution
- > sending/service of procedural documents and judicial decisions
- > hearing by video or telephone conference
- > temporary transfer detainees to requesting & requested state
- > cross-border observations
- > controlled deliveries
- > covert investigations (infiltration)
- > joint investigation teams
- > protection of witnesses
- > direct and telecom transmission of requests
- > confidentiality and data protection/specialty

Scope + grounds for refusal

- > scope
 - > broadened as to also include
 - > administrative offences
 - > acts for which a legal person may be held liable
 - > However
 - > Articles 49 b), c) and d) SIC not integrated
- > grounds for refusal
 - > no additional limitation

Promptness in affording assistance

- > obligation to promptly afford each other mutual assistance
- > possibility to postpone execution requests
 - > if prejudicial to own investigations, prosecutions or proceedings
 - > partial or conditional execution should be considered
 - > duty to explain reason postponement, non- or delayed execution
- > not, as on EU level
 - > obligation to take as full account as possible of deadlines set
 - > obligation for requesting MS to explain reason for deadline
 - > duty to inform if foreseeable that deadline cannot be complied with
 - > 1998 Joint Action on good practice in mutual legal assistance
 - > obligation to deposit statement of good practice for MS, including undertaking to acknowledge requests or reply substantively
 - > acknowledgements must include name and contact details
 - > model form: website EJN/Eurojust

Formalities/procedures requesting state

- > shift from *locus regit actum* principle (1959 CoE convention) to *forum regit actum* principle
- > undertaking to comply with formalities/ procedures necessary for/expressly indicated by requesting state, provided that these are not contrary to its fundamental principles of law
- > example & rationale
 - > see scenario by Ms Michèle Coninx
- > not, as on EU level
 - > duty to inform requesting S where the request cannot (fully) be executed in accordance with procedural requirements set
- > still too many exceptions?
 - > cross-border observations, controlled deliveries, covert operations, joint investigation teams, protection of witnesses, provisional measures

Spontaneous exchange of information

- > **acquis**
 - > 1967 Naples I Convention - Articles 8-9 (customs)
 - > Article 46 SIC (police)
 - > prevent future crime and offences against or threats to public order and security
 - > 1997 Naples II Convention - Articles 15-18 (customs)
- > **broadened to judicial cooperation**
 - > the competent authorities may, without prior request, forward information obtained within framework of their own investigations, to competent authorities other state
- > **remarks**
 - > 'without prejudice to their own investigations or proceedings'
 - > depends on secrecy/confidentiality level pre-trial investigations
 - > conditions on use may be imposed
 - > receiving state may declare not to be bound by such conditions
 - > especially important for states where prosecution is mandatory

Provisional measures

- > **2nd Protocol**
 - > at the request of requesting state, the requested state may, in accordance with its national law, take provisional measures for the purpose of preserving evidence, maintaining an existing situation or protecting endangered legal interests
- > **remarks**
 - > extremely soft wording for matter this important
 - > national implementing legislation required
 - > EU goes way further
 - > FD freezing evidence and assets

Restitution

- › 1959 European Convention (Article 6.2)
 - › property handed over in execution of letters rogatory shall be returned by requesting state ASAP unless the latter state waives the return thereof
- › 2nd Protocol
 - › the requested state may waive the return of articles supplied to the requesting state if the restitution of such articles to the rightful owner may be facilitated thereby (the rights of bona fide third parties shall not be affected)
 - › at the request of the requesting state, the requested state may also place articles obtained by criminal means at the disposal of the requesting states with a view to their return to their rightful owners (= seizure and subsequent handing over of the proceeds from crime, with a view to restitution)

Sending/service documents/decisions

- › possibility (as in Article 52 SIC) to send procedural documents and judicial decisions intended for persons on the territory of another MS directly by post
- › SIC guarantees as regards translation generalized
 - › to either post or traditional sending/service
- › additional report required stating that addressee may obtain information regarding his/her rights and obligations (e.g. if there is an obligation to appear)
- › Articles 8, 9 and 12 of 1959 Convention applicable in scenario of sending/service by post
- › not, as on EU level
 - › mandatory sending/service by post

Hearing by video/telephone conference

- > no obligation to appear under 1959 Convention
 - > hearing by video/telephone conference as alternative
 - > interesting for witness protection
- > combination of regular request for assistance and direct exercise of jurisdiction
 - > requested state: summons, technical realisation, procedural guarantees, control, perjury, refusal to testify
 - > hearing conducted/directed by judicial authority requesting state
- > witnesses and experts (investigation and trial stage)
- > video hearing accused persons and suspects: optional
 - > better than EU drafting (accused persons – not desirable)
- > financial implications

Temporary transfer detainees

- > to the requesting state
 - > Article 11 1959 Convention improved (not in EU)
 - > for evidentiary purposes other than for standing trial
 - > before only as a witness or for confrontation purposes
 - > new: personal appearance of transferred sentenced persons for purpose of review of the judgment
- > to the requested state
 - > new - until now: only possible under bilateral MLAT's, additional to 1959 CoE Convention
 - > possible for investigation for which the presence of a person held in custody on territory requested state is required (e.g. confrontation, reconstruction, recognition)
 - > consent of the detainee: optional
- > possibility to refuse transit own nationals: outdated

Cross-border observations

- > similar to revised version Article 40 SIC
- > cross-border observation
 - > of a person presumed to have taken part in an extraditable offence or who is strongly believed will lead to the identification or location of such a person
- > 2 scenario's
 - > prior authorisation following assistance request
 - > urgency does not allow prior request & authorisation
 - > general conditions for both scenario's
- > remark
 - > does not expressly allow for requesting (continuation of) observation by officials requested state

Controlled deliveries

- > MS must ensure that, at the request of another MS, controlled deliveries may be permitted on its territory
 - > not 'through' its territory?
- > broader scope than illicit traffic in drugs
 - > as in Articles 11 UN Vienna Convention & 73 SIC
- > in the framework of criminal investigations into extraditable offences
 - > criterion?
- > explanatory report
 - > wrongly refers to goods and money (draft text)
 - > could also include 'persons' – to be avoided
- > law and procedures requested state apply
 - > national legislation required

Covert operations (infiltration)

- > until now
 - > co-operation on police level, in legal vacuum
 - > facilitated by e.g. International Working Group on Undercover Policing (IWG)
 - > 'intelligence'/secret services not bound
- > state may agree to assist each other for investigations into crime by officers acting under covert or false identity
- > 3 possible scenario's (implicitly)
- > decision on the request: taken by competent authorities of requested state with due regard to its national law/procedures
- > law and procedures applicable of state where the action takes place (no forum regit actum)
- > duration, detailed conditions, preparation, supervision, security: agreed between both MS
- > 1996 Naples II Convention (only 1 scenario)

Joint investigation teams (1)

- > see scenario by Mr Simon Regis
- > composed of judicial, police and/or customs officers or even of officials of international organisations & bodies (e.g. Europol, Eurojust, OLAF?, ...)
- > may be set up for a specific purpose and for a limited period in case of
 - > difficult and demanding international investigations
 - > coordinated, concerted action between MS necessary
- > headed and led by official state where team operates
- > seconded team members operating in another state shall be bound by the law of that state
- > seconded team members may be entrusted by teamleader with task of certain investigative measures

Joint investigation teams (2)

- > team members may request own authorities to take the necessary investigative measures in their own state as if they would be taken in a domestic investigation
- > information lawfully obtained by seconded team members may be used in their own state
- > EU philosophy
 - > Europol intelligence (AWF's)
 - > Europol request MS to start/coordinate investigations
 - > MS set up team, with support Europol analyst
 - > MS inform Eurojust
 - > Eurojust coordinates prosecution
- > national legislation should be drafted as to allow for JIT's on various legal bases or even where bilaterally agreed to

Protection of witnesses

- > virtually meaningless provision
 - > where requested, states shall endeavour to agree on measures for the protection of a witness at risk of intimidation or in need of protection
- > EU
 - > Resolutions 1995/1996 + Europol confidential docs
 - > FD's underway (Ghent University – IRCP)
 - > FD on cooperation with (criminal) witnesses
 - > FD on protection of witnesses
 - > EU model agreement to be used on a bilateral basis (including for relocation purposes)

Direct and telecom transmission of requests

- > direct transmission
 - > always possible (except for temporary transfer detainees or periodical exchange convictions) as in Article 53 SIC
 - > including for controlled deliveries or covert investigations, even where non-judicial authorities are the competent authorities
 - > various reservations allowed for
 - > not, as on EU level
 - > obligation of direct transmission
 - > direct transmission including in principle the right for the locally competent authorities to directly execute and answer requests
 - > European judicial atlas (EJN/Eurojust)
 - > remark: review possibility by central authorities in fact only desirable for deciding on (certain) optional grounds for refusal
- > (electronic) telecom transmission allowed for
 - > non-acceptance must be notified

Confidentiality and data protection/specialty

- > confidentiality
 - > useful – acquis in many specific/thematic conventions
- > data protection
 - > looks as if generalization specialty principle
 - > before only in SIC regarding MLA in indirect tax matters
 - > however: not very meaningful
 - > use for [any] proceedings to which Convention or Protocols apply
 - > + other directly related judicial/administrative proceedings (inherent risk of violation purpose limitation principle embedded in Convention 108)
 - > + preventing serious imminent threat to public security
 - > therefore see last para: declaration possible making prior consent always required (genuine specialty)
 - > possibility of refusing transfer data obtained in execution request
 - > if protected by domestic law
 - > and other state not bound by Convention 108

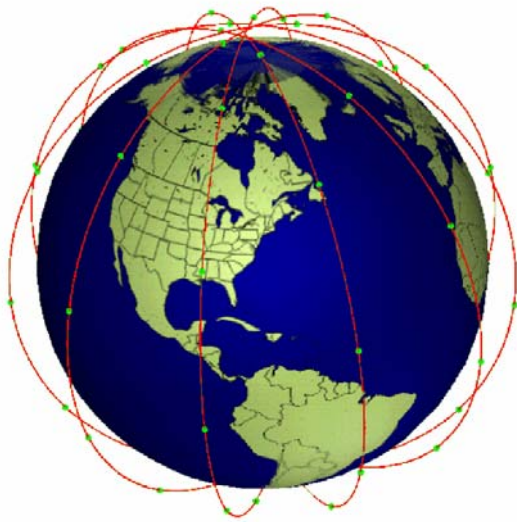
Schengen Implementation Convention

- > scope (Article 49) broader than ETS 182
 - > (a) 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
- > admissibility letters rogatory for search/seizure
 - > lower maximum conditions (dual criminality 6 months + consistent with domestic law requested state)
 - > EU currently going even way further
- > provision for cross-(land)border hot pursuit
 - > EU Naples II Convention: even for land/air/sea borders

EU 2000 Convention on Mutual Assistance

- > interception of telecommunications (1)
 - > adequate legal basis lacking before
 - > real-time interception
 - > GSM
 - > S-PCS (Satellite Personal Communications System)
 - > LEO's/MEO's (versus GEO's)
 - > upgoing signal not interceptable
 - > network of gateways
 - > i.e. adequate points for interception
 - > various scenario's

Interception of telecommunications (2)



Interception of telecommunications (3)

- > target neither in requesting state nor state technically capable of intercepting (requested state)
 - > obligation to inform that state
 - > permission necessary
 - > right to impose conditions for/prohibit the use of data gathered while the target was on its territory
- > service provider approach
 - > remote interception (2 scenario's)
 - > target in requesting state
 - > target in state where remote interception can be made
- > applicable to criminal investigations
 - > more lenient regime for interception by secret services
- > financial implications

EU 2001 Protocol to 2000 Convention (1)

- > information on bank accounts & banking operations
 - > natural and legal persons
 - > holder, financial beneficiary, proxy
 - > in as far as available in bank
 - > required level alleged crime: organized, Europol, PFI
 - > possibility to subject execution to same conditions house search/seizure
 - > account 'monitoring' allowed

EU 2001 Protocol to 2000 Convention (2)

- > (confidentiality)
- > information duty
- > additional requests
 - > no duplication
 - > on-the-spot requests allowed
- > no bank secrecy exception
- > fiscal offences
 - > reinforcement SIC and 1978 CoE Protocol
- > political offences
 - > refusal mutual assistance limited to same extent as in 1996 Extradition Convention

Other EU MLA-related developments

- > FD 13 June 2002 on joint investigation teams
 - > anticipated entry into force Article 13 Convention 29 May 2000
- > various new FD's underway or announced
 - > (partially as add-on to FD freezing evidence and assets)
 - > FD European evidence warrant (for existing evidence and criminal record information)
 - > announced: full replacement mutual assistance by mutual recognition, including for
 - > information/evidence requiring investigative action other MS
 - > real-time investigative measures, such as telecom interception and bank account monitoring
 - > stereotypical waiver of dual criminality requirement for 32/37 offences punishable with 3 years+

Questions and discussion
