

The EU Convention on Mutual Assistance in Criminal Matters and Its Protocol

Prof. Dr. Gert Vermeulen

‘Mutual Legal Assistance in Criminal Matters’
ERA & European Judicial Training Network
Barcelona, 30 September 2002

Structure

- > Convention of 29 May 2000
 - > additional to traditional/present legal instruments, concluded at
 - > Benelux level
 - > Council of Europe (COE) level
 - > 1959 Mutual assistance Convention
 - > 1978 Additional Protocol 1959 Convention
 - > (1990 Laundering Convention)
 - > (2001 Second Additional Protocol 1959 convention)
 - > Schengen level (SIC)
 - > Articles 40 and 48-53 SIC
 - > further development Schengen-acquis within EU
- > Protocol of 16 October 2001
- > other MLA-related developments

Convention of 29 May 2000

- > compliance with
 - > formalities and procedures of requesting MS
 - > deadlines set by requesting MS
- > interception of telecommunications
- > controlled deliveries
- > covert investigations (infiltration)
- > joint investigation teams
- > spontaneous exchange of information
- > sending and service procedural documents
- > hearing by video or telephone conference
- > temporary transfer detainees to requested MS
- > direct transmission of requests

Formalities/procedures requesting MS

- > shift from *locus regit actum* principle (1959 CoE convention) to *forum regit actum* principle
- > undertaking to comply with formalities/ procedures expressly indicated by requesting MS, provided that these are not contrary to its fundamental principles of law
- > example & rationale (e.g. presence defense lawyer)
- > duty to inform requesting MS where the request cannot (fully) be executed in accordance with the procedural requirements set by the requesting state
- > not applicable as regards controlled deliveries, undercover operations and joint investigation teams

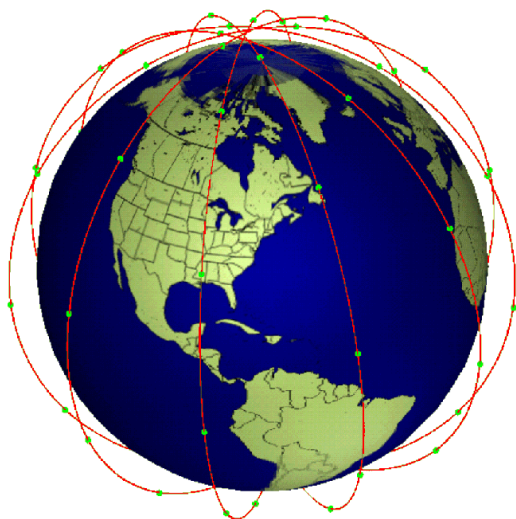
Deadlines set by requesting MS

- > obligation to execute requests for assistance ASAP
- > obligation to take as full account as possible of deadlines set
- > obligation for requesting MS to explain reason for deadline
- > duty to inform the requesting state if it is foreseeable that the deadline set for execution cannot be complied with
- > 1998 Joint Action on good practice in mutual legal assistance
 - > obligation to deposit statement of good practice in executing requests for mutual assistance, including a.o. an undertaking to acknowledge, where requested to do so by the requesting state all requests and written enquiries concerning the execution of requests, unless a substantive reply is sent quickly
 - > acknowledgements must provide the requesting authority with the name and contact details of the authority/person responsible for executing the request
 - > model form: website EJM (<http://ue.eu.int/ejm/index.htm>)

Interception of telecommunications (1)

- > adequate legal basis lacking before
- > real-time interception
- > GSM
- > S-PCS-networks (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

Controlled deliveries

- > MS must ensure that, at the request of another MS, controlled deliveries may be permitted on 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 (1996 EU Convention)
- > law and procedures requested ms apply
- > 1997 Naples II Convention
 - > comparable, though not the same provisions
- > several other conventions
 - > SIC, UN Vienna Convention, 2000 UN TOC Convention, 2nd Additional Protocol to 1959 CoE MLA Convention, ...

Infiltration (undercover operations)

- > until now
 - > co-operation on police level, in legal vacuum
 - > facilitated by e.g. International Working Group on Undercover Policing (IWG)
- > Ms 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)

- > 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
- > Eurojust must be informed of setting up
- > 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
- > also in the 1997 Naples II Convention (different rules)

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)
- > **2000 EU Mutual Assistance Convention**
 - > the competent authorities MS may, within limits national law and without a request to that effect, exchange information relating to criminal/administrative offences, the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided
 - > rationale: facilitate exchange of information that has come up during investigations, even before the closing thereof

Sending/service procedural documents

- > reinforcement and refinement acquis of Article 52 SIC
- > obligation (instead of possibility) to send procedural documents intended for persons on the territory of another MS directly by post
- > limited number of cases where documents may still be sent via the traditional channels (between judicial authorities, under Article 7 1959 CoE Convention)
- > SIC guarantees as regards translation generalized
- > 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 CoE convention applicable

Hearing by video/telephone conference

- > no obligation to appear under 1959 CoE Convention
- > hearing by video/telephone conference as alternative
- > interesting for witness protection
- > combination of regular request for assistance and direct exercise of jurisdiction
 - > requested MS: summons, technical realisation, procedural guarantees, control, perjury & unlawful refusal to testify
 - > hearing conducted by/under direction judicial authority requesting MS
- > witnesses and experts (investigation and trial stage)
- > video hearing accused persons (trial stage): optional
- > financial implications

Transfer detainees to requested MS

- > until now: only possible under bilateral MLAT's, additional to 1959 CoE Convention
- > possible in the framework of an investigation requested for which the presence of a person held in custody on territory requested MS is required (e.g. confrontation, reconstruction, recognition places)
- > consent of the detainee: optional

Direct transmission of requests

- > reinforcement acquis of Article 53 SIC
- > obligation (instead of possibility) of direct transmission and return
- > states may declare that their judicial authorities do not (in general) have authority to execute requests received directly - in absence of such a declaration: autonomy for the local judicial authorities to execute requests received directly (and not only to receive them)
- > limited number of cases where documents have to be sent via the central authorities (a.o. for temporary transfer)
- > European judicial atlas (EJN)

Protocol 16 October 2001 (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

Protocol 16 October 2001 (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 MLA-related developments

- > Second Additional Protocol (8 November 2001) to the 1959 CoE MLA Convention
 - > very similar to EU Convention 29 May 2000
- > FD 13 June 2002 on joint investigation teams
 - > anticipated entry into force of Article 13 Convention 29 May 2000
- > draft FD on the execution in the EU of orders freezing property or evidence
 - > mutual recognition
 - > mirrored on FD European arrest warrant
 - > no double criminality for 32 offences punishable 3 years+
- > series of draft instruments Danish Presidency pending

Implementation

- Belgium
 - implementing legislation drafted by end 2001
 - by inter-university research team
 - Vermeulen, G., Vander Beken, T., De Busser E. Van den Wyngaert, C., Masset, A. and Meunier, C., Een nieuwe Belgische wetgeving inzake internationale rechtshulp in strafzaken, Maklu, 2002
 - to be introduced to Parliament shortly
 - forthcoming in French also
 - French text and explanatory report on 'mutual assistance' part available in conference materials

Questions and discussion
