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(Acts adopted pursuant to Title V of the Treaty on European Union)

SECOND ANNUAL REPORT ACCORDING TO OPERATIVE PROVISION 8 OF THE EUROPEAN UNION CODE OF CONDUCT ON ARMS EXPORTS

(2000/C 379/01)

The European Union Code of Conduct on Arms Exports, adopted on 8 June 1998, set up a mechanism for information exchange and consultation among the Member States based on the common criteria adopted by the Luxembourg and Lisbon European Councils held in 1991 and 1992 respectively. The European Union thus embarked on a process of convergence of national arms export control policies accompanying the restructuring of European defence industries.

The European Code of Conduct provides for an annual review procedure. The first report was published in the *Official Journal of the European Communities* on 3 November 1999 [1] following a Council decision to publicise it in line with Member States' wishes.

This document constitutes the second annual report: it reviews the second year of implementation of the Code of Conduct. The second year was marked by consolidation of the first year's achievements and also by further progress, particularly in the priority areas defined in the first report. Finally, since the implementation of the Code of Conduct is part of a long-term process of convergence and harmonisation of arms export control policies, this report sets out guidelines which the Member States have adopted for the future.

I. REVIEW OF THE SECOND YEAR OF THE CODE'S IMPLEMENTATION: CONSOLIDATION OF ACHIEVEMENTS

The first report stated that considerable progress had been made over a short period of time and that the results of the Code's implementation during the first year of its existence were already positive. In the second year the Code was substantially strengthened and the first year's achievements consolidated. It was marked by a considerable increase in the number of notified denials and consultations, as will be seen from the table annexed to this report. This evolution is evidence of Member States' resolve to put into practice a new form of transparency in arms export control and to act in greater concert in this area.

Implementation of the Code of Conduct went hand in hand with greater concertation by Member States regarding not only the practical arrangements for implementing the Code and upgrading those arrangements, but also arms export control policies. The CFSP Working Party on Conventional Arms Exports (COARM) afforded a privileged framework for that concertation. During the second year of the Code's implementation, the working party concentrated on addressing the priority areas identified in the first report. The results achieved here are described below. The steady increase in the number of notifications and consultations, reflecting the Code of Conduct's rising impact, gives added substance to Member States' information exchanges in the said working party.

Operative provision 11 of the Code of Conduct provides that Member States will use their best endeavours to encourage other arms-exporting States to back the Code's principles. The first report already signalled support for these principles by the associated countries of central and eastern Europe, Cyprus, the EFTA countries' members of the European Economic Area and Canada. Turkey and Malta have since declared that they subscribe to the Code's principles and have undertaken to adjust their arms export policies accordingly but also, where necessary, their relevant rules. Member States welcome the fact that the Code's principles are being increasingly recognised; they are determined to continue encouraging that development.

In tandem with implementing the Code of Conduct, Member States have each embarked on a national drive to increase transparency. Thus, most arms-exporting Member States now publish national reports on arms exports. A list of those

[1] OJ C 315, 3.11.1999, p. 1.

reports and — for those that are available online — their Internet addresses are annexed to this document. Member States welcome this development as a boost to the Code of Conduct.

II. STATE OF PLAY AS REGARDS THE IMPLEMENTATION OF THE PRIORITY MEASURES IDENTIFIED IN THE FIRST REPORT

The first annual report identified four key areas for consideration and action by the Member States in the short term, with a view to strengthening the Code and ensuring greater transparency. Progress made in these areas during the second year of the Code's implementation is detailed hereafter:

Common list of military equipment

The first report emphasised that top priority needed to be given to finalisation of the common list of military equipment provided for in operative provision 5 of the Code because that list was to be a cornerstone of the Code of Conduct.

The list was adopted by the Council on 13 June 2000 and published in the *Official Journal of the European Communities* of 8 July 2000. The Council decided to publicise the list in accordance with the principle of wide-ranging transparency underlying the Code.

The adoption of the common list of military equipment represents a major positive development contributing significantly towards making the Code of Conduct more effective. It marks a further step towards convergence between the Member States in the area of controls on conventional arms exports. Member States will now use the common list's references in denial notifications (with retroactive effect for earlier denial notifications), thereby clarifying and simplifying their information exchanges on these matters.

The common list of military equipment has the status of a political commitment in the framework of the common foreign and security policy (CFSP). In this sense, all Member States have made a political commitment to ensure that their national legislation enables them to control the export of all the goods on the list. The common list of military equipment will act as reference point for Member States' national military equipment lists, but will not directly replace them.

Since the list has an evolutionary character, Member States will continue updating it on a regular basis within the COARM working party.

Lastly, the Member States have made it known that they would endorse efforts for any items from the common list of military equipment which are not contained in the Wassenaar list, to be put forward for consideration within the Wassenaar Arrangement.

'Essentially identical transactions'

The second priority identified in the first report was the development of a common understanding of what constitutes an essentially identical transaction. That concept is, in fact, central to the Code of Conduct's operative section; therefore, there is obviously a need for an understanding agreed by all Member States of the scope of essentially identical transactions.

Member States have continued discussion of this matter within the COARM working party. Progress has been made, but a common understanding has yet to be agreed. The concept is complex and the guidelines to be adopted here will have a major bearing on the Code's future operation.

Member States propose to continue exchanging information and harmonising matters in this area. The common list of military equipment will henceforward be the agreed basis for seeking a common understanding of what constitutes an essentially identical transaction.

More elaborate denial notifications

The first report also pointed to the need for denial notifications to give a fuller description of the reasons for denial in order to facilitate understanding of the general thinking behind each other's denials, and help Member States decide whether consultation would be warranted.

Here, Member States have agreed that denial notifications should include the following particulars:

— country of destination,

— full description of the goods concerned (with their matching common list number),

— buyer (specifying whether the buyer is a government agency, police, army, navy, air force, or paramilitary force, or whether it concerns a private natural or legal person and, if denial is based on criterion 7, the name of the natural or legal person),

— description of the end-use,

— reasons for denial (these should include not only the number(s) of the criteria, but also the elements on which the assessment is based),

— date of the denial (or information on the date when it takes effect unless it is already in force).

Member States have also agreed that denial of a licence for a transaction deemed essentially identical to a transaction already subject to a denial notified by another Member State should also be notified.

Embargoes on arms exports

Lastly, the first report emphasised that it was important for Member States to continue exchanging information on national interpretations of embargoes imposed by the United Nations, the European Union and the Organisation for Security and Cooperation in Europe.

Member States have also further concerted on national policies to control arms exports to certain embargo-free countries or regions that are being closely monitored (existence of an internal or external conflict, human rights situation, etc.).

III. FURTHER QUESTIONS ADDRESSED BY THE COARM WORKING PARTY IN CONNECTION WITH THE IMPLEMENTATION OF THE CODE OF CONDUCT

Member States have continued their efforts to upgrade and harmonise the arrangements for implementing the Code of Conduct mechanism.

Besides the questions referred to above, they have, *inter alia*, looked at the arrangements for the consultation procedures and, in particular, problems relating to the necessary confidentiality of such contacts, which should not, however, thwart the objective of transparency underlying the Code of Conduct.

Member States have further looked at military equipment used in humanitarian operations — in particular humanitarian mine-clearance operations — for which consideration was given to the possibility of making exceptions by means of a legal instrument.

As part of the implementation of the Code of Conduct, the Member States have also had to reflect on the question of arms brokerage control. This aspect was raised on several occasions and formed the subject of a meeting of experts specifically convened to address this problem. The Member States intend to continue and deepen their discussions on the procedures for monitoring arms brokers' activities in order to incorporate this special topic — the importance of which has been recognised — into the process of convergence of the Member States' control policies.

Finally, with a view to the 2001 United Nations Conference on the illicit trade in small arms and light weapons in all its aspects, the Member States have started to define common guidelines and to strengthen their coordination as regards the control of transfers of small arms and light weapons by drawing on the experience gained during implementation of the Code of Conduct.

IV. PRIORITY GUIDELINES FOR THE NEAR FUTURE

The implementation of the Code of Conduct forms part of the long-term process for strengthening cooperation and for promoting convergence between the Member States of the European Union in the area of conventional arms exports.

As stated in the first report, such a process is unique to date. The implementation of the Code of Conduct constitutes an important milestone for the future of Europe as regards arms export controls by promoting greater transparency between States and vis-à-vis civil society, and the gradual development of harmonised policies.

The results achieved in the area of exchanges of information between Member States after two years of implementation of the Code are already considerable. The application of the Code should nevertheless be deepened and consolidated so as to make full use of its potential.

With a view to improving and deepening the implementation of the Code of Conduct, several issues have already been mentioned in this report as continuing to require joint consideration.

Moreover, and in addition to the above questions, the Member States have identified a number of guidelines on issues on which decisions should be taken or to which attention should be given in the near future.

1. *Finalisation of a common list of non-military security and police equipment*

The Member States consider that exports of certain non-military equipment which may be used for internal repression should be monitored by national authorities on the basis — as regards civil goods — of Community rules, in order to prevent equipment originating in the

European Union from being used for acts which violate human rights.

For this purpose, the COARM working party has undertaken to draw up a common list of non-military security and police equipment, the export of which should be monitored in accordance with the second criterion of the code 'Respect for human rights in the country of final destination'. The list drawn up by the working party will be submitted to the Commission which will be responsible for taking the initiative of proposing a draft Community mechanism for controlling exports of non-military equipment which may be used for internal repression. This instrument will be separate from the operative provisions of the Code of Conduct. However, it will be linked to it as control will be implemented on the basis of the second criterion of the Code.

The Council takes note of the Commission's intention of submitting as soon as possible a proposal based on the list, enabling Community control arrangements to be set up.

2. *Development of exchanges of information on national control policies for the export of arms to certain countries or regions regarded as requiring special vigilance*

However, the development of a dialogue between the Member States on national arms exporting policies lies at the heart of the objective of the Code of Conduct. The Member States are determined to make headway with this dialogue. The body of denials — which is now substantial — notified in the framework of the mechanism of the Code constitutes the concrete basis for such exchanges.

3. *Harmonisation of the procedures implemented in the framework of the operational provisions of the Code*

The Member States will continue the harmonisation work already initiated. They will endeavour in particular to clarify and strengthen the bilateral consultations mechanism, to define the method for revoking certain notifications at the request of the notifying State (except the lifting of an embargo which is already covered by agreed procedures) and finally to reflect on the concept of a minimum threshold for export notifications.

4. *Harmonisation of national annual reports on the application of the Code of Conduct*

The annual report on the application of the Code of Conduct is drawn up on the basis of the Member States' reports. However, the fact that some of the data transmitted are hard to compare, especially statistics, makes the task of summarising the information more complex and may hamper joint efforts to achieve transparency. In order to improve transparency and to increase the informative value of the annual report, the Member States will, as far as possible, endeavour to define a harmonised framework for national reports, particularly as regards statistics.

5. *Coordination of the Member States' national positions in multilateral bodies dealing with arms export control issues*

In order to implement operative provision 7 of the Code of Conduct, the Member States will help the Presidency strengthen coordination of their national positions and that of the European Union in international bodies dealing with arms export control issues.

6. *Promotion of the principles of the Code of Conduct in third countries*

Operative provision 11 of the Code provides that the Member States will use their best endeavours to encourage other arms-exporting States to subscribe to the principles of the Code of Conduct. The Member States will actively pursue their efforts along those lines and strengthen the dialogue with the countries that have said that they will back the principles of the Code, including initiatives to assist countries that experience difficulties in applying them. Moreover, they have taken note with interest of the adoption by the United States Congress of the law on the 'promotion of an international code of conduct for arms exports' and have welcomed the fact that the United States has thus embarked upon a path where the European Union has played a pioneering role. The Member States consider it highly desirable that the United States and the European Union should work together towards promoting common principles of arms export controls in third countries.

ANNEX I

Information on conventional arms exports and implementation of the Code of Conduct in the Member States over the period 1 January to 31 December 1999 (*NB*: figures in brackets refer to the period 1 January to 30 June 2000).

Statistics are compiled differently by each Member State: no uniform standard is used. Consequently, not all countries have been able to submit this information owing to current procedures in the area of arms export controls or data protection legislation.

Country	Total value of arms exports (in euro)	Total number of licences issued	Number of notified denials	Number of bilateral consultations initiated	Number of consultation requests received
Austria	395 453 327 (1)	1 294	11 (7)	4 (0)	1
Belgium	622 021 411 (1)	950	29 (13)	6 (7)	2 (2)
Denmark	Not available under the current system (2)	228 in total(including 186 on common list + 17 for foreign police forces + 43 for, *inter alia*, hunting weapons)	2 (1)	0 (0)	0 (0)
Finland	40 155 692 (3)	174 (licences granted, i.e. excluding prior notifications)	1 (2)	0 (0)	0 (1)
France	3 780 000 000 (1)	5 093 for exports of war material	62 (46)	15 (7)	5 (0)
Germany	3 026 167 800 (1)	9 373	61 (9)	4 (0)	14 (4)
Greece	43 158 770	23	0 (0)	0 (0)	0 (0)
Ireland	60 394 090	41 (4)	0 (0)	0 (0)	0 (0)
Italy	1 340 812 490 (1)	Final: 495 For temporary export: 116 Extensions: 65	11 (12)	0 (2)	1 (3)
Luxembourg	39 093 (1)	20	0 (0)	0 (0)	0 (0)
Netherlands	366 336 768 (1)	Not available	12 (6)	0 (0)	4 (0)
Portugal	10 640 103,89 (1) (for 57 effective operations)	898	2 (from 1.1.1999 to 30.6.2000)	0 (0)	0 (0)
Spain	141 383,860 (3)	2 305	4 (2)	0 (0)	
Sweden	3 654 000 000 SEK (3) 7 153 000 000 SEK (1)	527 (export licences for sale)	0 (0)	0 (0)	0 (0)
United Kingdom	980 520 000 GBP (3)	Total number of licences: 9 416 (Standard individual export licences: 8 967 Open individual export licences: 449)	26 (15 from 8.6.1999 and 7.6.2000)	4 (5 from 8.6.1999 and 7.6.2000)	

(1) Total value of licences issued.

(2) A system for compiling these data has been operational since 1 July 2000.

(3) Actual value of exports.

(4) Irish law requires a licence to take out of the country guns and ammunition for any purpose whatsoever, including sports and hunting, repair and transfer of personal effects. A total of 419 licences were issued in 1999, including 378 for private purposes and 41 for the export of military equipment.

ANNEX II

National reports on arms exports are available in paper form or on the Internet at the following locations:

Belgium:	diplobel.fgov.be
Denmark:	Ministry of Foreign Affairs, No 2, Asiatisk Plads 2, DK-1448 Copenhagen K, Denmark or www.um.dk (the report will be available at the end of 2000)
Finland:	www.vn.fi/plm/index.html
France:	www.defense.gouv.fr/actualites/dossier/d49/index.html
Germany:	www.bmwi.de, select politikfelder, select Aussenwirtschaft & europa, select exportkontrolle
Ireland:	www.irlgov.ie/iveagh
Italy:	Government report to Parliament on 1999 arms exports — published by Camera dei deputati and by Senato della repubblica (Doc. LXVII n.4)
Netherlands:	www.minez.nl/ezenglish/export.htm
United Kingdom:	www.fco.gov.uk/news/newstext.asp?3991
Sweden:	www.utrikes.regeringen.se/inenglish/pressinfo/information/publications.htm

(Acts adopted pursuant to Title VI of the Treaty on European Union)

EXPLANATORY REPORT

on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union

(Text approved by the Council on 30 November 2000)

(2000/C 379/02)

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I. INTRODUCTION

A. BACKGROUND

The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereinafter 'the Convention') is the first to have been adopted in this field since the entry into force of the Treaty on European Union. It reflects the need, voiced in particular at the practitioners' seminar held in April 1995, for the European Union to equip itself with suitable instruments for judicial cooperation.

The experts who attended the seminar reviewed the mutual assistance arrangements operating among the Member States of the Union and concluded that those arrangements needed to be improved to meet the demands arising in the field of judicial cooperation. They recommended that a new instrument should be developed for that purpose.

Building on the results of this seminar, a draft proposal for a convention was introduced in April 1996. This text was later strengthened by extending its scope to areas which were not originally covered, in particular the interception of telecommunications. Work on the project continued through subsequent Presidencies. In view of the complexity of certain topics, the negotiations involved often required detailed and time-consuming discussion.

On 29 May 2000 the Convention was established by the Council and signed on the same day by all Member States [1]. Norway and Iceland informed the Council on the same day that they were in agreement with the content of the provisions of the Convention applicable to them, and in due time would take the necessary measures to implement those provisions.

B. PARTICULAR CONSIDERATIONS

In drawing up this new Convention, the Council did not decide to frame a separate instrument (see in this connection the explanations concerning Article 1). This is not solely due to the provisions in Article 26(3) of the European Convention on Mutual Assistance in Criminal Matters of 1959. In fact, the Council felt that mutual assistance between the Member States already lay on solid foundations, which had largely demonstrated their effectiveness, i.e. the European Convention on Mutual Assistance in Criminal Matters and its 1978 Protocol, on the one hand, and the Convention of 14 June 1990 implementing the Schengen Agreement of 14 June 1985, on the other hand, without overlooking the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, which contains certain precedents in the field of mutual assistance, as well as some provisions and special arrangements between certain Member States.

The primary aim of the Convention therefore is to improve judicial cooperation by developing and modernising the existing provisions governing mutual assistance, mainly by extending the range of circumstances in which mutual assistance may be requested and by facilitating assistance, through a whole series of measures, so that it is quicker, more flexible and, as a result, more effective. This aim is largely stated in Articles 3 to 9 of the Convention.

Furthermore, the Council decided to develop other measures which, while contributing to this primary aim, take account of major recent changes: political and social developments, on the one hand, and technological change, on the other.

The European Union first had to take account of a new situation: the disappearance of checks at the borders between most Member States as a result of the Schengen agreements, the major consequences of which played a part in fully achieving the internal market decided by the Single European Act of 1985. The disappearance of these checks, which accentuated a considerable increase in the movement of persons, goods and capital within the European Union in particular owing to globalisation, meant that the police and judicial authorities needed suitable rules to combat international crime which was fully exploiting the potential of this new freedom of movement, and the characteristics of which had changed significantly as a result. These new methods, which included the Benelux agreements, the Schengen Convention and especially the Convention on mutual assistance and cooperation between customs administrations (Naples II) of 18 December 1997 [2] laid the foundations for facilitating and furthering cross-border investigations. These are referred to in Articles 12 to 16 of the Convention.

The European Union also had to develop new techniques, and its high degree of political integration helped it to do so, enabling it to take account of important developments in the field of technology which, in certain cases, may facilitate mutual assistance (video-conferencing, teleconferencing) and in others (interception of telecommunications) may, in the absence of appropriate measures, make it difficult to put into practice. Articles 10, 11, and 17 to 22 set out to achieve this objective.

[1] OJ C 197, 12.7.2000, p. 1.

[2] OJ C 24, 23.1.1998, p. 1.

Moreover, the Council decided to adopt rules on data protection (Article 23).

Lastly, it is worth mentioning two institutional points linked to the fact that the Convention has the Treaty on European Union as its legal basis.

On the one hand, the Convention is a specific instrument of public international law complying with certain rules unknown to the parent convention of 1959: in particular, Article 35 of the Treaty on European Union confers on the Court of Justice of the European Communities jurisdiction to interpret, in accordance with the conditions it determines, the provisions of the Convention.

On the other hand, some of the Convention' s provisions apply not only to the Member States but also to Norway and Iceland. This point requires some explanation.

The Schengen Implementation Convention, signed on 19 June 1990 between five Member States of the European Community, contains a good number of provisions on judicial cooperation.

Other Member States subsequently acceded. In 1996 two non-member countries, Iceland and Norway, were associated with Schengen cooperation, particularly to allow all the Nordic States, the three Member States, Denmark, Sweden and Finland, and the two non-member countries, Iceland and Norway, to accede to the Schengen agreements while at the same time maintaining the Nordic Passport Union.

The Treaty of Amsterdam, which entered into force on 1 May 1999, integrated the Schengen *acquis* into the framework of the European Union by means of a protocol annexed to it.

Moreover, an Agreement with Iceland and Norway was signed on 18 May 1999 on the association of those two countries with the implementation, application and development of the Schengen *acquis* thus integrated [1]; it entered into force on 26 June 2000.

Accordingly, the provisions of the Convention listed in Article 2 thereof are identified as constituting a development of the Schengen *acquis* and are applicable in the relations between each Member State of the European Union and Iceland and Norway.

II. COMMENTS ON INDIVIDUAL ARTICLES

TITLE I

GENERAL PROVISIONS

Article 1

Relationship to other conventions on mutual assistance

This Article provides that the purpose of the Convention is to supplement and to facilitate the application, between the Member States of the European Union, of the international instruments in the field of mutual assistance in criminal matters listed in paragraph 1. The Article is modelled on Article 1 of the 1996 Convention relating to Extradition between the Member States of the European Union and it takes account, *inter alia*, of Article 26(3) of the European Convention on Mutual Assistance in Criminal Matters (the 1959 Convention).

The instruments mentioned in paragraph 1 are partly 'parent conventions' (the 1959 Convention and the Benelux Treaty) and partly supplementary instruments (the Additional Protocol to the 1959 Convention and the Schengen Implementation Convention).

The Convention supplements the instruments listed in paragraph 1 and it cannot, of itself, be used as the only basis for a request for mutual assistance. A further consequence of linking the 1959 Convention and the other texts is that the provisions of the instruments specified in the paragraph continue to have full effect to the extent that they deal with matters which do not come within the scope of the Convention.

Since the Convention supplements the earlier instruments, the position is that, where its provisions conflict with the instruments listed in paragraph 1, the provisions of the Convention prevail.

Paragraph 2 should be read in conjunction with Article 26(4) of the 1959 Convention. It provides that paragraph 1 shall not affect the application of provisions in bilateral or multilateral agreements which provide Member States with more favourable mutual assistance arrangements (as for instance between the Nordic countries), or arrangements in the field of mutual assistance in criminal matters agreed on the basis of uniform legislation, or agreements linked to special systems providing for the reciprocal application of measures of mutual assistance in their respective territories.

[1] OJ L 176, 10.7.1999, p. 36.

Article 2

Provisions relating to the Schengen *acquis*

This Article addresses certain matters arising from the integration of the Schengen *acquis* into the framework of the European Union pursuant to the Treaty of Amsterdam. In that regard it should be noted that the Schengen arrangements were applicable to most Member States and also to Iceland and Norway at the time of adoption of the Convention.

Paragraph 1 identifies the provisions of the Convention to be regarded as amending or building on the Schengen *acquis* for the purpose of the Agreement concluded by the Council with Iceland and Norway on 18 May 1999 concerning those two countries' association with the implementation, application and development of the Schengen *acquis*. Article 2(3) of the Agreement makes provision for acts and measures taken by the European Union in that context to be accepted, implemented and applied by Iceland and Norway.

Paragraph 2 repeals a number of provisions of the Schengen Implementation Convention superseded by the Convention, and thus clarifies which of the provisions on mutual assistance in the Schengen Implementation Convention remain in force and which do not.

Article 3

Proceedings in connection with which mutual assistance is also to be afforded

This Article goes beyond the scope of the 1959 Convention and takes over Article 49(a) of the Schengen Implementation Convention, repealed by Article 2(2). Assistance can be requested and obtained under Article 3 not only for investigations in criminal matters but also for investigations of conduct that is subject to certain administrative sanctions.

Paragraph 1 provides that mutual assistance shall also be provided in respect of administrative proceedings which relate to offences punishable under the national law of the requesting or the requested Member State, or both, as infringements of legal rules where the decision may result in proceedings before a court having jurisdiction in particular in criminal matters.

The effect of this provision is to enable mutual assistance to be requested in certain types of cases which are not covered, or are only covered to a limited degree, by the 1959 Convention, which applies only to judicial proceedings as opposed to administrative proceedings. For example, an 'Ordnungswidrigkeit' under German law is an offence which is not classified as criminal and is punishable by fines imposed by administrative authorities. Under the arrangements adopted in this Convention, mutual assistance may be sought in respect of administrative and judicial proceedings arising from such offences notwithstanding the fact that this is possible under the 1959 Convention only for the judicial phase of an 'Ordnungswidrigkeit'. It should be noted that equivalent concepts exist in certain other Member States.

In so far as paragraph 1 is concerned, it does not matter whether initially the proceedings in question fall within the scope of an administrative or a criminal authority in the Member States in question, but it is essential that they may, at a later stage, be brought before a court which has jurisdiction in particular in criminal matters. The inclusion of 'in particular' at the end of the paragraph makes it clear that the court before which the proceedings may be heard does not have to be one that deals exclusively with criminal cases.

Paragraph 2 ensures that mutual assistance will be afforded in respect of criminal and administrative proceedings covered by paragraph 1 where the relevant offence or infringement is one for which a legal person may be held liable in the requesting Member State. The fact that the law of the requested Member State does not provide for administrative or criminal liability of legal persons for the offences concerned can no longer in itself give rise to refusing a request for assistance. Accordingly, the Convention strengthens judicial cooperation in the field of liability of legal persons.

Article 4

Formalities and procedures in the execution of requests for mutual assistance

The purpose of this Article is to:

— enable a request for mutual assistance to be carried out in accordance with formalities and procedures expressly indicated by the requesting Member State to the maximum extent possible (paragraphs 1 and 3),

— oblige the requested Member State to take as full account as possible of any deadline that may be specified in the request (paragraph 2) within the limits indicated in paragraph 4.

Article 3 of the 1959 Convention provides for the execution of requests in the manner provided for by the law of the requested State. Article 4 of this Convention shifts the balance of mutual assistance so as to require where possible that assistance be provided in a manner requested by the requesting Member State.

It should be noted that declarations made under Article 5 of the 1959 Convention are not affected by Article 4 of the Convention.

Paragraph 1 lays down the general principle that a requested Member State which is executing a request must comply with the formalities and procedures expressly indicated by the requesting Member State. The reason for this provision is to facilitate the use of the information gathered by mutual assistance as evidence in the subsequent proceedings in the requesting Member State. The words 'formalities and procedures' should be interpreted in a broad sense and may include, for example, the situation where a request indicates that a representative of the judicial authorities of the requesting Member State or defence representative must be permitted to attend the taking of evidence from a witness. On account of the burden this might place on the requested Member State, the requesting Member State should set out only those formalities and procedures which are indispensable for its investigations.

The requested Member State can only refuse to give effect to the formalities and procedures in question where they are contrary to its fundamental principles of law or where the Convention itself expressly states that the execution of requests is governed by the law of the requested Member State.

Paragraph 2 relates to deadlines for the execution of requests by requesting Member States and it recognises that in certain cases it can be crucial that a mutual assistance request be dealt with within a specific time limit. In that context the paragraph commits requested Member States to taking as full account as possible of any deadlines that are set in requests for mutual assistance. If the requesting Member State authority considers it necessary to have the request executed before a certain date, it may state this in the request, provided it explains the relevant reasons.

It is clearly in the interests of all Member States that the possibility of setting deadlines should not be abused and, accordingly, where a requesting Member State considers it appropriate to adopt that course, it should only specify a deadline which in its view is reasonable or necessary under the particular circumstances.

Paragraph 3 is concerned with the situation where a request cannot, or cannot fully, be executed in accordance with the formalities sought by a requesting Member State in accordance with paragraph 1. In that case the requested Member State is obliged to outline the position to the other Member State without delay and to indicate the conditions under which the request can be executed. Such conditions may, where necessary, include the provision of supplementary documentation or information. Provision has also been made that the requesting and requested authorities may agree on how the request can be dealt with, where necessary, subject to the fulfilment of the relevant conditions.

While paragraphs 3 and 4 oblige a requested Member State to provide information to the requesting Member State under certain circumstances, no specific procedure has been provided for that purpose. This leaves the requested Member State free to choose the means of communicating the relevant information.

Paragraph 4 refers to the arrangements to be adopted if a deadline set by a requesting Member State cannot be complied with. Where the requested Member State is aware that a particular deadline cannot be met and that, on the basis of the grounds provided for the deadline under paragraph 2, this will lead to substantial difficulties with the proceedings under way in the requesting Member State, its authorities must indicate as quickly as possible the estimated time that will be required to execute the request. The authorities of the requesting Member State must respond without delay indicating whether the request should continue to be processed. In addition the text permits the authorities of both Member States to agree as to how the matter should be taken forward. In this connection Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters [1] should be borne in mind.

Article 5

Sending and service of procedural documents

The objective of this Article is to ensure that procedural documents can be sent and served as speedily as possible by a Member State where the recipient is present in the territory of another Member State. In the framing of the Article, to a large degree, account was taken of the arrangements set out in Article 52 of the Schengen Implementation Convention which is repealed by Article 2(2) of this Convention.

Paragraph 1 establishes the general rule that procedural documents relating to criminal proceedings which are required to be sent by a Member State to a person in the territory of another Member State should be sent directly to that person by post.

It should be noted that, as in Article 52 of the Schengen Implementation Convention, the term 'procedural documents' has not been defined. As was the case regarding said Article 52, Article 5 of this Convention should be interpreted in a broad sense and be taken to include, for example, summonses and court decisions.

The words 'who are in the territory', also found in Article 52 of the Schengen Implementation Convention, should be interpreted in a broad sense and do not necessarily mean that the person is resident in the requested State.

[1] OJ L 191, 7.7.1998, p. 1.

Communication by post is the rule henceforth. Exceptions to the use of postal means for communicating documents are outlined in paragraph 2 and, where they apply, documents may be sent via the competent authorities of another Member State for transmission to the intended recipient. These exceptions are concerned with cases where communication by post is not possible or appropriate. It is essential that the Member State sending the documents should make reasonable efforts to ascertain the address of the person in question before making a request to another Member State. Furthermore, any such request should be accompanied by as much relevant information as possible to assist the requested Member State in finding the person concerned.

Paragraph 3 requires that, where a Member State sending a document has grounds for believing that the addressee will not understand the language in which the document has been drafted, it must make arrangements to have the document, or at least its most important provisions, translated into a language of the Member State where the person is staying. This is primarily designed to protect the interests of the addressee but it is also likely to enhance the effectiveness of the document. Similarly, the paragraph caters for circumstances where the issuing Member State knows that the addressee only understands some other language. In that event, it must translate the document, or at least the most important parts of it, into the language in question.

In accordance with paragraph 4, a document must be accompanied by a report containing details of how he or she can obtain information from the issuing authority or other bodies in that Member State concerning his or her rights and obligations. The primary objective here is to safeguard the position of the recipient and, where language difficulties may arise, translations must be provided in respect of the report on the same basis as in paragraph 3. It should be borne in mind that no provision will oblige a person to attend in another Member State.

While no specific requirements have been laid down for reports provided under paragraph 4, it is important that, where appropriate, they should address the consequences of a failure to comply with the relevant procedural document under the law of the Member State from which the document was issued. In the event that the addressee has been summonsed to appear as a defendant, the report should indicate the circumstances in which the person concerned may be assisted by a lawyer. Furthermore, a person summonsed as a witness or an expert should, where appropriate, be informed whether he or she can obtain an advance to cover travel expenses and subsistence costs and also be informed of the rates involved.

Paragraph 5 confirms the application of certain provisions of the 1959 Convention and the Benelux Treaty in relation to recipients of documents under Article 5. The relevant provisions of the 1959 Convention and the Benelux Treaty are concerned with the position of a witness or expert who fails to answer a summons, expenses arising for a witness or expert and immunity from prosecution/detention where a witness appears in response to a summons issued by a foreign State.

Article 6

Transmission of requests for mutual assistance

The 1959 European Convention on Mutual Assistance in Criminal Matters provides that in most cases requests for mutual assistance should be forwarded between Ministries of Justice. Article 53 of the Schengen Implementation Convention, repealed by Article 2(2) of this Convention, gave the judicial authorities the ability to communicate directly with each other. Article 6 of this Convention replaces these provisions by making direct contacts between the judicial authorities the general rule tempering it, however, with some exceptions.

Paragraph 1 requires, unless otherwise permitted by this Article, that mutual assistance requests between Member States, and also communications relating to spontaneous exchanges of information under Article 7, be made directly between the appropriate judicial authorities and returned through the same channels. In addition, the said paragraph enables requests for the institution of proceedings in another Member State, in accordance with Article 21 of the 1959 Convention and Article 42 of the Benelux Treaty, to be handled directly between the competent judicial authorities.

An important and innovative feature of the paragraph is that it provides for requests to be made and dealt with, not only in writing but also by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity. This allows requests to be made, *inter alia*, by fax and e-mail and in that sense it goes further than the 1996 Convention relating to Extradition between the Member States of the European Union which permitted the transmission of extradition requests by fax. At the same time, however, the requested Member State has to be able to be satisfied that a request is authentic. The Member States should consult regarding the precise arrangements to be made for establishing authenticity where requests are made by fax, e-mail or other means of telecommunication.

While paragraph 1 has paved the way for an effective and up-to-date communication of requests, it does not prevent Member States from going even further and agreeing to accept oral requests, perhaps in certain types of case. In particular, oral requests might be accepted where the circumstances are especially urgent and could be made on the basis that they would be confirmed in writing as quickly as possible.

Paragraph 2 permits the sending and return in specific cases of requests between central authorities or between a judicial authority in one Member State and a central authority in another Member State. That course was adopted in recognition of the fact that circumstances may arise where it would be appropriate that a particular request should be dealt with by a central authority in a Member State, for example in complex cases or cases where the request is addressed to more than one competent authority in the requested Member State.

Pursuant to paragraph 3, it has been left open to the United Kingdom and Ireland, respectively, to declare that requests, other mutual assistance communications or Article 7 information be sent via its central authority. The grounds on which such a right of declaration was accepted were that the judicial authorities in the United Kingdom and in Ireland do not, or do not in general, have the authority to execute requests received from judicial authorities or requests from a central authority. In the event of any such declaration being made, each of the Member States is entitled to apply the principle of reciprocity in so far as it is concerned. The second and third sentences of the first subparagraph of Article 6(3) allow for further limitation of the declaration referred to above. In consequence, either Member State can, at any time, by a further declaration limit the scope of the original declaration, for the purpose of giving greater effect to the concept of direct transmission. It must do so when the mutual legal assistance provisions of the Schengen Implementation Convention come into effect for it.

Paragraph 4 allows requests to be made via Interpol where an urgent reply is needed. In addition the reference in the paragraph to any body competent under provisions introduced pursuant to the Treaty on European Union was primarily designed to enable requests to be channelled through a body such as Europol or a body yet to be created, such as Eurojust, if it were authorised to fulfil that function in the future.

Article 12 (controlled deliveries), Article 13 (joint investigation teams) and Article 14 (covert investigations) are concerned with matters in which in some Member States law enforcement authorities may play a leading role, but which in other Member States may be under direct judicial control. In the circumstances of the said Articles, paragraph 5 allows requests made with reference to those provisions to be made and answered directly, in appropriate cases, by a competent judicial or central authority in one Member State and a competent police or customs authority in another Member State. Paragraph 4 has also been made applicable to requests dealt with in that manner.

Similarly, paragraph 6 enables requests in relation to administrative proceedings under Article 3(1) to be made and answered directly where the competent authorities involved are a judicial or central authority in one Member State and an administrative authority in the other Member State.

Under paragraph 7 Member States may, however, declare that they will not apply paragraphs 5 and/or 6, or declare that they will only apply either or both of those provisions under specified conditions. The need to provide for such declarations arose from the fact that not all Member States were satisfied that they would be in a position to adopt the arrangements set out in paragraphs 5 and 6, at least during the initial stages of the operation of the Convention. To cater for future developments, a declaration made under paragraph 7 may be withdrawn or amended at any time.

The negotiators felt that the requests mentioned in paragraph 8(a) and notices of information mentioned in the first line of paragraph 8(b) were not supposed to be sent by the local judicial authorities in particular because in most Member States the Ministries of Justice have jurisdiction over the temporary transfer of detainees and over the transmission of notices of information from judicial records, which are centralised before being sent. For these reasons, such communication was reserved for the central authorities.

An exception has, however, been made for requests for details of convictions and subsequent measures which are sought with reference to Article 4 of the Additional Protocol of 17 March 1978 to the 1959 Convention. Article 4 of the Protocol inserted a new paragraph in Article 22 of the 1959 Convention which is concerned with the obligation of a Contracting Party to inform any other Party of criminal convictions and subsequent measures in respect of nationals of the latter, entered in the judicial records.

Article 7

Spontaneous exchange of information

This Article recognises the very useful purpose that can be served where a Member State shares information it has obtained in the criminal field with another Member State. The intention is to provide a general framework within which such information can be exchanged. Spontaneous exchanges of information by law enforcement agencies were already provided for in Article 46 of the Schengen Implementation Convention.

Paragraph 1 permits the competent authorities of Member States, without the need for a mutual assistance request, to exchange information relating to criminal offences or administrative infringements covered by Article 3. It should be noted that this is a facilitative provision which does not place obligations on Member States and that it expressly provides that the relevant exchanges are to be carried out within the limits of the national law of Member States.

In accordance with paragraph 2, conditions may be attached to the use of information provided under this Article, and paragraph 3 provides that, if that is the case, the receiving authority is bound by those conditions. In that case the data protection measures under Article 23(1) and (2) of the Convention do not apply in so far as they cover the same subject matter.

TITLE II

REQUESTS FOR CERTAIN SPECIFIC FORMS OF MUTUAL ASSISTANCE

Article 8

Restitution

This Article introduces new arrangements whereby mutual assistance requests may be made to place articles obtained by criminal means, stolen goods for example, at the disposal of a requesting Member State with a view to restoring them to their rightful owners. Paragraph 1 permits, but does not oblige, a requested Member State to give effect to such a request. The requested Member State could, for example, refuse such a request where property has been seized for evidential purposes in that Member State. This paragraph is not intended to bring about any change of provisions of national law on confiscation. It should furthermore be noted that the paragraph has been framed on the basis that it should apply only in cases in which there is no doubt as to who is the rightful owner of the property. It also operates 'without prejudice to the rights of bona fide third parties'. This ensures that legitimate claims involving the property will be fully preserved.

Provision was made in Article 6(2) of the 1959 Convention and in Article 29(2) of the Benelux Treaty for waiving the return of property handed over in the execution of letters rogatory. Article 8(2) allows a Member State to exercise such a waiver for the purpose of restoring property to its rightful owner. As in the case of paragraph 1, it is envisaged that the ownership of the property should be clear. Paragraph 2 also applies without prejudice to the rights of bona fide third parties.

Paragraph 3 supplements paragraph 2 by providing that, where the requested Member State, under the specified conditions, has waived the return of articles before they are surrendered under that paragraph, it is prohibited from exercising any security right or other right of recourse under tax or customs legislation it might enjoy in respect of a surrendered article. However, the text also provides that the exercise of a waiver under paragraph 2 shall not prevent the requested Member State from collecting any customs taxes or duties it may be owed by the rightful owner of the property.

Article 9

Temporary transfer of persons held in custody for purposes of investigation

Article 11 of the 1959 Convention enables a person in custody in a requested State whose personal appearance as a witness or for the purposes of confrontation is sought by a requesting State to be transferred to the requesting State. Article 9 of the Convention supplements said Article 11 by authorising a Member State to make arrangements for the temporary transfer of a person in its custody to another Member State in connection with an investigation being carried out by the custodial Member State. Paragraph 1 makes the transfer of persons in custody under this Article subject to the agreement of the competent authorities of both the requesting and the requested Member States. In accordance with paragraph 2, such agreement must cover the arrangements to be made for the transfer and specify a date for the return of the person concerned.

Paragraph 3 takes account of the fact that a Member State may require the consent of the person to be transferred and, where such consent is necessary, it must be provided to the requested Member State promptly. The paragraph is linked to paragraph 6.

Paragraph 4 seeks to ensure that any period spent in custody in the requested Member State in the course of a transfer will be deducted from the period of detention to be served by the transferred person in the requesting Member State.

Paragraph 5 makes the application of the Article subject to certain provisions of the 1959 Convention. The relevant parts of that instrument are concerned with transit arrangements for transfers of persons in custody, ensuring that transferred persons remain in custody and have immunity from prosecution for earlier offences, and expenses. No reference is made to the Benelux Treaty because of the general rule that the provisions of the said Treaty fully apply unless this Convention states the contrary.

Paragraph 6 allows a Member State to declare that, in so far as the application of this Article is concerned, it will still require the consent of the person concerned or will require such consent under certain precise conditions.

Article 10

Hearing by videoconference

The development of new technology has made it possible for a person in one country to communicate with a person in another country via a direct video link. Article 10 is designed to serve as a basis for and facilitate the use of this procedure to overcome difficulties that can arise in criminal cases when a person is in one Member State and attendance at a hearing in a second Member State is not desirable or possible. In particular, it lays down rules relating to requests for, and the conduct of, videoconference hearings. The Article applies generally to hearings of experts and witnesses, but may, under the particular conditions contained in paragraph 9, also be applied to hearings of accused persons.

Paragraph 1 establishes the principle that a request for a videoconference hearing may be submitted by a Member State in respect of a person who is in another Member State. The circumstances in which such a request may be made are that the judicial authorities of the requesting Member State require the person in question to be heard as a witness or expert and that it is not desirable or not possible for him or her to travel to that State for a hearing. 'Not desirable' could for example apply in cases where the witness is very young, very old, or in bad health; 'not possible' could for instance cover cases where the witness would be exposed to serious danger by appearing in the requesting Member State.

Paragraph 2 obliges a requested Member State to agree to a videoconference request provided that the hearing would not, in the circumstances of the particular case, be contrary to the fundamental principles of its law and that it has the technical capacity to carry out the hearing. In that context the reference to 'fundamental principles of law' implies that a request may not be refused for the sole reason that hearing of witnesses and experts by videoconference is not provided under the law of the requested Member State, or that one or more detailed conditions for a hearing by videoconference would not be met under national law. Where the relevant technical means are lacking, the requesting Member State may, with the agreement of the requested Member State, provide suitable equipment to permit the hearing to take place.

Paragraph 3 concerns the information that must accompany requests made under Article 10 and requires, *inter alia*, that a request must explain why it is undesirable or impossible for the person who is the subject of the request to attend a hearing in the requesting Member State. Although the requesting Member State must provide the reasons for its request, it is entirely up to it to assess the relevant circumstances.

Paragraph 4 provides that the person in question is summoned to appear by the judicial authorities of the requested Member State. Its purpose is to ensure that appropriate steps can be taken to secure his or her attendance for the hearing. This is a derogation from Articles 4 and 5. Unlike paragraph 9 concerning accused persons, the consent of a witness or expert to be heard by way of videoconference is not required.

The rules to be observed where a hearing takes place by way of videoconference are set out in paragraph 5. In particular, provision has been made in point (a) for the attendance, and if necessary the intervention, of a judicial authority from the requested Member State to ensure, *inter alia*, that the fundamental principles of law of that Member State are not contravened during a hearing. The requesting Member State may, for example, on the basis of this point in conjunction with Article 4 and Article 10(5)(c) of the Convention, request that counsel for the person to be heard be present at the hearing.

Under point (b), steps to ensure the protection of the person to be heard are, where necessary, to be agreed between the relevant competent authorities. These may include the application of any legislation which the requesting Member State may have on the protection of persons to be heard.

Point (c) states that hearings are to be conducted directly by, or under the direction of, the judicial authorities of the requesting Member State in accordance with its own laws. Without prejudice to point (e), the person to be heard by way of a videoconference must not have fewer rights than they would if they were participating in a hearing in the requesting Member State.

In addition, point (d) requires the requested Member State to make an interpreter available for the person to be heard if this is necessary and is sought by the requesting Member State or the person in question.

A safeguard is provided for that person in point (e) under which he or she is entitled to claim any right not to testify which he or she would enjoy under the law of either the requested or the requesting Member State. Where such a right is claimed, it will fall to be determined by the judicial authority conducting the hearing subject, of course, to the duty of the judicial authority from the requested Member State to take the necessary measures for the conduct of the hearing according to the fundamental principles of its law. The relevant judicial authorities should consult together in relation to any claim to refuse to testify at a hearing.

Paragraph 6 provides for minutes of a videoconference hearing to be drawn up by the judicial authority of the requested Member State and transmitted to the requesting Member State. The said paragraph sets out the items to be included in the 'minutes'. They are not concerned with the substance of the hearing. It should also be noted, however, that, arising from the need to ensure the protection of relevant persons, including participants in the requested Member State other than the person heard, the Member States concerned may, subject to their domestic law, agree on specific arrangements to be made in respect of the minutes. As a result of such an agreement it could be the case, for example, that the names of certain persons who were present in the requested Member State at the hearing would not be recorded in the minutes but their functions should if appropriate, be indicated.

In view of the substantial costs that could be involved, paragraph 7 establishes the rule that certain expenses arising from a videoconference hearing will be refunded to the requested Member State by the requesting Member State. It is, however, left open to the requested Member State to waive such refunds in whole or in part.

Paragraph 8 provides that if, in the course of a hearing by videoconference, a person refuses to testify or provides false testimony, the Member State in which the person being heard is located must be in a position to deal with that person in the same way as if he or she were appearing at a hearing conducted under its own national procedures. This follows from the fact that the obligation to testify at a videoconference hearing arises, pursuant to this paragraph, under the law of the requested Member State. The paragraph is in particular intended to guarantee that the witness, in case of non-compliance with an obligation to testify, is subject to consequences of his or her behaviour similar to those applicable in a domestic case where videoconferencing is not used.

Where the difficulties mentioned in paragraph 8 occur, the requesting and the requested Member States may communicate with each other in relation to the application of the paragraph. This will normally imply that the authority of the requesting Member State conducting the hearing as soon as possible provides the authority of the requested Member States with the information necessary to enable the latter to take appropriate measures against the witness or expert.

Paragraph 9 permits Member States to extend the application of Article 10 to videoconference hearings involving accused persons. Each Member State enjoys full discretion as to whether or not it will agree to execute requests for such hearings. A Member State may make a general declaration to the effect that it will not do so and such a declaration may be withdrawn at a later stage.

The Member States concerned must specifically agree on a decision to hold a videoconference hearing in respect of an accused person and any arrangements to be adopted in that regard. These arrangements are to operate subject to the national laws of the Member States and in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and other relevant international instruments.

To safeguard the position of the accused person, he or she must consent in each case before the hearing takes place. Since the position of an accused person differs substantially from that of a witness or expert, provision has also been made for the adoption by the Council of any rules that may be necessary for the purpose of ensuring that the rights of accused persons are adequately protected. The adoption of such rules is not, however, a pre-condition for the operation of paragraph 9.

Article 11

Hearing of witnesses and experts by telephone conference

Telephone-conference hearings represent a further area in which means of telecommunications can be employed in the mutual assistance field. Such hearings can be particularly useful in situations where, for example, a statement on a routine matter is required from a witness. In addition they can be arranged and conducted quite easily and economically.

This Article sets out the arrangements to apply between the Member States in respect of requests relating to hearings by telephone conference. It should be noted, however, that nothing in Article 11 is intended to undermine the practice that exists in some Member States whereby a person is heard as a witness by telephone from abroad, perhaps on consular premises, without the assistance of the Member State where he or she is situated.

The overall approach of this Article is to establish a general framework for telephone hearing requests which is somewhat different from that adopted for videoconferencing in Article 10. In that context it may be noted, in particular, that, according to Article 11(2), a hearing may be conducted only if the witness or expert agrees thereto. For that reason there was no need to establish that it is not desirable or possible for the person to be heard to appear for a hearing in person.

Paragraph 1 enables requests for assistance in arranging a telephone conference hearing to be made where a person who is to be heard as a witness or expert in one Member State is present in another Member State. A request will come within

the terms of the Article where the hearing in question is conducted by the judicial authorities of the requesting Member State and the law of that State provides for the making of such requests.

Paragraph 2 imposes the pre-condition that the person to be heard must consent where a request is made in relation to a hearing by telephone conference.

Paragraph 3 obliges the requested Member State to comply with a request provided it is not contrary to the fundamental principles of its law (see further explanations regarding 'fundamental principles of law' under Article 10). In accordance with paragraph 5, however, that Member State may, in so far as the practical arrangements relating to the hearing are concerned, require that the provisions in Article 10(5) and (8) will operate in respect of the hearing to the extent that they are applicable. Article 10(7) will apply automatically unless the Member States agree otherwise.

Article 12

Controlled deliveries

The purpose of this Article is to provide a framework for cooperation between Member States in relation to controlled deliveries. This is a technique which has proved to be very effective in combating drug trafficking and other forms of serious crime. The Article is broader in scope than Article 73 of the Schengen Implementation Convention which also dealt with controlled deliveries, as it is not limited to controlled deliveries offences related to drug trafficking. Europol has drawn up a 'European manual on controlled deliveries' containing information on the operation of such deliveries.

The expression 'controlled delivery' has not been specifically defined in the Convention and it should be interpreted in accordance with national law and practice. The provision applies if, for example, the illicit consignment, with the consent of the Member States concerned, has been intercepted and allowed to continue with the initial contents intact or removed or replaced in whole or in part.

The effect of paragraph 1 is that each Member State is obliged to adopt means to ensure that, where it is requested to do so by another Member State, it can permit a controlled delivery to take place on its territory in the framework of a criminal investigation into an extraditable offence. The concept of what constitutes an extraditable offence at the level of the Union was addressed in the 1996 Convention on Extradition between the Member States of the European Union. Under Article 2 of the said Convention, an extraditable offence is one which is punishable under the law of the requesting Member State by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six months.

Paragraph 2 provides that it is the requested Member State which decides whether or not a controlled delivery should take place on its territory. These decisions are to be made on a case-by-case basis and they must be taken within the framework of the relevant rules of the requested Member State.

While the practical arrangements to be undertaken for controlled deliveries will require close consultation and cooperation between the relevant agencies and authorities of the Member States concerned, paragraph 3 makes it clear, as an exception to Article 4(1), that such deliveries must be undertaken in conformity with the procedures of the requested Member State. Furthermore, the competent authorities of that Member State are to carry out any action and to direct any operations that may be required.

Article 13

Joint investigation teams

Experience has shown that where a State is investigating offences with a cross-border dimension, particularly in relation to organised crime, the investigation can benefit from the participation of law enforcement and other relevant personnel from another State in which there are links to the offences in question. The importance of operational cooperation among law enforcement agencies was specifically recognised by Article 30 of the Treaty on European Union.

One of the obstacles which has arisen in so far as joint teams are concerned has been the lack of a specific framework within which such teams should be established and operate. To meet that concern it was decided that the relevant matters should be dealt with in the Convention. In that regard Article 13 lays down the conditions under which joint teams are to be set up and how they will carry out their tasks.

Paragraph 1 contains the basic rules for the establishment of a joint investigation team. In order to set up a team, there must first be agreement between the competent authorities of the Member States concerned. No limitation has been placed on the number of Member States which may be involved.

Under the agreement the investigation team will be assigned a particular purpose, which will be to carry out criminal investigations in one or more of the participating Member States.

In addition, it will operate for a specified period which can be extended by mutual consent. The persons who will make up the team will also be specified in the agreement. While most of these persons are likely to be law enforcement officers, they will in many cases include prosecutors and judges, as well as other persons. Where agreement is achieved on the setting up of a team, the team will normally be established in the Member State in which the main part of the investigations is expected to be undertaken. The Member States will also have to take into account the question of costs, including the daily allowances for the members of the team.

Paragraph 3 states that an investigation team will operate on the basis that its leader will be a representative of the competent authority participating in criminal investigations for the Member State in which the team operates. This means, in particular, that the leadership of the team will change, for the specific purposes concerned, if investigations are carried out by the team in more than one Member State. The leader of the team must act within the requirements of his or her national law. In addition, the team is obliged to respect fully the law of the Member State where it operates. The leader will, from time to time, direct the other members of the team who will carry out his or her instructions with reference to the conditions under which the team was set up.

Members of a joint team who are not operating in their own Member State (seconded members) are permitted, under paragraph 5, to be present when investigative measures are taken in the Member State of operation. However, the team leader may, for particular reasons, in accordance with the law of the State where the team is operating, decide otherwise. In this context the expression 'particular reasons' has not been defined but it can be taken to include, for example, situations where evidence is being taken in cases involving sexual crimes, especially where the victims have been children. Any decision to exclude a seconded member from being present may not be based on the sole fact that the member is a foreigner. In certain cases operational reasons may form the basis for such decisions.

Paragraph 6 permits seconded members to carry out investigative measures in the Member State of operation, in accordance with the national law of that Member State. This will be done on the instructions of the team leader and with the approval of the competent authorities of the Member State of operation and the seconding Member State. Such approval may be included in the agreement establishing the team or it may be granted at a later stage. It may also apply in general terms or it may be restricted to specific cases or circumstances.

One of the most innovative aspects of Article 13 is provided for in paragraph 7. The effect of this provision is that it enables a seconded member to request his or her own national authorities to take measures which are required by the team. In that case it will not be necessary for the Member State of operation to submit a request for assistance and the relevant measures will be considered in the Member State in question in accordance with the conditions that would apply if they had been sought in a national investigation.

Paragraph 8 covers the situation where assistance is required from a Member State which was not involved in establishing the team or a third State. In these circumstances the assistance will be sought by the Member State of operation, according to the rules normally applicable.

Paragraph 9 facilitates the work of the joint investigation teams by opening the way for a seconded member to share with the joint investigation team information which is available in his or her Member State and is relevant to the investigations being conducted by the team. However, this will only be possible where it can be undertaken within the scope of the seconded member's national law and the limits of his or her competence.

Paragraph 10 is concerned with the conditions for the use of information lawfully obtained by a member or a seconded member of a joint team where the information in question would not otherwise be available to the competent authorities of the Member States concerned.

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

Paragraph 11 provides that Article 13 shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams.

Paragraph 12 paves the way for the Member States which have established a joint investigation team to agree that persons who are not representatives of their competent authorities can take part in the activities of the team. What the drafters of the Convention had in mind was that additional assistance and expertise could be provided to a joint investigation team by appropriate persons from other States or international organisations. In that context it should be noted that specific reference is made to officials of bodies set up pursuant to the

Treaty on European Union. This could include a body such as Europol or a body yet to be set up, such as Eurojust, in so far as its staff would in the future be authorised to take part in such teams.

The participation of Commission staff (OLAF) may also be considered, as 'persons other than representatives of the competent authorities of the Member States setting up the team'.

Persons who are authorised to participate in an investigation team under paragraph 12 will act primarily in a supportive or advisory role and are not permitted to exercise the functions conferred on members or seconded members of a team or to use the information referred to in paragraph 10 unless this is permitted under the relevant agreement between the Member States concerned.

Article 14

Covert investigations

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

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

Paragraph 1 is expressed in flexible terms and makes it clear that both the requesting and the requested Member State must agree in order for an undercover agent to be deployed in a particular case. Given this flexibility, it was not considered necessary to limit the investigations in respect of which assistance can be sought to those linked to extraditable offences, as was done in Article 12.

In accordance with paragraph 2, the decision in respect of a request relating to a covert investigation is to be taken by the competent authorities of the requested Member State. Where a request is agreed to, the paragraph also requires the Member States concerned to agree on a number of matters, including the duration of the investigation and its detailed conditions, having due regard to their national law and procedures.

Paragraph 3 has been formulated in broad terms to allow Member States the flexibility they are likely to need in connection with covert operations. It provides that covert investigations are to be carried out in conformity with the law and procedures of the Member State where the investigation takes place, as an exception to Article 4(1). The preparation and supervision of the investigation, including security for the relevant officers, are to be the subject of cooperation between the relevant Member States.

Member States may decide not to apply Article 14 by entering a reservation to that effect in accordance with paragraph 4. Such a reservation may subsequently be withdrawn.

Article 15

Criminal liability regarding officials

This Article makes provision for criminal liability in respect of offences committed by or against officials from a foreign Member State where they are operating in another Member State under Articles 12, 13 or 14. The position is that, for that purpose, the officials concerned will be placed in the same position as the officials of the Member State where the offences are committed. The Article is modelled on Article 42 of the Schengen Implementation Convention.

Article 16

Civil liability regarding officials

The purpose of this Article is to provide arrangements for the satisfaction of civil claims that may arise from operations carried out by the officials of a Member State on the territory of another Member State in accordance with Articles 12, 13 or 14. It is modelled on Article 43 of the Schengen Implementation Convention.

The basic rule that applies is that a Member State is liable for any damage that is caused by its officials during the operations concerned. However, the Member State where the damage was caused is required, in the first instance, to make good such damage on the same basis as if the damage had been caused by its own officials. In such an event, the other Member State must reimburse in full any compensation that has been paid out to victims of the damage or persons claiming on their behalf. Subject to such reimbursement and to any claims that it may make from third parties, for example the officials who carried out the operations, no further claims for reimbursement are permitted by the Member State where the damage occurred.

TITLE III

INTERCEPTION OF TELECOMMUNICATIONS

GENERAL INTRODUCTION AND TECHNICAL DATA

This is the first time that a multilateral convention on mutual assistance in criminal matters has dealt with the question of the international interception of telecommunications, at least in a specific way. It attempts this by focusing on the traditional aspects of telecommunications interception, but also by taking into account recent developments, while keeping its provisions sufficiently general in order to guarantee as far as possible their adaptability to future developments.

Article 1(1) of the European Convention on Mutual Assistance in Criminal Matters has of course made it possible for the Member States to develop practices in this area, particularly on the basis of Council of Europe Recommendation No R(85)10. However, the Council believed it was time to adopt specific provisions, particularly because it seems that not all Member States recognise Article 1(1) of the European Convention on Mutual Assistance in Criminal Matters as the relevant basis for responding favourably to a request for an interception of telecommunications.

In the last decade telecommunications technology has undergone considerable development, particularly in the field of mobile telecommunications. These are very widely used by offenders in the context of their criminal activities.

The absence of specific international agreements has made cooperation contingent on the goodwill of the individual Member States, whose practices are scarcely homogenous, which makes the work of practitioners more difficult.

Drawing up Articles 17 to 21 involved a substantial amount of work; this can be explained by two factors in particular:

— on the one hand, the subject of telecommunications interception necessitated finding a particularly delicate balance between the efficiency of investigations and respect for individual freedoms,

— on the other hand, modern technologies create new situations which needed to be regulated.

During negotiations, the following situations were taken into account more specifically:

— it could happen, on the one hand, that a State is not technically capable of directly intercepting telecommunications made from or received on its own territory (see point (a) below),

— or, on the other, that a State, for its own purposes (or the purposes of another) can technically from now on intercept telecommunications made from or received on the territory of another State, without having to request assistance from the latter (see point (b) below).

(a) Wherever the subject of the interception may be located, the interception of telecommunications made via a satellite system (and one day, undoubtedly, via other technologies) requires only one single operation by the technical installation known as the 'gateway'. The gateway makes it possible to establish the satellite link, thus enabling the use of telecommunications equipment in very large geographical areas. All of this potentially means that a State whose territory falls within the satellite's coverage area, but which does not have a gateway, would not be technically capable of directly intercepting telecommunications made from or received on its territory via a satellite telephone.

None the less, it is still possible to intercept in the following two ways:

— for each interception it intends to carry out, the State in question may request assistance from the State on whose territory the gateway is located,

— the operator installs remote access to the gateway, a sort of 'remote control'. This equipment enables a country to give an interception order from a distance via a gateway situated outside its territory. It may be given to the company or companies (the 'service providers' in the Convention) which provide the satellite telecommunications service on each national territory, on condition that they carry out the orders for interceptions which are lawfully requested by the competent authorities.

It is technically possible to limit use of this remote control equipment to those telecommunications made from or received on the territory of the Member State making use of them (therefore, with the remote control equipment to which the competent authorities of a Member State have access, it will only be possible to intercept telecommunications made from or received on the territory of that Member State).

The installation of such a system, and the definition of its operating arrangements, cannot be envisaged without international regulation. This is the subject of Article 19.

(b) There are two explanations for the new situation:

— firstly, and as stated above, by issuing just one interception order via a gateway, satellite telecommunications technology makes it possible to intercept a subject [1], irrespective of the satellite' s coverage area, i.e. in principle a large number of States,

— secondly, traditional mobile telephone networks (such as GSM networks) make interception abroad possible, for example in border areas, as their coverage areas do not match the contour of borders exactly. The same is likely to be true of territorial limits affecting the use of remote control equipment (see above).

In their own way, neither of the scenarios outlined above fit into the traditional framework of the conventions on mutual assistance.

— In the first case (a), a Member State is allowed to implement a measure on its own territory; the mutual assistance consists in principle of allowing a Member State (the requesting Member State) to implement an investigative measure on the territory of another Member State (the requested Member State).

— In the second (b), rules are provided for a situation where there is neither a requesting Member State nor a requested Member State (the intercepting Member State does not need technical assistance from the Member State on whose territory the subject is located).

In choosing not to disregard these two situations in the Convention, the Council made the political decision to deal in a non-restrictive manner with the question of interceptions carried out for the purpose of criminal investigations, and not only with the question of international mutual assistance in the area of interception. In particular, the adoption of Article 20 met the Council' s concern to regulate activities which gave every indication of developing, but were not likely to be regulated by any international rules. This is a step forward in legal terms, to be credited to the European Union, and stems from its resolve to create an area of freedom, security and justice.

Article 17

Authorities competent to order interception of telecommunications

This Article allows a Member State, where no judicial authority has competence for applying Articles 18, 19 and 20, to specify pursuant to Article 24(1)(e) an equivalent competent authority acting for the purpose of a criminal investigation. This provision means that under the conditions laid down in Articles 18, 19 and 20, the other Member States accept interception requests from a competent authority acting for the purpose of a criminal investigation, but which is not necessarily a judicial authority.

This Article does not exempt those Member States for which a judicial authority is competent to make a statement within the meaning of Article 24(1)(e), from specifying which of its authorities are competent for applying these Articles, in particular for applying, as a notified State, Article 20.

Article 18

Requests for interception of telecommunications

This Article governs those situations in which a Member State is requested by another Member State to order an interception operation from its own territory.

Paragraph 1 makes a distinction, in points (a) and (b), between two types of interception:

— the first concerns the immediate transmission to the Member State requesting the interception of telecommunications. Immediate transmission means forwarding the intercepted telecommunication directly to the requesting Member State, where it can be listened to and/or recorded by the competent authority which ordered it. This type of transmission, a novelty in the context of international cooperation, will be the rule from now on,

— the second concerns the recording and subsequent transmission of telecommunications to the requesting Member State; this is the current practice in judicial assistance. This second type of request is dealt with specifically in paragraphs 6 and 7 and should be the exception from now on.

[1] The subject is in principle the person specified in the interception order. However, because the identity of the person using the telecommunications equipment can never be certain, Article 20(2) refers more specifically to 'the telecommunication address of the subject specified in the interception order'.

The Council, after examining the matter, considered that it was not necessary to define the term 'telecommunications', which is not limited to telephone conversations, but rather should be understood in the widest sense of the word. Moreover, it is necessary that, as far as possible, the requested Member State also transmits technical data concerning each telecommunication, for example, the number called, the time and duration of the telecommunication, and, if known, the place from which the telecommunication was made or received. Due to this lack of a definition, it is self-evident that the provisions on the interception of telecommunications may apply to all forms of communication made possible by current and future technologies. However, when negotiating the Convention, it was absolutely impossible to foresee every conceivable hypothetical case given the speed of technological development in this area.

It is worth noting that the Convention has effect within the European Union only, even if the telecommunications technologies to which it applies or might apply cover the whole world.

Paragraph 2 determines, according to the location of the subject the three scenarios in which a request for judicial assistance may be made.

The first (a) concerns the situation where the subject is on the territory of the requesting Member State (see general introduction and technical data above).

The second (b) concerns the situation where the subject is on the territory of the requested Member State.

The third (c) concerns the situation where the subject is on the territory of a Member State other than the requested Member State, but where technical assistance from the requested Member State is needed for such interception (see general introduction and technical data above). The text lays down that the Member State on whose territory the subject is located, for whom the interception of telecommunications is requested, must be informed of the request in accordance with Article 20(2)(a).

On account of the diversity of these situations, each of these types of request is dealt with individually in paragraphs 4 to 8.

Paragraph 3 specifies the form in which the interception request must be submitted. In order to facilitate implementation of the text, it was decided to list in the body of the Article all of the information which must be provided by the requesting State. Article 18(3) therefore replaces Article 14 of the European Convention on Mutual Assistance in Criminal Matters with regard to requests for the interception of telecommunications between Member States. The information to be provided in the request does not require any particular comment.

Paragraph 4 is intended to supplement paragraph 3, in principle for those cases referred to in paragraph 2(b), i.e. where the subject is on the territory of the requested Member State. It is, in fact, the only scenario where, in accordance with paragraph 5(b), the requested Member State assesses how to follow up the request by establishing whether the measure could be taken in a similar national case. Under the terms of this paragraph, the requesting Member State must immediately supply a 'summary of the facts' with which the investigations are concerned. Although the terms are not exactly similar, they should be interpreted by reference to those of Article 12(2)(b) of the European Convention on Extradition of 13 December 1957. The requested Member State will be entitled to ask the requesting Member State for any additional information it considers necessary for it to assess 'whether the requested measure would be taken in a similar national case'.

This latter wording, which occurs at numerous points in the provisions on the interception of telecommunications, was adopted in preference to the concept of 'conformity with national law'. The fact that the requests concerned inevitably come from a competent authority in another Member State should be borne in mind. Different national laws on interceptions generally stipulate a limited list of authorities empowered to order interception, so that a request from a competent authority in another Member State is in danger of contravening the national law on interceptions.

Moreover, it is self-evident that this paragraph also applies where requests are made in accordance with paragraph 1(b) (request for interception, recording and subsequent transmission of telecommunications to the requesting Member State).

Paragraph 5 lays down the conditions under which a requested Member State must comply with a request to intercept telecommunications with immediate transmission to the requesting Member State. The paragraph cites two different cases:

(a) where the subject of the interception is present on the territory of a Member State other than the requested Member State (including the territory of the requesting Member State) and the information provided for in paragraph 3 has been received by the requested Member State.

Such a request must be accepted 'without further formality'. These terms were used to spell out that Member States must not treat such requests as they would a conventional request for mutual assistance, thereby

enabling the request to be spared some of the formalities applicable when the request is one which the requested Member State is to execute itself on its own territory. It follows therefore that the requested Member State does not have to check whether the request for interception complies with its national law but must merely check that the conditions set in the Convention for such requests have been fulfilled, as for example the fact that the information referred in Article 20(2)(a) (informing the notified Member State prior to interception) has actually been forwarded, otherwise interception cannot commence.

(b) where the subject of the interception is present on the territory of the requested Member State and that State has received the information referred to in paragraphs 3 and 4.

Should this be the case, the requested Member State must agree to the measure if such a measure would be taken by it in a similar national case. It may also make its consent subject to any conditions which would, under its national law, have to be observed in a similar national case. These could, for example, be conditions which exclude certain categories of person from the measure or which cover the use of the intercepted material. In the latter case, the data protection measures in Article 23 of the Convention are not applicable — that is if they relate to the same matter.

Paragraph 6 lays down special rules governing requests for interception, recording and subsequent transmission to the requesting Member State of the recording of telecommunications (paragraph 1(b)). It is only when immediate transmission is not possible that Member States are obliged to comply with such requests. This is to be understood as meaning an impossibility attributable to the requesting and/or the requested Member State.

Paragraph 7 permits a Member State to declare, when giving the notification provided for in Article 27(2), that it will apply paragraph 6 only when it is unable to provide immediate transmission. In other words, the fact that a requesting Member State is unable to provide facilities for receiving immediate transmission would not mean that the requested Member State was obliged to comply with the request if that State were itself able to transmit the telecommunications directly. Any Member State which chooses to apply such a restriction could find itself facing the opposition of the other Member States on grounds of reciprocity. The possibility of making a declaration in accordance with Article 18(7) was included in order to meet the requirements of the United Kingdom, where the national law and procedures do not allow for the systematic recording of intercepted data.

Naturally, there is nothing to prevent a Member State, as is already the practice, complying with a request within the meaning of paragraph 1(b) in cases where direct transmission is possible. It would be useful if the European Judicial Network could provide details of each Member State's practice in this respect.

In addition, the Council felt that the mere fact that a Member State was obliged to record intercepted telecommunications should mean that the situation was treated as though the subject of the interception were present on its national territory. It is for this reason that the text refers to paragraph 4 which deals with the further information to be provided in support of a request, stating as it does that the requested Member State may make its consent subject to the requested measure being one that would be taken in a similar national case, and also that it may make its consent subject to any conditions which would have to be observed in a similar national case. Restrictions on the duration of recording, or the use to which the information is put come to mind here for example. In the latter case, the data protection measures in Article 23(1) and (2) of the Convention do not apply, if they cover the same matter.

Paragraph 8 refers to requests for transcriptions of telecommunications recordings. As very considerable resources, particularly human resources, may be needed to deal with such requests, the Convention provides for special arrangements in such cases. First, the requesting Member State may only submit such a request if it has a special reason for doing so. The text — even if it does not say so explicitly — may be interpreted as meaning that a Member State making such a request should explain the reasons why it is asking for a transcription, for example because it would be easier to find interpreters or translators in the requested Member State than in the requesting Member State for the language or dialect in which the intercepted telecommunications would probably be conducted.

Lastly, the requested Member State will examine such requests in accordance with its national law and procedures, which means that should such law or procedures not permit the use of transcriptions the Convention would not oblige that State to amend them for that purpose. If, on the other hand, its law does permit transcriptions, the Member State concerned should comply with any request to that effect.

Paragraph 9 requires no special comment: it is in the interests of both an investigation and the persons being investigated that an interception measure remain confidential.

Article 19

Interceptions of telecommunications in national territory by the use of service providers

Paragraph 1 contains the rule which specifies that the Member State in whose territory the gateway is situated permits the installation of 'remote control equipment', the usefulness of which is outlined in the general introduction and technical data given above.

In paragraph 2 the Convention restricts the use of such 'remote access equipment' to interceptions ordered for the purposes of a criminal investigation in accordance with its national law by the Member State which uses that equipment. In addition, such 'remote control equipment' may only be used for telecommunications sent and/or received by the subject from the national territory of that Member State.

Paragraph 3 allows a requested Member State to use remote access equipment on behalf of another Member State to intercept telecommunications sent or received from its own territory, in response to a request for assistance made pursuant to Article 18(2)(b) (subject present in the territory of the requested Member State, a territory with remote control equipment in this case).

Paragraphs 1, 2 and 3 do not require Member States to use remote access equipment. It is therefore for them to decide as to the need to establish and use this system for the interception of subjects present in their territory.

Paragraph 4 is intended to respond to the following situation: in so far as a Member State has remote access equipment, it can no longer, in principle, submit a request under Article 18(2)(a), because it is no longer true that it 'needs technical assistance' as stated in that Article. Paragraph 4 waives this rule, so as not to deprive Member States of the convenience of making a single interception order through the gateway (see general introduction and technical data above) in situations where it is likely that a subject will move around a large number of Member States, including the Member State whose authorities need to carry out the interception.

Moreover, paragraph 4 highlights the fact that a Member State may submit a request under Article 18 in cases where there is no service provider in this Member State because the conditions laid down in this Article, i.e. that it 'needs technical assistance', are met.

In order to provide the best possible framework for implementing Article 19, the Council, when adopting the Convention, made a declaration specifically providing that 'the Member States shall ... consult each other within the Council on all practical and technical aspects related to the application of the Convention', going on to state that 'the obligations contained in Articles 4 and 5 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997, concerning the processing of personal data and the protection of privacy in the telecommunications sector shall be taken into account'.

Article 20

Interception of telecommunications without the technical assistance of another Member State

The title of Article 20 is self-explanatory. It covers the situations described in the explanatory technical details.

Paragraph 1 defines the scope of the Article, limiting its application to criminal investigations presenting certain characteristics. The paragraph therefore does not contain any definition of a criminal investigation, nor does it have any implications for the other provisions of the Convention or the conventions (see the third last recital).

The only function of the Article is to lay down an obligation to inform another Member State in certain interception situations relating to cases which in most Member States would be equivalent to a criminal investigation. It cannot be interpreted, *a contrario*, as authorising interception in other situations which it does not cover, those situations being governed by the general principles of international law, which remain unaffected by the Convention. The Council emphasised this point in the penultimate recital.

The Council agreed to make a United Kingdom declaration on this point an integral part of the Convention, stating the conditions for applying Article 20 in the United Kingdom with particular regard to interceptions by the security service in cases where, in accordance with the United Kingdom's national law, that service acts in support of an investigation presenting the characteristics described in Article 20(1). The words 'detection of serious crime' in the declaration are the terms used in United Kingdom law on the subject at the time the Convention was signed and are not intended to widen the scope of Article 20.

Paragraph 2 imposes an obligation on any intercepting Member State, when in the situation referred to by this Article and within the scope of the Article as referred to in paragraph 1, to inform the Member State on whose territory the subject of the interception is present (the notified Member State). This information must be provided:

— prior to the interception in cases where the requesting Member State knows when ordering the interception that the subject is on the territory of the notified Member State. In such circumstances interception cannot commence until the measure has been agreed to by another Member State (the notified Member State) under the conditions laid down in paragraph 4,

— where interception is already taking place, immediately after the requesting Member State becomes aware that the subject is present on the territory of the notified Member State.

Paragraph 3 lists the information which has to be notified by the intercepting Member State at the same time as the main body of information.

Paragraph 4 lays down the rules applicable once the information stipulated in paragraphs 2 and 3 has been transmitted.

Paragraph 4(a) obliges the notified Member State to respond without delay, and at the latest within 96 hours, to the intercepting Member State so as not to hinder the proper course of the investigations.

There are two possibilities open to the notified Member State, depending on whether it is (a) able or (b) unable to reply immediately:

(a) paragraph 4(a)(i), (ii) and (iii) covers cases where the notified State is able to take a decision on a notified interception within 96 hours. It has two options.

1. The notified Member State may agree to the interception or else make its consent subject to any conditions which have to be observed in a similar national case. This is the same procedure as that adopted for Article 18(5)(b).

2. It may also require the interception not to be carried out (for those cases referred to in Article 20(2)(a), where prior information has been provided) or to be terminated [the cases referred to in Article 20(2)(b), where someone who is already the subject of an interception enters the territory of a new Member State] where the interception would not be permissible pursuant to the national law of the State concerned or where that State would be entitled to refuse mutual assistance on the basis of Article 2 of the European Convention on Mutual Assistance in Criminal Matters. The reasons for such a requirement must be given in writing.

In this second case (Article 20(4)(b)(ii)) the notified Member State may also require that the material obtained from the interception up to the moment when it announces its refusal — whether the material was obtained before or after notification — should not be used, or may only be used under certain conditions that it specifies. The intercepting Member State must be informed of the reasons for such a requirement. It is understood that Member States will show flexibility regarding the use of already intercepted material for the purpose of taking urgent measures to prevent an immediate and serious threat to public security. It might also be necessary in some cases to use the material already intercepted in proceedings concerning claims for damages in relation to the interception carried out or action taken on the basis of Article 20(4)(b). Article 20(4)(a)(iii) does not prevent the intercepting Member State from fully informing any Court in response to any legal action brought against that Member State;

(b) paragraph 4(a)(iv) covers cases where the notified Member State is unable to reply within 96 hours. It is assumed here that such inability to reply is due to special procedures having to be followed by the notified Member State before it can take a decision: these procedures might, for example, be specifically imposed in certain countries by the status or professional activity of certain persons, such as Members of Parliament or lawyers. In such case the notified Member State may, after consulting the intercepting Member State, request a further period of not more than eight days in order to carry out internal procedures under its national law, which may, where appropriate, include certain checks. The notified Member State must inform the intercepting Member State in writing of the reasons justifying the requested extension of the deadline. The extension starts on expiry of the initial period of four days.

Paragraph 4(b) was drafted to govern situations where a Member State has not yet taken any decision regarding a notified interception. The Council felt that it was important to have clear rules in such cases in order to provide a stronger framework of legal certainty for investigations.

The following rule has been posited: until a Member State has replied to a request either by the end of the initial 96-hour deadline or by the end of the further period of no more than eight days, the intercepting Member State may continue the interception. It may not use the material already intercepted except where otherwise agreed with the notified Member State or for taking urgent measures to prevent an immediate and serious threat to public security. The latter phrase must not be understood in too restrictive a manner and would cover, for example, measures taken in respect of crimes involving threats to human life, serious drugs offences and similar serious crimes.

Paragraph 4(c) follows the same line of reasoning as Article 18(4). However, the text clearly states that any such request for further information does not call into question the rules set out in paragraph 4(b), unless otherwise agreed by the Member States concerned.

The Council felt that, if the system thus established was to function effectively, Member States would have to be able to react swiftly. Not only does paragraph 4(d) contain a general obligation to ensure that a reply is given within 96 hours, but it also obliges Member States to establish contact points, on duty 24 hours a day, and include them in their statements under Article 24(1)(e).

Paragraphs 5 and 6 deal with the confidentiality of the information provided by the intercepting Member State when the interception is notified.

Paragraph 5 lays down the principle that the information provided must be kept confidential. This provision has been included to ensure that ongoing investigations can be conducted with the required secrecy.

Paragraph 6 provides for possible transmission of particularly sensitive information through specific authorities. However, the Member States concerned must agree to this on a bilateral basis. Such an agreement could be concluded in general terms and not in each separate case. If no bilateral agreement exists, the normal channels will be used.

Paragraph 7 covers Member States which do not wish to receive information pursuant to Article 20.

Article 21

Responsibility for charges made by telecommunications operators

This Article specifies that it is the requesting Member State which must bear the interception costs. These are the costs of each separate interception, and not those necessarily incurred by telecommunications operators in modifying their systems to permit interceptions.

Article 22

Bilateral arrangements

This Article specifies that Member States may conclude bilateral or multilateral agreements for the purpose of facilitating the exploitation of present and future technical possibilities regarding the lawful interception of telecommunications.

TITLE IV

Article 23

Protection of personal data

This is the first time that a convention on judicial cooperation in criminal matters has incorporated rules on protecting personal data exchanged between two or more Member States. The Council, however, saw a need for these rules, particularly given the inclusion in the Convention of certain methods of investigation which are not exclusively judicial.

Scope of the Article

The Article applies 'to personal data communicated under this Convention'. The expression 'personal data' has been used within the meaning of the definition of that expression in Article 2(a) of the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Article 2(a) provides that 'personal data' means any information relating to an identified or identifiable individual ('data subject'). That definition applies irrespective of the way in which the personal data concerned are filed or processed. Article 23 consequently applies to both data processed automatically and data not processed automatically.

At the same time, the obligations of Member States under the 1981 Convention are not affected by Article 23 in any way. The definition is to be understood as implying that an identifiable person is one who can be identified, directly or

indirectly, by reference to an identification number or to one or more factors specific to his or her physical, mental, physiological, economic, cultural or social identity.

The innovative arrangements established by the Convention led the drafters to specify what should happen to data exchanged in certain specific situations.

Accordingly, paragraph 2 specifies that personal data 'obtained otherwise' as opposed to 'communicated' are also covered under the Convention. It was important to include in the scope of all the provisions of this Article data obtained pursuant to Articles 9 (Temporary transfer of persons held in custody for purposes of investigation) and 20 (Interception of telecommunications without the technical assistance of another Member State). Similarly, as regards Articles 10 (Hearing by videoconference) and 11 (Hearing of witnesses and experts by telephone conference), the data are not really communicated but should not receive less protection as a result.

By contrast, it was considered expedient for paragraph 6 explicitly to exclude from the scope of Article 23 'personal data obtained by a Member State under this Convention and originating from that Member State'. That provision states an obvious, explicit principle but it was nevertheless felt important to spell it out in an Article dealing with the restrictions on the use of data communicated or obtained through the Convention. The negotiators were thinking of the following situations in particular:

— data obtained by videoconference (Article 10) or telephone conference (Article 11): data derived from a statement made by a witness in one Member State during a videoconference, for example in a confrontation where that procedure exists, in so far as the data are used by the competent authorities of the Member State on whose territory the witness is present,

— data collected by joint investigation teams (Article 13): data derived from the hearing of a witness on the territory of the Member State which wishes to use those data. It should be noted that this is an exception to Article 13(10), confined to those cases where the data are 'otherwise available' (see the text of that paragraph),

— data obtained in the territory of the requesting Member State pursuant to Article 19 (Interceptions of telecommunications on national territory by the use of service providers): data derived from the interception of the telecommunications of a subject present in the territory of the intercepting Member State.

Arrangements for the use of personal data

The purpose for which personal data will be used dictates the conditions in which they may be used i.e. with or without the prior consent of the Member State which forwarded them.

In three cases, the Member State to which such data have been sent may use them without the prior consent of the Member State which forwarded them:

— the first case (paragraph 1(a)) covers use 'for the purpose of proceedings to which this Convention applies'. These proceedings are those defined by the conventions mentioned in Article 1 and those referred to in Article 3 (Proceedings in connection with which mutual assistance is also to be afforded). These proceedings can obviously differ from those for which judicial assistance has been requested,

— the second case (paragraph 1(b)) covers use 'for other judicial and administrative proceedings directly related to proceedings referred to under point (a)'. The words 'directly related' may include the following examples, *inter alia*:

  — commercial proceedings related to following a fraudulent bankruptcy,

  — proceedings for withdrawing parental authority related to criminal proceedings for ill-treatment of children,

  — proceedings for withdrawing a firearms licence related to criminal proceedings for violence with firearms.

  In the cases referred to in paragraph 1(b), personal data obtained in the context of an international letter of request may be used without the prior consent of the Member State which forwarded them,

— the last case (paragraph 1(c)) covers the prevention of 'an immediate and serious threat to public security'. This concept is the same as that in Article 20(4)(b)(ii) and its inclusion in this Article follows the same logic. The statement made by the Federal Republic of Germany on this point should be borne in mind; this questioned the extent to which data collected by the legal authorities in

one Member State may be used by the police services in another Member State for preventing serious risks and combating serious crime in the future.

As regards the use of personal data for any other purpose, paragraph 1(d) stipulates that the Member State wanting to use them must obtain the prior consent of the Member State which has sent them unless it has obtained the consent of the data subject.

Paragraph 7 lays down a special arrangement for Luxembourg. That State may, at the time of signing the Convention, declare that, when Luxembourg communicates personal data to another Member State under the Convention, the following provisions shall apply: depending on the particular case, Luxembourg may require that the data may only be used for the purposes referred to in paragraph 1(a) and (b) with its prior consent in respect of proceedings for which Luxembourg could have refused or limited the transmission or use of the personal data in accordance with the provisions of the Convention or the instruments referred to in Article 1. Luxembourg cannot, by virtue of this declaration, make systematic use of the possibility afforded by paragraph 7. The last subparagraph of paragraph 7 also specifies that Luxembourg must give reasons in writing for refusing to consent to a request to use data in the framework of this provision.

Paragraph 3 provides that the communicating Member State may require the Member State to which the personal data have been transferred to give information on the use made of the data. To avoid excessive bureaucracy, a Member State may not make systematic use of the option given in this Article.

Compatibility with special data protection rules

Since certain provisions in the Convention include special rules on data protection, it was necessary to define precisely the relations between these specific rules and the general rules laid down in this Article. This is done in paragraphs 4 and 5.

Paragraph 4 covers the cases where the Convention accords the Member States the right to attach certain conditions to the use of data they transmit. This Article lays down that where conditions on the use of personal data have been imposed at the time of transmitting the data, these conditions will prevail over the rules in Article 23. Where no such conditions have been imposed, Article 23 will apply.

Paragraph 5 stipulates that the provisions governing the use of data contained in Article 13(10), specially adapted to the original situation from the point of view of the assistance afforded by the joint investigation teams, will take precedence over the general rules laid down in Article 23.

TITLE V

FINAL PROVISIONS

Article 24

Statements

This Article takes account of the fact that, under the provisions of the Convention, certain additional authorities within Member States will become competent for mutual assistance purposes. In that regard it provides that statements are to be made by the Member States with details of the authorities which are competent for the application of the Convention, with particular reference to a number of its provisions, and similarly the authorities competent to deal with the application between Member States of the mutual assistance provisions of the instruments mentioned in Article 1(1). These statements, which may be amended at any stage, are not to include authorities which have already been designated for the purposes of the operation of the 1959 Convention and the Benelux Treaty.

Given that Member States can specify different authorities for different provisions of the Convention, it is essential that the statements made under this Article are fully clear as to the exact competence of each of the authorities named in the statements.

Article 25

Reservations

This Article prevents Member States from entering reservations to the Convention other than those for which express provision is made in the Convention. Reservations are provided for in Articles 6(3), 6(7), 9(6), 10(9), 14(4), 18(7) and 23(7).

Article 26

Territorial application

This Article makes arrangements for the application of the Convention, in due course, to Gibraltar, the Channel Islands and the Isle of Man.

On the adoption of the Act establishing the Convention, the Council adopted a declaration which specifies that this Article is without prejudice to the application of the Convention to the territories of Member States other than the United Kingdom and does not affect the right of Member States to extend the application of the Convention to their overseas countries and territories.

Article 27

Entry into force

This Article governs the entry into force of the Convention in a manner which is somewhat different from the rules established in these matters by earlier conventions adopted by the European Union. In this regard no departure was made from Article 34(2)(d) of the Treaty on European Union.

The Convention comes into force 90 days after completion of the procedures necessary for the adoption of the Convention by the eighth State which was a Member of the European Union on 29 May 2000 when the Act establishing the Convention was adopted by the Council. The Convention will operate among the eight Member States in question and it will apply to each of the other Member States 90 days after they complete their adoption procedures. The entry into force of the Convention gives rise to the implementation of Article 35 of the Treaty on European Union on the jurisdiction of the Court of Justice of the European Communities.

As in judicial cooperation instruments concluded previously between the Member States and within the Union, paragraph 5 allows for the possibility whereby each Member State, at the time of its adoption of the Convention or at any time subsequently, can issue a declaration making the Convention applicable in advance vis-à-vis any other Member States that have made a similar declaration. This will enable the Convention to be implemented as soon as possible between the Member States most concerned. A declaration made under the said paragraph takes effect 90 days after being deposited.

Paragraph 6 is concerned with commencement matters and it restricts the application of the Convention to mutual assistance proceedings which are initiated after the Convention has entered into force for the Member States concerned. In addition, however, the provisions of the Convention will operate between two Member States which have made declarations which are in force in respect of anticipated application under paragraph 5.

Article 28

Accession of new Member States

This Article opens the Convention for accession by any State which becomes a Member of the European Union, and lays down the arrangements for such accession.

Where the Convention is already in force when a new Member State accedes, it will come into force with respect to that Member State 90 days after the deposit of its instrument of accession. However, if the Convention is still not in force 90 days after that State's accession, it will come into force with respect to that State at the time of entry into force specified in Article 27. An acceding State will also be able to make a declaration of anticipated application as provided for in Article 27(5).

Article 29

Entry into force for Iceland and Norway

This Article contains the arrangements for the entry into force for Iceland and Norway of the provisions of the Convention specified in Article 2(1). These arrangements are governed by the Agreement of 18 May 1999 concluded by the Council, Iceland and Norway concerning the implementation, application and development of the Schengen *acquis*.

Essentially, the position, as set out in paragraph 1, is that the relevant provisions of the Convention will come into operation for Iceland and Norway 90 days after each of those countries provides notification of the fulfilment of its appropriate constitutional requirements. When that happens, the provisions will apply in their mutual assistance arrangements with any Member State for which the Convention is already in force. It should be noted, however, that anticipated application by Iceland and Norway has not been provided for.

Paragraph 2 covers the situation where the Convention enters into force for a Member State when the provisions referred to in Article 2(1) are already in operation in relation to Iceland and/or Norway. Paragraph 3 provides that those provisions shall not become binding on Iceland and Norway before the date which will be determined in accordance with Article 15(4) of the Agreement referred to in Article 29(1). Paragraph 4 of this Article ensures that these provisions will enter into force for Iceland and/or Norway at the latest when they become operational for all the 15 Member States who were members of the Union when the Convention was adopted.

Article 30

Depositary

This Article provides that the Secretary-General of the Council is the depositary for the Convention. The Secretary-General will inform the Member States of any notification received from Member States in relation to the Convention. These notifications are to be published in the *Official Journal of the European Communities* as well as relevant information on the progress of adoptions, accessions, declarations and reservations.