The draft Convention on mutual assistance has for its purpose to improve judicial cooperation in criminal matters between the Member States and, in respect of certain provisions, between the group of States constituted by the Member States and Norway and Iceland.

The draft Convention has been published in the Official Journal of the European Communities. The European Parliament was in August 1999 invited by the Council to give its opinion on the draft as published. The opinion of the European Parliament was delivered on 17 February 2000.

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2 Document 6128/00 PE-RE 13 + ADD 1
The JHA Council examined at its meeting on 2 December 1999 a number of outstanding questions concerning the draft Convention. After the Council meeting, the issues that remained unresolved have been examined by the Working Party on Cooperation in Criminal Matters, the JHA Counsellors group, the Article 36 Committee and Coreper. Where appropriate, proceedings have taken place in Mixed Committee procedure with Norway and Iceland.

The present document is the result of proceedings on the basis of document 6836/00 COPEN 18 COMIX 257 in Coreper on 15 March 2000 and in Coreper/ Mixed Committee on 16 March 2000. It contains:

- below under point II a description of the outstanding problems not relevant to the Mixed Committee procedure;
- below under point III a description of the outstanding problems to be examined in Mixed Committee procedure;
- in Annex I the full text of the draft Convention;
- in Annex II certain draft declarations;
- in Annex III certain items to be addressed in the explanatory report to the Convention;
- in Annex IV certain “quality drafting” suggestions of the Legal Service on Articles 15 to 20 which have not yet been examined.

It is noted that Coreper at its meeting on 15 March 2000 decided to further examine Articles 17, 18(3) (point II.B 2 and 3 below - interception) and 20a (point III.3 below - data protection) on 22 March 2000. The outcome thereof will be reported to Council in a separate document.

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1 See documents 13451/99 COPEN 60 + COR 1 and 14103/99 COPEN 65.
II OUTSTANDING QUESTIONS NOT RELEVANT TO THE MIXED COMMITTEE PROCEDURES

A. General reservations

The Convention is subject to a general parliamentary scrutiny reservation by the Danish and United Kingdom delegations.

The Spanish delegation has maintained a reservation regarding the application of the Convention in relation to Gibraltar.

B. Interception of telecommunications

1. General

The provisions on interception of telecommunications are, in addition to the general parliamentary scrutiny reservations by the Danish and United Kingdom delegations referred to under II.A above, subject to a general parliamentary scrutiny reservation by the German delegation.

2. Article 17

This item will be examined by Coreper on 22 March 2000 on the basis of the following. The result thereof will be included in a separate report.

The purpose of Article 17 is in particular to make it possible for Member States to intercept satellite telecommunications regarding targets present on their own territory by the use of service providers operating in that territory in cases where the gateway of the telecommunications system is situated in another Member State. To the extent that this possibility is available, the need for mutual assistance under Article 16 can be avoided regarding interception by a Member State of targets present on its own territory.
Article 17 was examined on 2 December 1999 by the JHA Council.

On that occasion, the Italian delegation noted that progress had been made, but maintained its reservation on paragraph 1.

The Luxembourg delegation maintained its scrutiny reservation on Article 17.

Furthermore, the Luxembourg delegation proposed to add the following words to Article 17(4): “..., in particular where there is no intermediary in the requesting Member State.”

Coreper is invited to examine these questions.

At the meeting of the JHA Council on 2 December 1999 it was agreed that the following draft Council declaration proposed by the Commission on Article 17 should be examined:

“Within a year after signature of the Convention, but at the latest by the entry into force of the Convention, Member States and telecommunications service providers concerned shall elaborate a secure system for submission of interception requests and for transmission of intercepted communications for the purpose of implementing the provisions of Article 17 of the Convention. They shall develop and agree procedures and technical modalities to be used for interception by direct access in order to ensure a high level of security in transmissions between all competent authorities and service providers concerned.

Moreover, the system to be elaborated shall take account of the obligation placed on providers of public telecommunications services by 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, to ensure the security of their networks.
Member States shall provide the satellite service providers granting direct access with the names of service providers on their territory designated to act as intermediary for the purpose interception by direct access.”

Coreper is invited to consider the declaration proposed by the Commission.

3. Article 18(3)

This item will be examined by Coreper on 22 March 2000 on the basis of the following. The result thereof will be included in a separate report.

Article 18 of the draft Convention provides that a Member State intercepting a target present in another Member State shall notify that other Member State accordingly.

Article 18(3) provides an obligation for the notified Member State to reply to the notification and, under certain conditions, a right for that Member State to require that the interception be stopped. It also contains provisions on the use of already intercepted material.

Following the JHA Council on 2 December 1999 certain main questions remained unresolved. One question was to which extent the notified Member State should be able to restrict the use of already intercepted material. On this issue, some delegations thought that it should only be possible to impose restrictions on the use of the material for use as evidence in criminal proceedings. Others thought that this approach was too narrow. Another question was if failure of the notified Member State to reply within the fixed deadline should mean approval or prohibition regarding continued interception and use of intercepted material.
Article 18(3) was examined by Coreper on 15 March 2000 on the basis of document 6836/00 COPEN 18 COMIX 257. Based on comments made by delegations in Coreper and subsequent bilateral contacts, the Presidency has for the purpose of discussions in Coreper on 22 March 2000 established the amended version of Article 18(3)(a)3 and (b) set out in Annex I.

Coreper is invited to examine the compromise proposal made by the Presidency.

C. Quality drafting

The Working Party on Cooperation in Criminal Matters examined on 8 March 2000 the drafting suggestions proposed in document SN 1533/00 by the Legal Service in the light of the common guidelines for the quality of drafting of Community legislation.¹

Agreement has been reached on a number of the suggestions made. The relevant parts of the text of the draft Convention have been changed accordingly. Certain suggestions on the provisions on interception of telecommunications have not yet been fully examined and are set out in Annex IV.

The French delegation has maintained a scrutiny reservation on the amended version of Article 8.

The Council is invited to examine if the scrutiny reservation referred to can be lifted and to agree that further consideration should be given to the suggestions of Legal Service set out in Annex IV.

III OUTSTANDING QUESTIONS TO BE EXAMINED UNDER THE MIXED COMMITTEE PROCEDURES

1. Article 6(1)

Article 6(1) set out in the Annex is subject to a parliamentary scrutiny reservation by the United Kingdom delegation.

2. Article 6(3)

Parliamentary scrutiny reservation by the United Kingdom delegation, and scrutiny reservation by the Irish delegation, on Article 6(3), and in particular on the last sentence of that paragraph.

3. Article 20a - data protection

This item will be examined by Coreper on 22 March 2000 on the basis of the following. The result thereof will be included in a separate report.

Coreper examined the subject of data protection at its meeting on 15 March 2000 on the basis of document 6836/00 COPEN 18 COMIX 257. Article 20a as it stands, with observations by delegations in footnotes to the text, and with the inclusion of an alternative proposal made by the Luxembourg delegation, is set out in the Annex.

Coreper is invited to examine Article 20a.

IV CONCLUSIONS

The Council is invited to examine the above questions, as far as the questions under point III are concerned in Mixed Committee procedure, with a view to reaching political agreement on the draft Convention. A separate note will be issued following Coreper on 22 March 2000 as a basis for proceedings concerning points II.B.2 and 3 and III.3.
ANNEX I

DRAFT COUNCIL ACT¹

of

establishing in accordance with Article 34 of the Treaty on European Union
the Convention on mutual assistance in criminal matters
between the Member States of the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 31(a) and 34 thereof,

Having regard to the initiative of the Member States;

Having regard to the opinion of the European Parliament;

Whereas,

1. for the purposes of achieving the objectives of the Union the rules on mutual assistance in
criminal matters between the Member States of the European Union should be improved and
a Convention, as set out in the Annex hereto, should be established to that end;

2. some of the provisions of the Convention fall within the scope of Article 1 of Council
Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the
Agreement concluded by the Council of the European Union and the Republic of Iceland and
the Kingdom of Norway concerning the association of those two States with the
implementation, application and development of the Schengen acquis;

3. this is the case for Articles 3, 5, 6, 7, 12 and 20a, and, to the extent relevant for Article 12,
Articles 14a and 14b, and, to the extent relevant for the Articles referred to, Article 1;

¹ Amendments compared with document 6297/00 COPEN 11 COMIX 177 are underlined.
4. the procedures set out in the Agreement concluded by the Council of the European Union with the Republic of Iceland and the Kingdom of Norway concerning the latter’s association with the implementation, application and development of the Schengen acquis have been observed in respect of these provisions;

5. when notifying the present Act to the Republic of Iceland and the Kingdom of Norway in accordance with Article 8(2)(a) of the aforementioned Agreement, these two States will be informed in particular of Article 24b on entry into force for Iceland and Norway and will be invited to submit, at the time they inform the Council and the Commission upon fulfilment of their constitutional requirements, the relevant statements under Article 21 of the Convention;

DECIDES that the Convention, the text of which is appended hereto and which is signed today by the Representatives of the Governments of the Member States of the Union, is hereby established;

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional requirements;

INVITES the Member States to begin the procedures applicable for that purpose before ...¹

Done at ,

For the Council
The President

¹ Date to be inserted.
DRAFT CONVENTION,
ESTABLISHED BY THE COUNCIL
IN ACCORDANCE WITH ARTICLE 34
OF THE TREATY ON EUROPEAN UNION,
ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS
BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION

Amendments as compared with 13451/99 COPEN 60 introduced at the examination on 8 March 2000 by the Working Party on Cooperation in Criminal Matters of the "quality drafting" paper of the Legal Service set out in SN 1533/00 are in bold. The text of Articles 15 to 20 has not been amended, but the suggestions made by the Legal Service on these Articles is set out in Annex IV and may be examined at a later stage.

Article 18(3) has been based on 6640/00 COPEN 15, proceedings in Coreper on 8 March and in the JHA Counsellors group 10 March 2000 - amendments compared with COPEN 15 are underlined.

Article 20a has been based on 6654/00 COPEN 16 COMIX 235.

Article 24b has been based on 6297/00 COPEN 11 COMIX 177.

Changes introduced at the examination on 8 March 2000 by the Working Party of the opinion of the European Parliament are underlined.

Article 24a has become Article 2. Former Article 2 has become Article 3. Former Article X has become Article 20a.
THE HIGH CONTRACTING PARTIES to this Convention, Member States of the European Union,

REFERRING to the Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

WISHING to improve judicial co-operation in criminal matters between the Member States of the Union, without prejudice to the rules protecting individual freedom,

POINTING OUT the Member States' common interest in ensuring that mutual assistance between the Member States is provided in a fast and efficient manner compatible with the basic principles of their national law, which is rapid and complies with the individual rights and principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950,

EXPRESSING their confidence in the structure and functioning of their legal systems and in the ability of all Member States to guarantee a fair trial,

RESOLVED to supplement the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and other Conventions in force in this area, by a Convention of the European Union;

RECOGNISING that the provisions of those Conventions remain applicable for all matters not covered by this Convention,

CONSIDERING that the Member States attach importance to strengthening judicial co-operation, while continuing to apply the principle of proportionality,

RECALLING that this Convention regulates mutual assistance in criminal matters, based on the principles of the 1959 Convention;

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The following three recitals are a reproduction of the agreed text set out under point II.B.2.c of 13451/99 COPEN 60.
WHEREAS, however, Article 18 of the Convention covers certain specific situations of interception of telecommunications, without having any implications with regard to other such situations outside the scope of the Convention;

WHEREAS the general principles of international law apply in situations which are not covered by this Convention;

RECOGNISING that this Convention does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, and that it is a matter for each Member State to determine, in accordance with Article 33 of the Treaty on European Union, under which conditions it will maintain law and order and safeguard internal security,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

TITLE I

GENERAL PROVISIONS

ARTICLE 1

Relationship to other conventions on mutual assistance

1. The purpose of this Convention is to supplement the provisions and facilitate the application between the Member States of the European Union, of:

(a) the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, hereinafter referred to as the "European Mutual Assistance Convention";
(b) the Additional Protocol of 17 March 1978 to the European Mutual Assistance Convention;

(c) the provisions on mutual assistance in criminal matters of the Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (hereinafter the "Schengen Implementation Convention") which are not repealed pursuant to Article 2(2);

(d) Chapter 2 of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, as amended by the Protocol of 11 May 1974, (hereinafter referred to as the "Benelux Treaty"), in the context of relations between the Member States of the Benelux Economic Union.

2. **This Convention** shall not affect the application of more favourable provisions in bilateral or multilateral agreements between Member States or, as provided for in Article 26(4) of the European Mutual Assistance Convention, arrangements in the field of mutual assistance in criminal matters agreed on the basis of uniform legislation or of a special system providing for the reciprocal application of measures of mutual assistance in their respective territories.

**ARTICLE 2**

**Provisions related to the Schengen acquis**

1. The provisions of Articles 3, 5, 6, 7, 12 and 20a, and, to the extent relevant for Article 12, Articles 14a and 14b and, to the extent relevant for the Articles referred to, Article 1 constitute measures amending or building upon the provisions referred to in Annex A to the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis. ¹

2. The provisions of Articles 49(a), 52, 53 and 73 of the Schengen Implementation Convention are hereby repealed.

ARTICLE 3

Procedures in connection with which assistance is also to be afforded

1. Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

2. Mutual assistance shall also be afforded in connection with criminal proceedings and proceedings as referred to in paragraph 1 which relate to offences or infringements for which a legal person may be held liable in the requesting Member State.

ARTICLE 4

Formalities and procedures in the execution of requests for mutual assistance

1. Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State.
2. The requested Member State shall execute the request for assistance as soon as possible, taking as full account as possible of the procedural deadlines and other deadlines indicated by the requesting Member State. The requesting Member State shall explain the reasons for the deadline.

3. If the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting Member State, the authorities of the requested Member State shall promptly inform the authorities of the requesting Member State and indicate the conditions under which it might be possible to execute the request. The authorities of the requesting and the requested Member State may subsequently agree on further action to be taken concerning the request, where necessary by making such action subject to the fulfilment of those conditions.

4. If it is foreseeable that the deadline set by the requesting Member State for executing its request cannot be met, and if the reasons referred to in paragraph 2, second sentence, indicate concretely that any delay will lead to substantial impairment of the proceedings being conducted in the requesting Member State, the authorities of the requested Member State shall promptly indicate the estimated time needed for execution of the request. The authorities of the requesting Member State shall promptly indicate whether the request is to be upheld nonetheless. The authorities of the requesting and requested Member States may subsequently agree on further action to be taken concerning the request.

ARTICLE 5

Sending and service of procedural documents

1. Each Member State shall send procedural documents intended for persons who are staying in the territory of another Member State to them directly by post.
2. Procedural documents may be sent via the competent authorities of the requested Member State only if:

(a) the address of the person for whom the document is intended is unknown or uncertain, or

(b) the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post, or

(c) it has not been possible to serve the document by post, or

(d) the requesting Member State has justified reasons for considering that dispatch by post will be ineffective or is inappropriate.

3. Where there is reason to believe that the addressee does not understand the language in which the document is drawn up, the document, or at least the important passages thereof, must be translated into (one of) the language(s) of the Member State in the territory of which the addressee is staying. If the authority by which the procedural document was issued knows that the addressee understands only some other language, the document, or at least the important passages thereof, must be translated into that other language.

4. All procedural documents shall be accompanied by a report stating that the addressee may obtain information from the authority by which the document was issued or from other authorities in that Member State regarding his or her rights and obligations concerning the document. Paragraph 3 shall also apply to that report.

5. This Article shall not affect the application of Articles 8, 9 and 12 of the European Mutual Assistance Convention and Articles 32, 34 and 35 of the Benelux Treaty.
ARTICLE 6

Transmission of requests for mutual assistance

1. Requests for mutual assistance and spontaneous exchanges of information referred to in Article 7 shall be made in writing or by any means capable of producing a written record, under conditions allowing the receiving Member State to establish authenticity. Such requests shall be made directly between judicial authorities with territorial competence for initiating and executing them, and shall be returned through the same channels unless otherwise specified in this Article.

Any information laid by a Member State with a view to proceedings before the courts of another Member State within the meaning of Article 21 of the European Mutual Assistance Convention and Article 42 of the Benelux Treaty may be the subject of direct communications between the competent judicial authorities.

2. Paragraph 1 shall not prejudice the possibility of requests being sent or returned in specific cases:

(a) between a central authority of a Member State and a central authority of another Member State, or

(b) between a judicial authority of one Member State and a central authority of another Member State.

1 Parliamentary scrutiny reservation on Article 6(1) by the United Kingdom delegation.
2 It will be explained in the explanatory report that this wording also covers E-mail. It will also be explained in that report that nothing prevents Member States from going even further and agree to accept oral requests in certain cases. Oral requests could in particular be relevant in urgent cases, and it could be agreed that they should be followed up by a written confirmation.
3. Notwithstanding paragraph 1, the United Kingdom and Ireland, respectively, may, when giving the notification provided for in Article 23(2), declare that requests and communications to it, as specified in the declaration, must be sent via its central authority. These Member States may at any time by a further declaration limit the scope of such a declaration for the purpose of giving greater effect to paragraph 1. They shall do so when the provisions on mutual assistance of the Schengen Implementation Convention are put into effect for them.

Any Member State may apply the principle of reciprocity in relation to the declarations referred to above.

4. Any request for mutual assistance may, for the sake of speed, be made via the International Criminal Police Organisation (Interpol) or any body competent under provisions adopted pursuant to the Treaty on European Union.

5. Where, in respect of requests pursuant to Articles 12, 13 or 14, the competent authority is a judicial authority or a central authority in one Member State and a police or customs authority in the other Member State, requests may be made and answered directly between these authorities. Paragraph 4 shall apply to these contacts.

6. Where, in respect of requests for assistance in relation to proceedings as envisaged in Article 3(1) the competent authority is a judicial authority or a central authority in one Member State and an administrative authority in the other Member State, requests may be made and answered directly between these authorities.

7. Any Member State may declare, when giving the notification provided for in Article 23(2), that it is not bound by the first sentence of paragraph 5 or by paragraph 6, or both or that it will apply those paragraphs only under certain conditions which it shall specify. Such a declaration may be withdrawn or amended at any time.

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1 Parliamentary scrutiny reservation by the United Kingdom delegation, and scrutiny reservation by the Irish delegation, on Article 6(3), and in particular the last sentence of that paragraph.
8. The following requests or communications shall be made through the central authorities of the Member States:

(a) requests for temporary transfer or transit of persons held in custody as referred to in Article 9 of this Convention, in Article 11 of the European Mutual Assistance Convention and in Article 33 of the Benelux Treaty;

(b) notices of judgements as referred to in Article 22 of the European Mutual Assistance Convention and Article 43 of the Benelux Treaty. However, requests for copies of convictions and measures as referred to in Article 4 of the Additional Protocol to the European Mutual Assistance Convention may be made directly to the competent authorities.

ARTICLE 7

Spontaneous exchange of information

1. **Within the limits of their national law** the competent authorities of the Member States may exchange information, **without a request to that effect**, relating to criminal offences as well as to the infringements of rules of law as referred to in Article 3(1), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided.

2. The providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority.

3. The receiving authority shall be bound by those conditions.
TITLE II

REQUESTS FOR CERTAIN SPECIFIC FORMS OF MUTUAL ASSISTANCE

ARTICLE 8

Restitution

1. At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.

2. In applying Articles 3 and 6 of the European Mutual Assistance Convention and Articles 24(2) and 29 of the Benelux Treaty, the requested Member State may waive the return of articles either prior or after handing them over to the requesting Member State if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.

3. In the event of a waiver prior to the handing over of the articles to the requesting Member State, the requested Member State shall exercise no security right or other right of recourse under tax or customs legislation in respect of these articles.

A waiver as referred to in paragraph 2 shall be without prejudice to the right of the requested Member State to collect taxes or duties from the rightful owner.¹

¹ Scrutiny reservations on the “quality drafting” amendments to paragraphs 2 and 3 by the French delegation.
ARTICLE 9

Temporary transfer of persons held in custody for purposes of investigation

1. Where there is agreement between the competent authorities of the Member States concerned, a Member State which has requested an investigation for which the presence of a person held in custody on its own territory is required may temporarily transfer that person to the territory of the Member State in which the investigation is to take place.

2. The agreement shall cover the arrangements for the temporary transfer of the person and the date by which he or she must be returned to the territory of the requesting Member State.

3. Where consent to the transfer is required from the person concerned, a statement of consent or a copy thereof shall be provided promptly to the requested Member State.

4. The period of custody in the territory of the requested Member State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the requesting Member State.

5. The provisions of Articles 11(2) and (3), 12 and 20 of the European Mutual Assistance Convention shall apply mutatis mutandis to this Article.

6. Each Member State may declare when giving the notification provided for in Article 23(2) that, before reaching an agreement under paragraph 1 of this Article, the consent referred to in paragraph 3 of this Article will be required or will be required under certain conditions indicated in the declaration.
ARTICLE 10

Hearing by video conference

1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by video conference, as provided for in paragraphs 2 to 8.

2. The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for video conferencing, such means may be made available to it by the requesting Member State by mutual agreement.

3. Requests for a hearing by video conference shall contain, in addition to the information referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, the reason why it is not desirable or possible for the witness or expert to attend, the name of the judicial authority and of the persons who will be conducting the hearing.

4. The judicial authority of the requested Member State shall summon the person concerned to appear in accordance with the forms laid down by its legislation.

5. With reference to hearing by videoconference, the following rules shall apply:

(a) a judicial authority of the requested Member State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State is of the view that during the hearing the fundamental principles of the law of the requested Member State are being infringed, it shall immediately take the necessary measures for ensuring the continuation of the hearing in accordance with the said principles;
(b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Member States;

(c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws;

(d) at the request of the requesting Member State or the person to be heard the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if necessary;

(e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State;

6. Without prejudice to any measures agreed for the protection of persons, the judicial authority of the requested Member State shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested Member State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the competent authority of the requested Member State to the competent authority of the requesting Member State.

7. The cost of establishing the video link, costs related to the servicing of the video link in the requested Member State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Member State shall be refunded by the requesting Member State to the requested Member State, unless the latter waives the refunding of all or some of these expenses.

8. Each Member State shall take the necessary measures to ensure that its national law applies where witnesses or experts are being heard within its territory in accordance with this Article and refuse to testify when under an obligation to testify or do not testify according to the truth, in the same way as if the hearing took place in a national procedure.
9. Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

Any Member State may, when giving its notification pursuant to Article 23(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time.

Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.

ARTICLE 11

Hearing of witnesses and experts by telephone conference

1. If a person is in one Member State's territory and has to be heard as a witness or expert by a judicial authority of another Member State the latter may, where its national law so provides, request assistance of the former Member State to enable the hearing to take place by telephone conference, as provided for in paragraphs 2 to 5.

2. A hearing may be conducted by telephone conference only if the witness or expert agrees that the hearing take place by that method.

3. The requested Member State shall agree to the hearing by telephone conference where this is not contrary to fundamental principles of its law.
4. An application for a hearing by telephone conference shall contain, in addition to the information referred to in Article 14 of the European Convention on Mutual Assistance and Article 37 of the Benelux Treaty, the name of the judicial authority and of the persons who will be conducting the hearing and an indication that the witness or expert is willing to take part in a hearing by telephone conference.

5. The practical arrangements regarding the hearing shall be agreed between the Member States concerned. When agreeing such arrangements, the requested Member State shall undertake to:

   (a) notify the witness or expert concerned of the time and the venue of the hearing;

   (b) ensure the identification of the witness or expert;

   (c) verify that the witness or expert agrees to the hearing by telephone conference.

The requested Member State may make its agreement subject, fully or in part, to the relevant provisions of Article 10(5) and (8). Unless otherwise agreed, the provisions of Article 10(7) shall apply mutatis mutandis.

ARTICLE 12

Controlled deliveries

1. Each Member State shall undertake to ensure that, at the request of another Member State, controlled deliveries may be permitted on its territory in the framework of criminal investigations into extraditable offences.

2. The decision to carry out controlled deliveries shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that State.
3. Controlled deliveries shall take place in accordance with the procedures of the requested Member State. Competence to act and to direct operations shall lie with the competent authorities of that Member State.

ARTICLE 13

Joint investigation teams

1. By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement.

A joint investigation team may, in particular, be set up where:

(a) a Member State’s investigations into criminal offences require difficult and demanding investigations having links with other Member States;

(b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate co-ordinated, concerted action in the Member States involved;

A request for the setting up of a joint investigation team may be made by any of the Member States concerned. The investigation team shall be set up in one of the Member States in which the investigations are expected to be carried out.

2. In addition to the information referred to in the relevant provisions of Article 14 of the European Convention on Mutual Assistance in Criminal Matters and Article 37 of the Benelux Treaty, requests for the setting up of a joint investigation team shall include proposals for the composition of the team.
3. A joint investigation team shall operate in the territory of the Member States setting up the team under the following general conditions:

(a) the leader of the team shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates. The leader of the team shall act within the limits of his or her competence under national law;

(b) the joint investigation team shall carry out its operations in conformity with the law of the Member State in which it operates. The members of the team shall carry out their tasks under the leadership of the person referred to in subparagraph (a), taking into account the conditions set by their own authorities in the agreement on setting up the joint investigation team.

(c) the Member State in which the team operates shall make the necessary organisational arrangements for it to do so.

3a. In this Article, members of the team from Member States other than the Member State in which the team operates are referred to as being "seconded" to the team.

4. Seconded members of the team are entitled to be present when investigative measures are taken in the Member State of operation. However, the leader of the team may, for particular reasons, in accordance with the law of the Member State where the team operates, decide otherwise.

5. Seconded members of the team may, in accordance with the law of the Member State where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the Member State of operation and the seconding Member State.

6. Where the joint team needs investigative measures to be taken in one of the Member States setting up the joint team, persons seconded to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in that Member State under the conditions, which would apply if they were requested in a domestic investigation.
7. Where the joint team needs assistance from a Member State other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operation to the competent authorities of the other State concerned in conformity with the relevant instruments or arrangements.

8. A member of the joint team may, in accordance with his or her national law and within the limits of his or her competence, provide the joint team with information available in the Member State which has seconded him or her for the purpose of the criminal investigations conducted by the joint team.

9. Information lawfully obtained by an official while part of a joint investigation team which is not otherwise available to the competent authorities of the Member States concerned may be used for the following purposes:

(a) for the purposes for which the joint investigation team has been set up;

(b) subject to the prior consent of the Member State where the information became available, for detecting, investigating and prosecuting other criminal offences. Such a consent may be withheld only in cases where such use would endanger criminal investigations in the Member State concerned or in respect of which that Member State could refuse mutual assistance;

(c) for preventing an immediate and serious threat to public security, and without prejudice to subparagraph (b) if subsequently a criminal investigation is opened;

(d) for other purposes to the extent that this is agreed between Member States setting up the team.

10. This Article shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams.
11. To the extent that the laws of the Member States concerned or the provisions of any legal instrument applicable between them permit arrangements may be agreed for persons other than representatives of the competent authorities of the Member States setting up the team to take part in the activities of the team. Such persons may, for example, include officials of bodies set up pursuant to the Treaty on European Union. The rights conferred upon the members of the team by virtue of this Article shall not apply to these persons unless the agreement expressly states otherwise.

ARTICLE 14

Covert investigations

1. The requesting and the requested Member State may agree to assist one another for the operation of investigations into crime by officers acting under covert or false identity (covert investigations).

2. The decision on the request is taken in each individual case by the competent authorities of the requested Member State with due regard to its national law and procedures. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the Member States with due regard to their national law and procedures.

3. Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place. The Member States involved shall cooperate to ensure the preparation and supervision of the covert investigation and to make arrangements for the security of the officers acting under covert or false identity.

4. Any Member State may when giving the notification provided for in Article 23(2) declare that it is not bound by this Article. Such a declaration may be withdrawn at any time.
ARTICLE 14a

Criminal liability regarding officials

During the operations referred to in Articles 12, 13 and 14, officials from a Member State other than the Member State of operation shall be regarded as officials of the Member State of operation with respect to offences committed against them or by them.

ARTICLE 14b

Civil liability regarding officials

1. Where, in accordance with Articles 12, 13 and 14, officials of a Member State are operating in another Member State, the first Member State shall be responsible for any damage caused by them during the course of their mission, in accordance with the law of the Member State on whose territory they are operating.

2. The Member State on whose territory the damage referred to in paragraph 1 is caused shall repair such damage under the conditions applicable to damage caused by its officials.

3. The Member State whose officials have caused damage to whomever on the territory of another Member State shall reimburse in full to the latter any sums it has paid out to the victims or other entitled persons.

4. Without prejudice to the exercise of the rights vis-à-vis third parties and without prejudice to paragraph 3, each Member State shall refrain, in the case provided for in paragraph 1, from requesting reimbursement of damages it has sustained from another Member State.
TITLE III

INTERCEPTION OF TELECOMMUNICATIONS

ARTICLE 15

Authorities competent to order interception of telecommunications

For the purpose of the application of the provisions of Articles 16, 17 and 18, "competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in this area, an equivalent competent authority, specified pursuant to Article 21(1)(e) and acting for the purpose of a criminal investigation.

ARTICLE 16

Requests for interception of telecommunications

1. For the purpose of a criminal investigation, a competent authority in any Member State (the requesting Member State) may, in accordance with the requirements of its domestic law, make a request to a competent authority in another Member State (the requested Member State) for:

(a) the interception and immediate transmission to the requesting Member State of telecommunications; or

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

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1 See points II.B.1 (general reservations) and II.D ("quality drafting") of the report.
2. Requests under paragraph 1 may be made in relation to the use of means of telecommunications by the subject of the interception, if this subject is present:

(a) in the requesting Member State, and where the requesting Member State needs the technical assistance of the requested Member State to intercept his communications;

(b) in the requested Member State, and where his communications can be intercepted in that Member State;

(c) in a third Member State, which has been informed pursuant to Article 18(1)(a), and where the requesting Member State needs the technical assistance of the requested Member State to intercept his communications.

3. By way of derogation from Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, requests under this Article shall include the following:

(a) an indication of the authority making the request;

(b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;

(c) information for the purpose of identifying the subject of the interception;

(d) an indication of the criminal conduct under investigation;

(e) the desired duration of the interception; and

(f) if possible, the provision of sufficient technical data to ensure that the request can be met (in particular the relevant network connection number).
4. In the case of a request pursuant to paragraph 2(b), a request shall also include a summary of the facts. The requested Member State may require any further information necessary to enable the requested Member State to decide whether the request would be granted if it had been made by a national authority of that Member State.

5. The requested Member State undertakes to comply with requests under paragraph 1(a):

(a) in the case of a request pursuant to paragraph 2(a) and 2(c), on being provided with the information in paragraph 3. The requested Member State may allow the interception to proceed without further formality;

(b) in the case of a request pursuant to paragraph 2(b), on being provided with the information in paragraphs 3 and 4 and where the request would be granted if it had been made by a national authority of that Member State. The requested Member State may make its consent subject to any conditions which it would impose had the request been made by one of its own national authorities.

6. Where immediate transmission is not possible, the requested Member State undertakes to comply with requests under paragraph 1(b) on being provided with the information in paragraphs 3 and 4 and where the request would be granted if it had been made by a national authority of that Member State. The requested Member State may make its consent subject to any condition which it would impose had the request been made by one of its own national authorities.

7. Any Member State may declare when giving the notification provided for in Article 23(2) that it is bound by paragraph 6 only when it is unable to provide immediate transmission of the telecommunications. In this case the other Member States may apply the principle of reciprocity.

8. When making a request under paragraph 1(b), the requesting Member State may, where it has a particular reason to do so, also request a transcription of the recording. The requested Member State shall consider such requests in accordance with its national law and procedures.
9. The Member State receiving the information provided under paragraphs 3 and 4 shall keep that information confidential in accordance with its national law.

ARTICLE 17

Interceptions of subjects on national territory by the use of service providers

1. Member States shall ensure that systems of telecommunications services operated via a gateway on their territory, which for the lawful interception of the communications of a subject present in another Member State are not directly accessible on the territory of that State, may be made directly accessible for the lawful interception by that State through the intermediary of a designated service provider present on its territory.

2. In the case referred to in paragraph 1, the competent authorities of a Member State, for the purposes of a criminal investigation and in accordance with applicable national law, shall carry out the interception on the condition that the subject of the interception is present in that Member State.

3. Paragraph 2 shall also apply where the interception is carried out upon a request made pursuant to Article 16(2)(b).

4. Nothing in this article prevents Member States to request the Member State on whose territory the gateway is located the lawful interception of telecommunications in conformity with Article 16.

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1 See point II.B.2 of the report
ARTICLE 18

Interception of subjects on the territory of another Member State without technical assistance of this member state

1a. Without prejudice to the general principles of international law as well as to the provisions of Article 16 (2) (c), the obligations under this Article apply to interception orders authorised by the competent authority of one Member State in the course of criminal investigations which present the following characteristics:

An investigation following the commission of a specific criminal offence, including attempts in so far as they are criminalized under national law, in order to identify and arrest, charge, prosecute or deliver judgement on those responsible.

1. Where for the purpose of a criminal investigation, the interception of telecommunications is authorised by the competent authority of one Member State (the intercepting Member State), and the telecommunication address of the subject specified in the interception order is being used on the territory of another Member State (the notified Member State) from which no technical assistance is needed to carry out the interception, the first mentioned Member State shall inform the other Member State on the interception:

(a) prior to the interception in cases where it knows when ordering the interception that the subject is on the territory of that Member State;

(b) immediately after it knows that the subject of the interception is on the territory of that Member State in other cases.

2. The information to be provided by the intercepting Member State includes:

(a) an indication of the authority ordering the interception;
(b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;

(c) information for the purpose of identifying the subject of the interception;

(d) an indication of the criminal conduct under investigation; and

(e) the expected duration of the interception.

3. The following shall apply where a Member State is notified pursuant to paragraphs 1 and 2:

(a) Upon receipt of the information provided under paragraph 2 the competent authority of the notified Member State shall, without delay, and at the latest within 96 hours, reply to the intercepting Member State, with a view to:

1. allowing the interception to be carried out or to be continued. The notified Member State may make its consent subject to any conditions which it would impose in a domestic case;

2. requiring the interception not to be carried out or to be terminated where the interception would not be permissible pursuant to the national law of the notified Member State, or for the reasons specified in Article 2 of the European Mutual Assistance Convention. Where the notified Member State imposes such a requirement, it shall give reasons for its decision in writing;
3. in cases referred to in subparagraph (a)(2), requiring that any material already intercepted while the subject was on its territory may only be used under conditions which it shall specify. The notified Member State shall inform the intercepting Member State of the reasons justifying the said conditions.¹

4. requiring a short extension, up to a maximum period of 8 days, of the original 96 hours deadline, to be agreed with the intercepting Member State, in order to carry out internal procedures under its national law. The notified Member State shall communicate, in writing, to the intercepting Member State, the conditions which, pursuant to its national law, justify the requested extension of the deadline.

¹ See point II.B.3 of the report. Based on comments made by delegations in Coreper and subsequent bilateral contacts, the Presidency proposes for the purpose of discussions in Coreper on 22 March 2000:

a) the amended version of Article 18(3)(a)3 and (b), and

b) that the explanatory report should:

- explain that a decision of the notified Member State pursuant to Article 18(3)(a)3 should not as such give rise to a right for persons to claim damage in relation to the interception carried out or action taken on the basis of the intercepted material. In addition, it should be explained how to obtain this result in practice;

- explain in relation to Article 18(3)(a)3 that it is being 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;

- explain that the expression “for taking urgent measures to prevent an immediate and serious threat to public security” under Article 18(3)(b) should not be understood in a too restrictive manner and would cover for example measures taken in respect of crimes involving threats to human life, drugs offences and serious cases of money laundering;

- contain appropriate explanations on the consequences of failure by the notified Member State to reply within the deadlines (96 hours and 8 days).
(b) Until a decision has been taken by the notified Member State pursuant to points 1 or 2 of subparagraph a), the intercepting Member State:
- may continue the interception; and
- may not use the material already intercepted, except:
  = if otherwise agreed between the Member States concerned; or
  = for taking urgent measures to prevent an immediate and serious threat to public security. The notified Member State shall be informed on any such use and the reasons justifying it.

(c) The notified Member State may request a summary of the facts of the case and any further information, necessary to enable the notified Member State to decide whether interception would be granted in a domestic case. Such a request does not affect the application of subparagraph b), unless otherwise agreed between the notified Member State and the intercepting Member State.

(d) The Member States shall take the necessary measures to ensure that a reply can be given within the 96 hour period. To this end they shall designate contact points (to be on duty twenty-four hours a day) under Article 21(e).”

4. The Member State receiving the information provided under paragraph 2 shall keep that information confidential in accordance with its national law.

5. Where the intercepting Member State is of the opinion that the information disclosed by paragraph 2 is of a particularly sensitive nature, it may be transmitted to the competent authority through a specific authority where that has been agreed on a bilateral basis between the Member States concerned.

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1 See footnote to Article 18(3)(a)3.
6. Any Member State may declare, when giving its notification under Article 23(2), or at any time thereafter, that it will not be necessary to provide it with the information on interceptions as envisaged in this Article.

ARTICLE 19

Responsibility for charges made by telecommunications operators

Costs which are incurred by telecommunications operators or service providers in executing requests pursuant to Article 16 shall be borne by the requesting Member State.

ARTICLE 20

Bilateral arrangements

Nothing in this Title shall preclude any bilateral or multilateral arrangements between Member States for the purpose of facilitating the exploitation of present and future technical possibilities regarding interception of telecommunications
TITLE IIIA

Article 20a

Personal data protection

1. Personal data communicated under this Convention may be used by the Member State to which they have been transferred:

(a) for the purpose of proceedings to which this Convention applies;

(b) for other (...) judicial and administrative proceedings directly related to proceedings referred to under a. above;5

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1 Parliamentary scrutiny reservation by the United Kingdom delegation. Scrutiny reservations by some delegations. Linguistic scrutiny reservations by some delegations.
2 It was discussed whether a provision on the principles applicable to the protection of the data referred to in paragraph 1 should be included for the purpose of ensuring that these principles will be binding for future member States. However, it was agreed that such a provision was not necessary as the 1981 Council of Europe Convention is part of the acquis, which must be respected by future Member States. It was agreed to explain this in the explanatory report.
3 The Luxembourg delegation maintained its reservation on Article 20a and proposed the alternative proposal set out in the text.
4 The explanatory report will contain an explanation along the following lines: “The expression “personal data” has been used within the meaning of the definition of that expression in Article 2a of the 1981 Council of Europe Convention for the protection of individuals with regard to automatic processing of data. Article 2a provides that “personal data” means any information relating to an identified or identifiable individual (“data subject”). That definition applies irrespectively of the way in which the personal data concerned is filed or processed. This implies that Article 20a 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 20a in any way. The definition is expected 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 physical, mental, economic, cultural or social identity.”
5 The explanatory report will contain explanations on point b), including examples on what is to be understood by “directly related”.

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(c) for preventing an [immediate and] serious threat to public security;

(d) for any other purpose, only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject.

2. The present Article also applies to personal data not communicated but obtained otherwise in application of this Convention.

3. In the circumstances of the particular case, the communicating Member State may require the Member State to which the personal data has been transferred to give information on the use made of the data.

4. Where conditions on the use of personal data have been imposed pursuant to Articles 7(2), 16(5)(b), 16(6) or 18(3), these conditions shall prevail. Where no such conditions have been imposed, the present Article shall apply.

5. The provisions of Article 13(9) prevail over the present Article regarding information obtained in the framework of the application of Article 13.

6. The present Article does not apply to personal data obtained by a Member State in application of this Convention and originating from that Member State.

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1 The German delegation has entered a reservation and called for the deletion of the text in square brackets. The Greek and Netherlands delegations could not agree to this proposal. The Netherlands delegation would be prepared to consider “...an imminent and serious threat...”.

2 It will be explained in the explanatory report that the purpose of paragraph 2 is to cover personal data obtained by Member States within the framework of this Convention as a result of activities carried out by its own authorities.

3 It will be explained in the explanatory report that paragraph 5 has been introduced on the basis that Article 13 in its paragraph 9 contains exhaustive provisions on use of information and that there for that reason is no need to apply Article 20a to Article 13.
The Luxembourg delegation has proposed to replace paragraph 1 of Article 20a with the following:

1. When signing the present Convention, each Member State shall make a declaration in which it shall specify if the conditions for use of personal data originating from that Member State shall be determined by the provisions of paragraph 1a or those of paragraph 1b.

1a. Personal data communicated under this Convention may be used by the Member State to which they have been transferred:

   (a) for the purpose of proceedings to which this Convention applies;

   (b) for other (...) judicial and administrative proceedings directly related to proceedings referred to under a. above;

   (c) for preventing an [immediate and] serious threat to public security;

   (d) for any other purpose, only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject.

1b. Personal data communicated under this Convention may be used by the Member State to which they have been transferred:

   (a) for the purpose of proceedings to which this Convention applies and for other (...) judicial and administrative proceedings directly related to proceedings to which this Convention applies; the Member State from which the data originate may state that the use of those data or part of those data for the purpose of proceedings for which it could have denied or limited the transmission or the use of the data in accordance with the provisions of this Convention or the instruments mentioned in Article 1 is subject to its prior consent;
(b) for preventing an immediate and serious threat to public security and without prejudice to the provisions of point (a) if proceedings are subsequently started;

(c) for any other purpose, only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject."

TITLE IV

FINAL PROVISIONS

ARTICLE 21

Statements

1. When giving the notification referred to in Article 23(2), each Member State shall make a statement naming the authorities which, in addition to those already indicated in the European Mutual Assistance Convention and the Benelux Treaty, are competent for the application of this Convention and the application between the Member States of the provisions on mutual assistance in criminal matters of the instruments referred to in Article 1(1), including in particular:

(a) the competent administrative authorities within the meaning of Article 3(1), if any,

(b) one or more central authorities for the purposes of applying Article 6 as well as the authorities competent to deal with the requests referred to in Article 6(8)(a) and (b),

(c) the police or customs authorities competent for the purposes of Article 6(5), if any,

(d) the administrative authorities competent for the purposes of Article 6(6), if any, and
(e) the authority or authorities competent for the purposes of the application of Articles 16 and 17 and Article 18(1) to (4).

2. Statements made in accordance with paragraph 1 may be amended in whole or in part at any time by the same procedure.

ARTICLE 22

Reservations

No reservations may be entered in respect of this Convention, other than those for which it makes express provision.

ARTICLE 23

Entry into force

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of this Convention.

3. This Convention shall, 90 days after the notification referred to in paragraph 2 by the State, member of the European Union at the time of adoption by the Council of the Act establishing this Convention, which is the eighth to be complete this formality, enter into force for the eight Member States concerned.
4. Any notification by a Member State subsequent to the receipt of the eighth notification referred to in paragraph 2 shall have the effect that, 90 days after the subsequent notification, this Convention shall enter into force as between this Member State and those Member States for which the Convention has already entered into force.

5. Before the Convention has entered into force pursuant to paragraph 3, any Member State may, when giving the notification referred to in paragraph 2 or at any time thereafter, declare that it will apply this Convention in its relations with Member States which have made the same declaration. Such declarations shall take effect 90 days after the date of deposit thereof.

6. This Convention shall apply to mutual assistance initiated after the date on which it has entered into force, or is applied pursuant to paragraph 5, between the Member States concerned.

ARTICLE 24

Accession of new Member States

1. This Convention shall be open to accession by any State which becomes a member of the European Union.

2. The text of this Convention in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.

3. The instruments of accession shall be deposited with the depositary.

4. This Convention shall enter into force with respect to any State which accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of this Convention if it has not already entered into force at the time of expiry of the said period of ninety days.

5. Where this Convention is not yet in force at the time of the deposit of their instrument of accession, Article 23(5) shall apply to acceding Member States.
ARTICLE 24b

Entry into force for Norway and Iceland

1. Without prejudice to Article 8 of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis (the "Association Agreement"), the provisions referred to in Article 2(1) shall enter into force for Iceland and Norway 90 days after the receipt by the Council and the Commission of the information pursuant to Article 8(2) of the Association Agreement upon fulfilment of their constitutional requirements, in their mutual relations to any Member State for which this Convention has already entered into force pursuant to Article 23(3) or (4).

2. Any entry into force of this Convention for a Member State after the date of entry into force of the provisions referred to in Article 2(1) for Iceland and Norway, shall render these provisions also applicable in the mutual relations between that Member State and Iceland and Norway.

3. The provisions referred to in Article 2(1) shall in any event not become binding on Iceland and Norway before the date to be fixed pursuant to Article 15(4) of the Association Agreement.

4. Without prejudice to paragraphs 1, 2 and 3 above, the provisions referred to in Article 2(1) shall ultimately enter into force for Iceland and Norway on the date of entry into force of this Convention for the fifteenth State, being a member of the European Union at the time of the adoption by the Council of the act establishing this Convention.

1 Text from document 6297/00 COPEN 11 COMIX 177.
ARTICLE 25

Depositary

1. The Secretary-General of the Council of the European Union shall act as depositary of this Convention.

2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, statements and reservations and also any other notification concerning this Convention.

Done at ...................................... on ................................................ in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all texts being equally authentic, such original being deposited in the archives of the General Secretariat of the Council of the European Union.
DRAFT DECLARATIONS

Article 10(9)¹

The following declaration is added in an annex to the Convention:

"When considering the adoption of an instrument as referred to in Article 10(9), the Council shall respect Member States' obligations under the European Convention on Human Rights.

Article 18²

The following declaration by the United Kingdom shall be annexed to the Convention and form an agreed, integral part of the Convention:

"In the United Kingdom, Article 18 will apply in respect of interception warrants issued by the Secretary of State to the police service or HM Customs & Excise where, in accordance with national law on the interception of communications, the stated purpose of the warrant is the detection of serious crime. It will also apply to such warrants issued to the Security Service where, in accordance with national law, it is acting in support of an investigation presenting the characteristics described in Article 18(1a)."

¹ Text from footnote 1, page 26, of 8560/00 JUSTPEN 39.
² Text from point II.B.2.b of 13451/99 COPEN 60.
EXPLANATORY REPORT ¹

Article 1

The text of Article 1 has been modelled on Article 1 of the Convention on Extradition of 27 September 1997 (OJ No C 313, 23.10.1996, p. 11). The explanatory report to be drawn up will provide explanations on the Article, including the expression "more favourable" in paragraph 2. On this issue it might take a lead from the explanatory report on the Extradition Convention (OJ No C 191, 23.6.1997, p. 13).

Article 3

Paragraph 1

The explanatory report will have to make it clear that paragraph 1 covers the concept of "Ordnungswidrigkeit" in German legislation (see Article 1(i) in the explanatory report on the European Mutual Assistance Convention).

Article 4

General

The explanatory report will point out that statements made under Article 5 of the European Mutual Assistance Convention are not affected by Article 4.

¹ The list has been put together on the basis of 13451/99 COPEN 60 (Articles 6(1), 13(4), (5) and (9) and Article 18 (general) and 8560/99 JUSTPEN 39 (Articles 1, 3(1), 4 (general), 4(1), 4(3), 6(3), 8(1), 10(2), 10(5)(a), 10(5)(b), 10(8), 10(9), 11, 12 and 16(7)).
Paragraph 1

The explanatory report will point out that the possibility of setting deadlines should not be abused and that where the requesting Member State considers it appropriate to set deadlines it should only set deadlines which are reasonable under the given circumstances.

Paragraph 3

The explanatory report to the Convention will state that if the conditions set out in paragraph 3 are met, the requested Member State is obliged to make the notification to the requesting Member State as provided for in the paragraph. The last sentence provides for the possibility of agreements between Member States, which may be reached in an informal manner and do not imply any binding legal obligations.

The Netherlands delegation has asked that the explanatory report should make it clear that the requested Member State could notify the Requesting Member State of delays either in writing or by telephone.

Article 5

Paragraph 1

The explanatory report to the Convention will clarify the term "procedural documents", interpreting it widely to include, for example, court decisions and judicial verdicts.

Paragraph 2, first indent

The explanatory report will point out that the requesting Member State should make reasonable efforts to find the address of the person before making a request and that the request should be accompanied by relevant information where possible to help the requested Member State to find the person.
Paragraph 4

The explanatory report will give additional information on the content of the report referred to in Article 5(4). The report could draw on Article 11(4) and (5) of 7945/97 JUSTPEN 41.

Article 6

Paragraph 1

It will be explained in the explanatory report that the wording of the first sentence of paragraph 1 also covers E-mail. It will also be explained in that report that nothing prevents Member States from going even further and agree to accept oral requests in certain cases. Oral requests could in particular be relevant in urgent cases, and it could be agreed that they should be followed up by a written confirmation.

Paragraph 3

The explanatory report will explain that the possibility of a declaration regarding paragraph I has been provided to cater for Member States, in particular Ireland and the United Kingdom, where judicial authorities are not generally competent to execute direct requests for mutual assistance.

Article 8

Paragraph 1

The explanatory report will contain an explanation of the expression "rights of bona fide third parties" and will make it clear that Article 8 is to apply only in cases where there is no doubt as to who is the rightful owner of the article.
Article 10

Paragraph 2

It will be explained in the explanatory report that the reference to "fundamental principles of its law" implies that a request may not be refused for the sole reason that one or more detailed conditions for hearing by video conference under the law of the requested Member State are not met.

Paragraph 5, point (a)

It will be stated in the explanatory report on the Convention that the requesting Member State could ask on the basis of Article 4 and Article 10(5)(c) that counsel for the person to be heard be allowed to attend the hearing.

Paragraph 5, point (b)

The explanatory report will state that the measures referred to in the provision may include, for instance, the implementation of the requesting Member State's legislation on the protection of the persons to be heard.

Paragraph 8

It will be explained in the explanatory report that the requesting and requested Member States could inform each other where appropriate for the purpose of application of paragraph 8. The explanatory report should also make it clear that the obligation to testify is under the law of the requested Member State, i.e. where the person being heard is located.
Paragraph 9

It will be stated in the explanatory report, with reference to the last sentence of Article 10, paragraph 9, that the use of video-conference will be allowed for accused persons even prior to the possible adoption by the Council of a legally binding instrument for the protection of the rights of accused persons.

Article 11

It has been proposed that the explanatory report should indicate that:
- the jurisprudence of the European Court on Human Rights should be taken into account when applying this provision;
- Article 11 does not prevent existing practices to continue (hearing of persons by telephone without the assistance of the Member State in which the person is).

Article 12

The explanatory report on the Convention will mention the various possibilities for procedures in controlled deliveries, including the possibility mentioned in Article 10(4) of 9897/97 JUSTPEN 65, and will contain a reference to the European Manual on Controlled Deliveries.

Article 13

Paragraph 4

The explanatory report will contain some concrete examples of the “particular reasons” referred to in the second sentence of paragraph 4 (like taking evidence in cases of sex crimes committed against children). It will also be explained in that report that decisions to exclude a seconded member from being present may not be based on the sole fact that the member is a foreigner, and that operational reasons in some cases may be the basis for such decisions.
Paragraph 5

It will be explained in the explanatory report that the approval of the action may be included already in the agreement referred to in paragraph 1 or given later, and may apply in general, in specified cases or in specific concrete cases.

Paragraph 9

The Irish delegation thought that where the information lawfully obtained consists of a voluntary witness statement given solely for the purposes for which the joint investigation team has been set up, the consent of the witness shall be required for its use for purposes mentioned at (b) and (d) of paragraph 9. It was agreed to deal with this issue in the explanatory report.

Article 16

Paragraph 7

The explanatory report will explain that the possibility of a declaration pursuant to Article 16(7) has been provided to cater for the UK where national law and procedure do not provide for the routine recording of intercepted material.

Article 18

General

The explanatory report will specify that Article 18 of the Convention only regulates the obligation to inform another Member State in certain situations of interceptions relating to what in most Member States would fall under the concept of criminal investigations and that it cannot be interpreted a contrario so as to permit interception in other situations which are not covered. Those situations are covered by the general principles of international law, which remain unaffected by the present Convention.
It will be explained in the explanatory report that the terms “detection of serious crime” used in the UK declaration reflect the terms used in UK law in this area, as it is at the time of signature of the Convention, and are not intended to broaden the scope of Article 18.

Paragraph 3

See the footnotes to Article 18(3) in Annex I of the present document.

Paragraph 5

It will be explained in the explanatory report that if no bilateral agreement exists, the normal channels for transmission of the information are applied.

Article 20a

See footnotes to Article 20a in Annex I.

Article 21

It will be explained in the explanatory report that the Member States could appoint different authorities for different provisions on cooperation and that the statements under Article 21 should be clear as to the exact competencies of the authorities named in the statements.
Suggestions made by Legal Service regarding Articles 15 to 20 ("quality drafting")

TITLE III

INTERCEPTION OF TELECOMMUNICATIONS

ARTICLE 15

Authorities competent to order interception of telecommunications

For the purpose of the application of the provisions of Articles 16, 17 and 18, "competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by those provisions, an equivalent competent authority, specified pursuant to Article 21(1)(e) and acting for the purpose of a criminal investigation.

ARTICLE 16

Requests for interception of telecommunications

1. For the purpose of a criminal investigation, a competent authority in the requesting Member State may, in accordance with the requirements of its domestic law, make a request to a competent authority the requested Member State for:

(a) the interception and immediate transmission to the requesting Member State of telecommunications; or

(b) the interception, recording and subsequent transmission to the requesting Member State of the recording of telecommunications.
2. Requests under paragraph 1 may be made in relation to the use of means of telecommunications by the subject of the interception, if the subject of the interception is present in:

(a) the requesting Member State and the requesting Member State needs the technical assistance of the requested Member State to intercept his or her communications;

(b) the requested Member State and his or her communications can be intercepted in that Member State;

(c) a third Member State which has been informed pursuant to Article 18(1)(a) and the requesting Member State needs the technical assistance of the requested Member State to intercept his or her communications.

3. By way of derogation from Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, requests under this Article shall include the following:

(a) an indication of the authority making the request;

(b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;

(c) information for the purpose of identifying the subject of the interception;

(d) an indication of the criminal conduct under investigation;

(e) the desired duration of the interception; and

(f) if possible, the provision of sufficient technical data to ensure that the request can be met (in particular, the relevant network connection number).

4. In the case of a request pursuant to paragraph 2(b), a request shall also include a summary of the facts. The requested Member State may require any further information to enable it to decide whether the requested measure could be taken by it in a similar national case.
5. The requested Member State undertakes to comply with requests under paragraph 1(a):

(a) in the case of a request pursuant to paragraph 2(a) and 2(c), on being provided with the information in paragraph 3. The requested Member State may allow the interception to proceed without further formality;

(b) in the case of a request pursuant to paragraph 2(b), on being provided with the information in paragraphs 3 and 4 and where the **requested measure could be taken by it in a similar national case**. The requested Member State may make its consent subject to any conditions which would **apply to the taking of such measures by it in a similar national case**.

6. Where immediate transmission is not possible, the requested Member State undertakes to comply with requests under paragraph 1(b) on being provided with the information in paragraphs 3 and 4 and where the **requested measure could be taken by it in a similar national case**. The requested Member State may make its consent subject to any condition which would **apply to the taking of such measures by it in a similar national case**.

7. Any Member State may declare when giving the notification provided for in Article 23(2) that it is bound by paragraph 6 only when it is unable to provide immediate transmission. In this case the other Member States may apply the principle of reciprocity.

8. When making a request under paragraph 1(b), the requesting Member State may, where it has a particular reason to do so, also request a transcription of the recording. The requested Member State shall consider such requests in accordance with its national law and procedures.

9. The Member State receiving the information provided under paragraphs 3 and 4 shall keep that information confidential in accordance with its national law.
ARTICLE 17

Interceptions of telecommunications by the use of service providers

1. Member States shall ensure that systems of telecommunications services operated via a gateway on their territory, which for the lawful interception of the communications of a subject present in another Member State are not directly accessible on the territory of the latter, may be made directly accessible for the lawful interception by that Member State through the intermediary of a designated service provider present on its territory.

2. In the case referred to in paragraph 1, the competent authorities of a Member State shall be entitled, for the purposes of a criminal investigation and in accordance with applicable national law and provided that the subject of the interception is present in that Member State, to carry out the interception without involving the Member State on whose territory the gateway is located.

3. Paragraph 2 shall also apply where the interception is carried out upon a request made pursuant to Article 16(2)(b).

4. Nothing in this Article shall prevent a Member State from making a request to the Member State on whose territory the gateway is located for the lawful interception of telecommunications in conformity with Article 16.
INTERCEPTION OF TELECOMMUNICATIONS WITHOUT THE TECHNICAL ASSISTANCE OF ANOTHER MEMBER STATE

1a. Without prejudice to the general principles of international law as well as to the provisions of Article 16 (2) (c), the obligations under this Article apply to interception orders made or authorised by the competent authority of one Member State in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence, including attempts in so far as they are criminalised under national law, in order to identify and arrest, charge, prosecute or deliver judgement on those responsible.

1. Where for the purpose of a criminal investigation, the interception of telecommunications is authorised by the competent authority of one Member State (the "intercepting Member State"), and the telecommunication address of the subject specified in the interception order is being used on the territory of another Member State (the "notified Member State") from which no technical assistance is needed to carry out the interception, the first mentioned Member State shall inform the other Member State on the interception:

(a) prior to the interception in cases where it knows when ordering the interception that the subject is on the territory of that Member State;

(b) in other cases, immediately after it becomes aware that the subject of the interception is on the territory of that Member State.

2. The information to be notified by the intercepting Member State shall include:

(a) an indication of the authority ordering the interception;

(b) confirmation that a lawful interception order has been issued in connection with a criminal investigation;

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(c) information for the purpose of identifying the subject of the interception;

(d) an indication of the criminal conduct under investigation; and

(e) the expected duration of the interception.

3. The following shall apply where a Member State is notified pursuant to paragraphs 1 and 2:

(a) upon receipt of the information provided under paragraph 2 the competent authority of the notified Member State shall, without delay, reply to the intercepting Member State, with a view to:

(i) allowing the interception to be carried out or to be continued. The notified Member State may make its consent subject to any conditions which would have to be observed in a similar national case;

(ii) requiring the interception not to be carried out or to be terminated where the interception would not be permissible pursuant to the national law of the notified Member State, or for reasons specified in Article 2 of the European Mutual Assistance Convention. Where the notified Member State imposes such a requirement, it shall give reasons for its decision in writing;

(iii) in cases referred to in point (a)(ii) requiring that any material intercepted while the subject was known by the intercepting Member State to have been on the territory of the notified Member State not be used as evidence in criminal proceedings.

(b) If, exceptionally, the notified Member State fails to reply within 96 hours from the time it was informed by the intercepting Member State, this shall constitute a decision to prohibit the interception and the use of the intercepted material pursuant to points (a)(ii) and (a)(iii). The notified Member State shall without delay give a written statement of reasons for that decision.
(c) The notified Member State may request a summary of the facts of the case and any further information, necessary to enable it to decide whether interception could be authorised in a similar national case. Such a request does not affect the application of point (b), unless otherwise agreed between the notified Member State and the intercepting Member State.

(d) The Member States shall take the necessary measures to ensure that a reply can be given within the 96 hour period. To this end they shall designate contact points, on duty twenty four hours a day, and include them in their statements under Article 21(1)(e).

4. The notified Member State shall keep the information provided under paragraph 2 confidential in accordance with its national law.

5. Where the intercepting Member State is of the opinion that the information to be provided under paragraph 2 is of a particularly sensitive nature, it may be transmitted to the competent authority through a specific authority as may have been agreed on a bilateral basis between the Member States concerned.

6. Any Member State may declare, when giving its notification under Article 23(2), or at any time thereafter, that it will not be necessary to provide it with information on interceptions as envisaged in this Article.

ARTICLE 19

Responsibility for charges made by telecommunications operators

Costs which are incurred by telecommunications operators or service providers in executing requests pursuant to Article 16 shall be borne by the requesting Member State.
ARTICLE 20

Bilateral arrangements

Nothing in this Title shall preclude any bilateral or multilateral arrangements between Member States for the purpose of facilitating the exploitation of present and future technical possibilities regarding the lawful interception of telecommunications.