MINISTERIO DE JUSTICIA MINISTE
DE JUSTICIA MINISTERIO DE JU
RIO DE JUSTICIA MINISTE
TICIA MINISTERIO DE
DE JUSTICIA MI
JUSTICIA M
JUSTI

COMPENDIUM OF PRACTICAL GUIDES ON INTERNATIONAL MUTUAL LEGAL ASSISTANCE BETWEEN SPAIN AND THE UNITED STATES

General Directorate for International Legal Cooperation, Interfaith Relations, and Human Rights

Office of Justice Affairs in Washington, D.C.
Embassy of Spain in the United States

2018

GOBIERNO DE ESPAÑA
MINISTERIO DE JUSTICIA

NIPO: 051-18-022-8

Edita:
Ministerio de Justicia
Secretaría General Técnica

Maquetación:
Subdirección General de Documentación y Publicaciones

General Directorate for International Legal Cooperation, Interfaith Relations, and Human Rights

Office of Justice Affairs in Washington, D.C.

Embassy of Spain in the United States

COMPENDIUM OF PRACTICAL GUIDES ON INTERNATIONAL MUTUAL LEGAL ASSISTANCE BETWEEN SPAIN AND THE UNITED STATES

5th Revision

FOREWORD

The phenomena of intergovernmental and supranational integration have acquired a leading role in international relations these days. Technology and the merging of financial markets are key factors for this phenomenon. However, from the point of view of mutual legal assistance, the countries are pooling their Law, which remains a substantial instrument for bilateral and multilateral relations. In this global scenario, one of the most important stakeholders is the United States, with which Spain has excellent relations also on a legal level.

The present volume has its origin in a small set of single documents concerning mutual legal assistance between Spain and the United States focused on different specific subjects. Although, because of this, it retains its original title as a compendium of practical guides, it is now a fully structured and systemized work that addresses the most substantial part of the bilateral relationship between both countries on the matter.

The first initial guides, with a solely criminal content, have increased in number –and also in length and accuracy of their content– to cover eight criminal subjects and two civil ones, as a result of the work of the Office of Justice Affairs at the Embassy of Spain in Washington, D.C., which is the facilitator of our activity of mutual legal assistance with the United States.

As might be expected, their eminently practical nature remains, which is aimed at providing legal practitioners with solutions to problems or issues arising routinely in certain acts of international legal cooperation. There is a gradual incorporation into this nature of an informative outlook on the legal reality of the United States that has made advisable to publish it in an open-access format on the website of the Ministry of Justice.

It is impossible to imagine civil and criminal legal traffic today without being more or less directly related to that country, either because of the logical consequences of a globalized world or due to the penetration of the digital services offered by U.S.-based large providers into daily activities.

So far, the acceptance by judges, magistrates, prosecutors, and judicial counselors has been very positive, in line with the increased demand for its use, which no doubt has stimulated more, if possible, the work of the Office of Justice Affairs to continually update the information provided, increasing links, pieces of advice, and best practices.

Finally, and continuing the gratitude expressed in previous editions, it is essential to acknowledge the collaboration, both for the development of these guides and for the performance of its functions, received by the Ministry of Justice—as Spanish Central Authority—from the General Council of the Judiciary, the Public Prosecutor's Office, and the Department of Justice of the United States, as well as from the Embassy of Spain in Washington, D.C., and the different Spanish consular authorities in the United States.

Madrid, October 1, 2018

Ana Gallego Torres
Director General for International Legal Cooperation, Interfaith Relations, and Human Rights

CONTENTS

OPERATIONAL GUIDE

1. Introduction

The Office of Justice Affairs at the Embassy of Spain in the United States, hereinafter "the Office", is a technical resource created by the Ministry of Justice, intended to strengthen cooperation in legal matters between our country and the United States of America.

The main activity of the Office involves what is referred to as international legal assistance.

The Office follows up and supports processes of legal assistance that are underway, but can also act beforehand, collaborating with the competent judicial authorities in the identification of strategies and the preparation of future requests for assistance addressed to U.S. authorities, which helps to avoid subsequent problems.

In addition, the Office draws up practical guides and notes on questions of interest relating to the processes of international legal assistance, supports diplomatic action relating to the Justice sector that is set in motion via the Embassy and issues reports on interesting bilateral and multilateral legal questions linked to the United States, whilst constantly working to strengthen institutional relations with the various agents in the U.S. justice sector.

2. Agents

The Office forms a part of the Central Authority for International Cooperation within the Ministry of Justice.

In the exercise of its duties, the Office interacts with judges, prosecutors, court registrars, and those in charge of areas of international cooperation within the General Council of the Judiciary and the Office of the State Prosecutor General.

From the U.S. perspective, the main counterpart of the Office is the U.S. Department of Justice, where there are various divisions and services dedicated to the different aspects of judicial cooperation.

In certain cases, with the support of the corresponding services within the Embassy, work is initially undertaken with the U.S. Department of State.

3. Strategy

The main objective of the Office is to strengthen judicial cooperation with the United States, which necessarily leads to celerity and efficacy within requests for assistance.

To this end, it operates at two levels, with clearly defined objectives in each case.

The first level involves Spanish judicial authorities, wherein our objectives are as follows:

- Increasing the visibility of the service and the corresponding opportunities.
- The development, implementation and generalized use of a preventative service.

- Disseminating the cornerstones and advantages of the service and encouraging judicial authorities to make consultations prior to issuing a request for assistance.
- Assisting in the formulation of a request for assistance, with experience and materials.
- Documenting experiences and the lessons learned (guides).

- The development, implementation and generalized use of a follow-up and support service in relation to requests for assistance that have already been formulated.
  - Disseminating the cornerstones and advantages of the service and encouraging judicial authorities to employ it for support.
  - Supporting and facilitating the resolution of incidents that may arise during the processing of the request for assistance.

The second level involves U.S. judicial authorities, wherein our objectives are as follows:

- Establishing free-flowing and fruitful contact between the two parties, capable of strengthening mutual trust
- Strengthening institutional relations at different operational and policy levels
- Strengthening two-way work, forwarding consultations and requests for coordination issued by North American authorities
- Improving our understanding of the U.S. justice sector

The core values that represent the cornerstones of our strategy are as follows:

- Quality
- Trust
- Comprehensive and effective response
- Celerity
- Empathy
- Support
- Participation
- Coordination
- Security
- Interinstitutional cooperation and collaboration

4. Procedures

The Office can also act at the behest of the central authority or the various agents outlined above.

The Office can be contacted via e-mail (consejeria.washington@mjusticia.es) or by telephone (+1 202 567 2123 / +1 202 728 2345).

Judicial agents can contact the Office directly, or, where they prefer, they can do so via the Ministry's central authority, the General Council of the Judiciary or the Office of the State Prosecutor General. Whilst this is true for consultations of a general nature, it must be remembered that certain formal procedures must always be carried out via the Ministry's central authority, as this is stipulated in the respective international instruments.

The Office works in accordance with a paperless model, preferring to employ this model in all contacts and document transfers, insofar as this proves possible.

Our service is committed to providing an initial response within 24 hours of the receipt of the request. However, depending on the complexity of the question and other vicissitudes, support processes have a duration that is difficult to determine *a priori*, although there is always a commitment to act with the greatest possible celerity.

In the event of an emergency, a 24/365 telephone contact service is available: +1 202 480 0609.

5. Evaluation and accountability

The Office requires support, suggestions and observations from its interlocutors in order to meet its commitment to quality and the continuous improvement of the service. Therefore, all agents must feel free to forward the observations, suggestions and criticisms that they deem appropriate. Only in this manner can we collectively ensure a good user experience and greater celerity and efficacy within the administration of justice.

The Office draws up weekly and annual accountability reports that are made available to our superiors.

In each annual report, the strategy for action is reviewed and proposals are drawn up with a view to the subsequent period. The weekly reports are employed to monitor and evaluate the current annual strategy as it progresses.

GENERAL CHECKLIST FOR MLATs[1]

- The U.S. authorities WILL NOT process MLATs relatingt to cases entailing amounts of less than $5,000 or those relating to minor or less serious crimes, which in general involve prison terms of less than one year, except where they relate to terrorism, violent crimes, the sexual exploitation of minors, organized crime, drug trafficking or corruption. This is due to the fact that the Department of Justice is unable to deal with all of the requests it receives from different parts of the world. Where doubt exists in relation to this point, consult the Office and, where appropriate, we will forward the consultation in relation to a specific case in order to avoid subsequent problems. Given that the rules governing punishment in the United and States and Spain adhere to different methodologies (e.g., calibration, bands), determining punishment will always leave grey areas where no clear solution can be found. Therefore, we recommend that courts cite the maximum punishment that can be imposed for the crime in question, taking into consideration all concurrent circumstances when issuing the letter of request.
- All MLATs deriving from proceedings entailing crimes that were perpetrated more than five years ago must include information on the statute of limitations, outlining the regulations applicable to the case and clearly justifying that the crime or crimes are not subject to a statute of limitations.
- MLATs grounded exclusively on denounced acts or the existence of a lawsuit, without subsequent investigation, generally give rise to processing problems.
- Where MLATs are issued to obtain statements, the list of questions must always be provided. Requests phrased in the following manner are inadmissible: “s/he is to be interrogated in relation to the acts outlined in the complaint, or the lawsuit, or in relation to the documents provided”.
- MLATs deriving from proceedings relating to defamation, slander and certain types of threats that are not particularly serious, and in general, requests MLATs relating to the expression of opinions or the defense of ideologies will not normally reach a successful outcome. This is due to the restrictions imposed by the First Amendment to the U.S. Constitution (freedom of speech) and its jurisprudential interpretation. Before issuing any MLAT relating to crimes of this nature, it is extremely important to consult with the Office.

It is vital that the issuing authority clearly and meticulously outlines the facts, providing all details that prove necessary in each case in accordance with the applicable U.S. legal standards. It is also important to indicate the source or evidence on which the conclusions drawn are based, and in the majority of cases it is recommended that the evidence be provided, particularly the most significant evidence, in the form of adjoined documents. Where this course is taken, avoid excessive content and attempt to provide content clearly and in an easily manageable and comprehensible manner.

[1] The terms “letters of request” or “letter of request” have been substituted in this new edition of the Compendium by the terms that are more commonly used in the U.S. when a Mutual Legal Assistance Treaty is in force: MLATs or MLAT. When such a treaty is nonexistent the term Letter Rogatory is the one to be used, but this is not the case between Spain and the United States.

- In general, MLATs should cite the criminal precepts applicable to the case and it is also important that they be transcribed in full.
- Pay particular attention to the accuracy of the first and surnames of people, place names, bank accounts, e-mail accounts, addresses and other similar details. The number of typographical errors associated with such details is normally fairly high, giving rise to problems and the ensuing loss of time.
- To correctly identify individuals residing in the United States, the following details should be provided:
  - Full Name.
  - Date of birth.
  - Place of birth.
  - Social security number (non-resident foreigners usually also have one), or, in the case of foreigners and, in particular, foreigners who are non-residents legally staying in the U.S., passport number or some other form of I.D. not issued by the U.S. authorities.
  - In the case of women, the maiden and married name should be provided, where applicable.
  - Presumed geographical location.

PRACTICAL GUIDE TO EXTRADITION PROCEDURES WITH THE UNITED STATES

A PRACTICAL DOCUMENT FOR THE FORMULATION OF REQUESTS FOR EXTRADITION ADDRESSED TO THE UNITED STATES AUTHORITIES

1. Introduction

This document has a highly practical objective. It is not prescriptive and is issued with full respect for the principle of the judicial independence.

It assumes prior acquaintance with the applicable legal texts and the theoretical and dogmatic grounds for extradition. Furthermore, we recommend consulting the other subject matter featured in the *Vade Mecum of International Judicial Assistance*.

Notwithstanding the guidelines herein provided, the reader should bear in mind that both the Ministry of the Interior and the Ministry of Justice of Spain have Offices at the Embassy of Spain in the United States of America.

Indeed, one of the roles of the Office of Justice Affairs in Washington is to provide the necessary support, when called upon to do so, for the formulation of requests for extradition, in order to thereby ensure the best results. The Office of the Ministry of the Interior also provides any necessary support within the confines of its competencies.

The Office of Justice Affairs in Washington can be contacted as follows:

- E-mail: consejeria.washington@mjusticia.es
- Telephone: +1 202 567 2123

2. Fundamental aspects to bear in mind when drawing up a request for extradition and the corresponding extradition package

- Carefully complete the form provided in the *Vade Mecum of International Judicial Assistance*. Ensure that you are using the version of the form specifically for the U.S. It is highly recommended that you use the form, as it not only allows you to forward information in a more ordered fashion, but also serves as a checklist for the issuing authority.
- Bear in mind that within any extradition process, the correct identification of the individual to be extradited is a key element for the success of the entire procedure. In the U.S., people do not possess two surnames as they do in Spain, whereby, if only the first surname is considered, as sometimes occurs, the probabilities of coincidence, even with the date of birth, are much higher than in our country. As a result, it is always recommended that photographs of good quality be sent, provided by the judicial police, which, where possible, should be presented within a document affirming that the photographs correspond to the individual to be extradited. Moreover, it is also very important to attach a fingerprint file or any other element or detail enabling identification that is deemed necessary.
- All extradition requests are to be accompanied by the following: 1) the judicial ruling ordering the request, 2) the warrant for the search and arrest of the accused, 3) an indictment; on this point, close attention should be paid to the following:

- The European Arrest Warrant, where one exists, does not have to be sent to the U.S. authorities. Where a European Arrest Warrant is sent in isolation, the request will be rejected or will require supplementation, with the ensuing loss of time.
- In certain procedures, more than one ruling to search for and capture or arrest the accused may exist. In this case, only the currently active ruling pertaining to the request for extradition to be processed is to be sent. It is better not to include any other rulings of this nature as this may lead to confusion.

- The documentation that should accompany the request must be truly essential, in accordance with the applicable legal texts. Excessive documentation can prove just as pernicious as a lack of documentation. A number of practical recommendations can be offered in this regard, as follows:
  - Do not systematically photocopy all of the proceedings. Only those details that are truly necessary to support the extradition should be forwarded with the request.
  - Ensure that all photocopies of proceedings are of good quality and can be easily read.
  - Draw up a table of contents for the entire dossier that is to be forwarded to the Ministry of Justice, with the pages correctly numbered.
  - If the dossier includes graphic files, such as photographs or maps, try to ensure that the photocopies are of the highest quality. If there are still doubts with regards to legibility, advise of this via an informal note (e-mail) addressed to the Office of the Ministry in Washington D.C.: this Office can subsequently forward the graphics with the necessary quality as supplementary documentation. To this end, bear in mind that the high quality files to be resent from Washington should be included as attachments to the e-mail in question.
  - If transcripts of telephone surveillance exist, include only those extracts that are required to support the request for extradition.
- All documentation must be duly translated into English.

3. Aspects to consider according to the type of extradition requested

Extradition can be requested on the basis of a conviction that partially or entirely remains to be served, or on the basis of circumstantial evidence pointing to a criminal act, with a view to having the extradited individual stand trial.

In each case, a number of practical aspects must be carefully considered.

Practical experience has shown that, in each case, the formal declaration that the crimes or the sanction, as applicable, are not subject to a statute of limitation is often forgotten.

3.1 Extradition based on a conviction

Here, the essential element is the certified copy of the judgment.

The document must be legible throughout, whereby the photocopy must be of the highest quality. The translation must be as precise and correct as possible.

Moreover, certification must be provided, affirming that the serving of the sentence remains pending, either partially or in its entirety.

Simply forwarding the judgment does not enable precise ascertainment of the stage of its enforcement.

3.2 Extradition based on circumstantial evidence pointing to a criminal act

This is a sensitive issue, as it requires comprehensive accreditation of the existence of reasonable circumstantial evidence before the U.S. authorities. This is what U.S. legislation refers to as "probable cause".

In the United States, as is the case in Spain, a distinction is made between direct evidence and circumstantial evidence.

For direct evidence, it is highly advisable to draw up a document that should be entitled REPORT ON PROBABLE CAUSE. It may well be an explanatory document based on the court decision, or even the court decision itself, providing that its structure is in keeping with the example provided below, and in either case it is essential that each of the facts on which the request for extradition is grounded are clearly linked to one or more of the documents or records that are adjoined.

In other words, it is essential, employing language that is as plain and clear as possible, to explain, in the manner of a report, the specific reasons providing grounds for the criminal responsibility of the individual whose extradition is requested, outlining, one by one, each piece of "evidence" held against this individual.

When drafting this report, it is advisable to:

- Use short sentences, avoiding subordinate clauses where possible.
- Avoid excessively technical or flowery language which could cause difficulties when translating into English.
- Avoid an excess of information. The U.S. authorities are extremely grateful when no more information is included than is strictly necessary. Experience indicates that doing otherwise can lead to unwanted delays.
- Make an effort to explain step by step. Take into account that the report will be read by someone whose legal frameworks and categories differ significantly from ours.
- If in doubt, please consult the Office.

Moreover, the evidence or "proof" in question must be provided and prove easily identifiable and legible.

Under no circumstances should you forward records that are not essential, in terms of supporting the request for extradition. Excessive documentation not only increases the efforts required by the requesting authority, but also generates doubt amongst U.S. authorities that leads to delay in their resolution.

Finally, if the court considers that the drafting of the report in question may involve a certain "contamination" and become grounds for a challenge, the United States authorities have no objection to the document being drafted and signed by the judicial administration clerk of the court[2] or by the Prosecutor's Office.

- For example:

  Between 02:30 and 03:15 on 7 January 2022, the accused, ABC, born on XXX of DD/MM/YY, with no prior criminal record, colluded with other individuals who we have been unable to identify and, acting with a view to obtaining illicit economic benefit and having observed VVV filling up his vehicle in the XXX petrol station at Kilometer 1 on National Road II in the municipality of XXX, he approached him in his vehicle, a Peugeot 205, with registration plate XXX and, when he reached him he offered him hashish at a good price; however, when Mr. VVV approached him, he suddenly, without saying anything, punched him in the face several times and threw him to the ground. Next, the accused, with the aid of the other occupant of the vehicle, taking advantage of the fall, removed the amount of 860 euros in cash from Mr. VVV's jacket pocket along with a credit card pertaining to XXX, whereupon they both tried to flee. At this point a struggle commenced with the victim, who, from the ground, attempted to prevent the flight of the unidentified individual by holding on to his foot. When the accused became aware of this, he turned towards VVV and with one hand grabbed his throat whilst covering his mouth and nose with the other hand, maintaining this action until VVV stopped moving, causing his death through asphyxiation due to obstruction of the respiratory orifices...

  The events outlined above, on which the indictment of ABC is based, gave rise to the following proceedings:

  - Identification of the accused: personal details, photographs and fingerprints of the accused are included in attached document 1 of the dossier.
  - The arrival of the accused in the aforementioned vehicle, the initial conversation with VVV and the subsequent punches: were brought to light via the testimony of witness TTT, provided on DD/MM/YY, included as attached document 2 within the dossier. This act was also confirmed by the accused in the statement made before the judge on DD/MM/YY, included as attached document 3.
  - The subsequent act of obstructing the respiratory orifices of VVV that caused his death: was confirmed by the testimony of the aforementioned individual, TTT (adjoined document 2), and by the testimony of TTT2, included as adjoined document 4.
  - The cause of death: was confirmed by the report issued by the forensic scientist FFF, included as attached document 5. Moreover, the hospital report, included as attached document 6, affirms that Mr. VVV was dead on arrival.

[2] This is a question where further consideration might be advisable with a view to determining the best options and strategies.

In the case of circumstantial evidence, it is advisable that the judge formulate each item of evidence in a clear and precise manner, indicating its value as evidence and providing grounds for the conclusion reached on the basis of the evidence.

Obviously, when dealing with evidence of this nature, descriptive precision and the list of procedures must be as comprehensive as possible.

4. Arrest prior to extradition

Here, we are basically referring to remand in police custody, due to urgency, which is requested prior to issuing the extradition proceedings, although clearly the request for police custody can also be requested within the extradition dossier.

If the U.S. authorities are to implement this measure, clear and well-grounded urgency must exist. Where the matter is not urgent, it is better to simply request extradition.

Spanish authorities must bear in mind the following:

- The United States cannot execute an arrest based solely on an Interpol red notice, in contrast to what occurs in Spain and a large number of other countries. To execute an arrest based on a red notice, a warrant must be obtained, which requires procedural activity.
- Given what has been outlined in point A), where the matter is urgent and remand in custody is to be requested with a view to extradition, a minimum time is required (approximately 24 hours). Therefore, in such cases the Spanish authorities must act as quickly as possible, contacting the Office in order to determine the best strategy to be followed.
- Cases of police custody prior to extradition commonly occur where there are stopovers in airports. In such cases Interpol detects a given movement and becomes aware that the individual sought will make a brief stopover in a U.S. airport. However, if the destination is a country within the European Union, it is better to wait until the individual has landed in the E.U. before making the arrest, as authorization for the arrest will prove much easier and it is likely that more time will be available. If the destination country does not lie within the European Union, it is necessary to act very quickly to ensure the arrest is made.
- In any situation involving remand in police custody due to urgency, the requesting authority must provide grounds for the urgency and, where possible, indicate or provide evidence justifying the urgency.

Finally, it is not recommended that extradition packages include a request for remand in police custody by default, as is usually the case in practice. Such a request should only be included if it is truly justified and sufficient grounds must also be provided.

5. Subsequent provision of information, documents or clarifications

If, for any reason, a problem is detected, doubts arise or a shortcoming is identified in relation to the initial dossier, it may be supplemented via the provision of documentation or additional information.

In such cases, the transfer process is much simpler, as the U.S. authorities even allow for such information to be sent via e-mail. However, documents or information sent must be identified as pertaining to, or bear the official stamp of the Spanish Ministry of Justice and must be translated.

Where such situations arise, it is strongly recommended that you contact the Ministry or the Office in Washington, where they will be pleased to do everything possible to adequately support the process, in close coordination with the U.S. authorities.

ANNEX I: EXTRADITION REQUEST MODEL

EXTRADITION REQUEST[3]

ISSUING AUTHORITY

Name and post:

Station:

Contact information:

Tel/Fax:
E-mail:
Postal address:

AUTHORITY ADDRESSED

Name and post:

U.S. CENTRAL AUTHORITY DEPARTMENT OF JUSTICE WASHINGTON, D.C.

Station:

Office of International Affair

IDENTIFICATION OF THE CRIMINAL PROCEEDINGS

Proceedings:

Court:

[3] English translations of both the form and the accompanying documents must always be provided.

I) ACTS UNDER INVESTIGATIONS. BRIEF REPORT ISSUED BY THE AUTHORITY REQUESTING EXTRADITION[4]

II) PARTIES WITHIN THE PROCEEDINGS

Individual under investigation/defendant:
Prosecutor[5]:
Victim/s[6]:

(III) EXTRADITION REQUEST

Via this document the extradition of the following individual is requested[7]:
Purpose of the extradition[8]:
In relation to the following crime/s[9]:
Physical description of the individual sought: Fingerprints and photographs are adjoined. They are provided in the appropriate format to be employed by the authority addressed. Further identification details can be provided where necessary.

[4] In this field a clear and concise outline is to be provided, with references to time and place, in relation to the acts under investigation within the proceedings, highlighting the relationship between these acts and the individual sought and the motives for which he or she is under investigation (prima facie evidence of wrongdoing/probable cause). It is recommended that the facts outlined in the ruling for extradition, imprisonment, prosecution or a similar resolution, are not merely transcribed, but rather that the opportunity is taken to provide a summary that is as clear as possible to facilitate understanding on the part of the authority addressed. It is important to use clear wording, with short sentences, avoiding subordinate clauses insofar as possible. Bear in mind that this report is of vital importance, that it must be translated and that it must be thoroughly understood. In certain cases, it might be appropriate to provide a supplementary report on probable cause. Consult the Guides and speak with the Office in this regard.

[5] Personal details are to be omitted where unnecessary

[6] Personal details are to be omitted where unnecessary

[7] In this field all details held enabling identification of the individual sought are to be provided.

[8] In this field whether the extradition is sought to bring proceedings against the individual or to have him or her serve a sentence is to be specified. In the case of the latter, there must be express indication that the full sentence was not served along with the remainder of the sanction that is still to be served.

[9] In this field the legal classification of the act imputed to the individual sought is to be recorded.

IV) TREATY ON WHICH THE REQUEST IS GROUNDED OR OFFER OF RECIPROCITY

–Agreement on Extradition between the United States of America and the European Union signed June 25, 2003.

–Instrument envisaged in article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed June 25, 2003, for the application of the Extradition Treaty between Spain and the United States of 29 May 1970 and the Supplementary Extradition Treaties of 25 January 1975, 9 February 1988 and 12 March 1996, approved *ad referendum* in Madrid on 17 December 2004.

V) APPLICABLE REGULATIONS[10]

1) Classification

2) Involvement

3) Punishment

4) Prescription[11]

VI) STATEMENT IN RELATION TO THE PRESCRIPTION OF THE CRIMINAL ACTION OR SENTENCE[12]

VII) FURTHER CLARIFICATION OR EVIDENCE[13]

[10] This field is to be employed to transcribe the substantive regulations classifying the crimes under investigation, the regulations governing the prescription of the criminal action or sanction, as applicable, and the regulations establishing the competence of the requesting authority to hear the case. The currently applicable legal framework requires the applicable precepts to be forwarded in full along with their translations, which are to be adjoined to the request.

[11] Where the extradition relates to the serving of a sentence, the regulations applicable to the statute of limitations are to be indicated and provided.

[12] This field is to be employed to expressly state that the criminal action or the sentence has not prescribed, providing a brief explanation of the grounds to this effect.

[13] This field is to be employed to include any additional information deemed useful, such as the procedural stages that have been completed to date or the specific formal requirements of the applicable treaty that have not been expressed elsewhere in the request. Evidence and exhibits can also be provided where deemed appropriate to support certain aspects of the request. Where they are provided, in addition to listing them in the corresponding appendix, in accordance with section VIII, it is advisable to include a brief description here and outline the reasons why they have been provided.

VIII) ADJOINED DOCUMENTS[14]

Appendix A[15]:
Appendix B[16]:
Appendix C[17]:
Appendix D[18]:
Appendix E[19]:
Additional appendices[20]:

IX) DETAILS OF THE RULING ORDERING THE REQUEST

Extradition ruling:
International arrest warrant:

X) SUPPORT IN THE U.S. FOR THE PROCESSING OF THE EXTRADITION

In the event of any problems relating to the processing of the extradition, the U.S. Central Authority can contact the Office of the Ministry of Justice in the Spanish Embassy in Washington, D.C., which forms a part of the Spanish Central Authority.

PLACE AND DATE:

[14] Copies that are adjoined must be duly certified.

[15] This appendix is to be used to adjoin a certified copy of the ruling ordering the request for the extradition of the individual sought.

[16] This appendix is to be used to adjoin a certified copy of the ruling ordering the arrest or imprisonment of the individual sought.

[17] This appendix is to be used to adjoin the texts of all applicable precepts.

[18] This appendix is to be used to adjoin the separate probable cause report, where deemed necessary.

[19] This appendix is to be used to adjoin high-quality photographs and the fingerprints of the individual sought.

[20] The remaining appendices are to be employed to adjoin copies of the evidence deemed important that the authority wishes to provide.

ANNEX II: MODEL FOR THE RULING TO REQUEST EXTRADITION (DEFENDANTS)[21]

MODEL SERVING AS A GUIDELINE FOR THE RULING TO REQUEST THE EXTRADITION OF INDIVIDUALS UNDER INVESTIGATION OR DEFENDANTS

Preliminary advice

As general advice, to promote coordination between the judge delivering the ruling, the Judicial Administration Clerk and the body executing the ruling, and to enable the Clerk to issue the extradition form without subsequent consultation with the judge, the ruling must include all elements that later appear in the form or in the extradition package.

Likewise, prior to the ruling, it is advisable to have the case well prepared, in formal terms and, insofar as specifying the charge is concerned, this preparatory or preliminary task must encompass the ruling as closely as possible. Where this course is followed, the judge will not have to intervene in subsequent phases (the form, creation of the package...) and the likelihood that clarification or supplementation will be required at later date is reduced.

Within the background to the facts section, notwithstanding its variable and open nature, it is suggested that the main details and milestones within the procedure be listed:

- Identify the individual under investigation.
- Indicate the date on which the proceedings began, referencing the resolution to open proceedings, in view of its importance in terms of prescription.
- Outline any rulings ordering arrest, imprisonment, EAWs, prosecution, an appeal hearing or the opening of a trial that may have been issued. In the event that a ruling to convene an appeal hearing was issued, the facts therein listed should be transcribed, save where the facts subsequently presented in the extradition ruling are more detailed. Where a ruling ordering the opening of a trial has been issued, copy the facts of the first classification within the written accusation, at least, if there is only one: in the event that more than one exists, then try to incorporate them into the legal grounds, as when the stage is reached, it does not fall to the judge to outline the facts, rather they are established by the prosecuting parties; however, if these parties have been too succinct, the information may be supplemented, respecting the ruling to convene an appeal hearing.
- In any event, it is advisable for the judge to draw up a detailed outline of the facts, either in the background to the facts or in the legal grounds, for subsequent use, by simply copying and pasting into the form and appended report– formal grounds– and because, in the end, this is the material factual grounding of the ruling itself.
- Make reference to the procedural phase of hearing the prosecutor and, where applicable, the prosecuting parties and their request for extradition.

[21] This model was designed by Judge Alfonso Pérez Puerto and we are grateful to him for his collaboration.

- It is not inordinate to indicate at this stage why imprisonment was ordered, that is, to take a statement, etc., even though this will also be outlined in the legal grounds and the operative provisions.
- In the event that the extradition is preceded by remand in police custody, point this out.

In the legal grounds, and notwithstanding the unique features of each case, the following should be borne in mind:

- It is advisable to make reference to the elements of discretion, providing arguments. In this manner, it can be made clear why it is held that there are grounds to not demur extradition, if there is a possibility that the authority addressed might raise objections, e.g., demurring on the basis of nationality; in the event of any possibility of discretion on the part of the authority addressed, provide grounds in support of the measure, addressing such elements of discretion.
- With regards to the affirmation that the crime has not prescribed, rigorous analysis must be carried out in accordance with the law and Spanish jurisprudence, as the Supreme Court calculates the degree of execution and the level of involvement. Any acts that have interrupted the period during which prescription is calculated should be included in the legal grounds with clear indication of the date.
- If there is a possibility of obtaining evidence of the crime in the possession of the individual under investigation, grounds can be provided here for the evidence to be handed over; however, in all likelihood this will not preclude the need for an international request.

.....

COURT OF XXXX

Proceedings: xxxx/xxxx-x

EXTRADITION RULING:

Magistrate/Judge: Xxxxx Xxxx Xxxx

Place and date: Xxxxxx x ddmmaaaa

BACKGROUND TO THE FACTS

Provide information on the background to the facts, as appropriate.

One.

Two.

_____
_____
_____
_____

LEGAL GROUNDS

One

1. Article 824 et seq. of the Law of Criminal Procedure regulates the active extradition procedure. Article 824 refers to the request on the part of the State Prosecutor's Office, which applies here.

2. Article 825 of the Law of Criminal Procedure stipulates that, for extradition to be requested or proposed, a ruling for imprisonment with grounds must have been issued, or a final judgment against the individuals in question, and the former applies in the present case, as ruling xxxx/xxxx-x was handed down.

3. In accordance with the stipulations of article 826 of the Law of Criminal Procedure, extradition can be requested or proposed in relation to the following individuals: 1) For Spanish nationals who have committed a crime in Spain and fled to a foreign country. 2. For Spanish nationals who, in a foreign country, have threatened the exterior security of the State, and then fled to a different country from the one in which they committed the crime. 3) Foreigners who should be tried in Spain but have fled to a country that is not their own.

In the present case, the circumstances xxxxxxxx of this precept apply, insofar as _____
_____
_____
_____

4. Furthermore, article 827. 1 of the Law of Criminal Procedure stipulates that an extradition request is applicable under the following circumstances: 1. In those cases determined by the treaties currently in force with the State in which the individual sought is to be found. 2. Where no treaty exists, requests for extradition will apply in those cases wherein extradition is apposite in accordance with the written or customary law in force in the nation to which the extradition request is to be addressed. 3. Where neither of the two aforementioned cases are relevant, requests for extradition will apply where extradition is apposite in accordance with the principle of reciprocity.

Two

a) In accordance with the stipulations of article 828 and article 829 of the Law of Criminal Procedure, the judge hearing the case has competence to request extradition, to be ordered via a ruling with grounds, from the point at which it proves apposite, in keeping with the provisions of article 826 and 827 of the Law of Criminal Procedure, respecting the formal requisites of article 832 and 833 of the Law of Criminal Procedure and the applicable treaties.

b) In accordance with article 830 of the Law of Criminal Procedure, this ruling is subject to appeal.

c) In accordance with the stipulations of article 831 of the Law of Criminal Procedure, in the present case it proceeds to send a petition to the Ministry of Justice.

d) (i) In the present case, given that extradition is requested from the United States of America, the following instruments are applicable:

1. The Agreement on Extradition between the United States of America and the European Union signed on June 25, 2003 and the instrument envisaged in article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed on June 25, 2003 for the application of the Extradition Treaty between Spain and the United States of May 29, 1970 and the Supplementary Extradition Treaties of January 25, 1975, February 9, 1988, and March 12, 1996 (Official State Gazette no. 22, January 26, 2010), (Consolidated texts of the provisions of the EU-U.S. Extradition agreement that will apply upon the entry into force of this instrument).

2. Bilateral Extradition Treaty between Spain and the United States of May 29, 1970 and the Supplementary Extradition Treaty of January 25, 1975, Second Supplementary Extradition Treaty of February 9, 1988, and Third Supplementary Extradition Treaty of March 12, 1996 (hereinafter collectively referred to as the "Bilateral Extradition Treaty").

(ii) In accordance with the aforementioned consolidated text, extradition for the purpose of trial (article I) is apposite where the sanction entails more than 1 year of imprisonment (article II.A), even if the crime is not classified in the same category or using the same terminology in the two countries (article II.C), the requesting party having stated that the crime has not prescribed, even if it may be subject to a statute of limitation in accordance with the legislation of the party addressed (article II. bis), demurring of the basis of nationality is not applicable (article IV), the proceedings do not involve political, military or other types of crime excluded in article V, and particularly in view of the fact that we are dealing with a crime of murder or homicide included in article V B.(3) of the consolidated text, exclusion on the basis of age (article VI) is not applicable, the restriction envisaged in article VII is not applicable as the death penalty is no envisaged and, finally, the formal requisites and requirement of translation, as outlined in article X and article XI, have been fulfilled.

Three

In these proceedings, all legal requisites are in place, as outlined above and as we have indicated, to enable us to propose to the Government of Spain that it call on the corresponding U.S. authorities to have the defendant who is sought, identified above, extradited.

1. The purpose of the procedure and the facts of the case are as follows:

A) Legal precepts:

a) Classification of the crime and punishment:

The text of the Penal Code in force when the events occurred (October 5, 1998), in accordance with the original wording provided via Organic Law 10/1995, November 23,

concerning the Penal Code, which entered into force on May 24, 1996 (Official State Gazette no. 281, November 24, 1995).

Article xxxx of the Penal Code:

Content of the article

Article xxxx of the Penal Code:

Content of the article

b) Involvement:

Content of the article

c) Prescription of the crime:

Content of the article

d) Jurisdiction: international competence in criminal matters of Spanish courts:

Article 23 of Organic Law 6/1985 of July 1, on the Judiciary (Official State Gazette no. 157, July 2, 1985).

"1. Within criminal law, the hearing of proceedings relating to crimes and misdemeanors perpetrated on Spanish territory or on board Spanish vessels or aircraft falls within Spanish jurisdiction, subject to the provisions of international treaties to which Spain is a signatory."

2. The prima facie evidence of wrongdoing (probable cause), resulting from the measures implemented within these proceedings, held against the individual under investigation is as follows:

_____

_____

_____

In view of the matters outlined above and the grounds provided, having considered the cited legal precepts and concordant precepts,

OPERATIVE PROVISIONS

I. I petition the Government of the Kingdom of Spain, via the Ministry of Justice, to request, through diplomatic channels, from the corresponding Authorities in the United States of America, the EXTRADITION to Spain of the individual sought, Xxxxx Xxxx Xxxx, who is currently to be found in Xxxxxxx, Xxxx XX, for the following purpose:

REMAND INTO CUSTODY: We call for the individual under investigation to be arrested by the Authorities of the aforementioned country as soon as possible.

A) Having transferred the individual to be extradited to Spain, he is to be brought before this court in order to continue these criminal proceedings and, more specifically, for the following purposes:

a) To take a preliminary statement from the individual under investigation and defendant via questioning, having previously informed him of his rights.

b) To order him personally to provide security to cover pecuniary liabilities.

c) To order him to assign a lawyer and representative before the courts, who he may freely choose, notwithstanding any appointments made by the court to date.

d) To escort him to prison, which has already been ordered, notwithstanding that he may subsequently be heard in relation to his personal situation as a result of the proceedings and a resolution issued in this regard.

e) To hear him and issue a ruling in relation to the conversion of the proceedings into a Jury Trial.

II. I AFFIRM THAT THE CRIME and the CRIMINAL ACTION have not prescribed in these proceedings brought against the individual under investigation in relation to the acts and crimes outlined in the ruling and the subsequent extradition petition.

III. Issue a petition in due form to the Ministry of Justice, via legal channels, adjoining the following documentation:

—A cover letter or heading

(Along with an acknowledgement of receipt form that can be separated)

Include the full details of this court in both of these documents (address, contact details– telephone number, fax number, e-mail–, etc.)

—The completed form currently provided in the *Vade Mecum of International Judicial Assistance*, adapted to the nation in question and the applicable treaties; and the following appendices:

—A list of documents with reference to adjoined documents and their page numbers or appendix number within the documentation as a whole.

A) Identifying details:

a) Identifying and personal details of the individual under investigation (outlined in the first point within the background to the facts)

b) Photographs of the individual in question (of the highest possible quality)

c) Fingerprints of the individual in question (of the highest possible quality) and any other details relating to physical description

d) Comparative facial analysis (where such analysis exists and proves necessary)

B) Certified copies of the following elements within the proceedings:

1) The ruling ordering extradition (this resolution)

2) The report issued by the State Prosecutor's Office in relation to the petition to request extradition

3) The ruling ordering remand into custody of the individual sought, dated ddmmaaaaaa

4) (a) The national and international arrest warrant with an extradition commitment; and (b) The European Arrest Warrant (EAW) with international validity

5) The ruling to prosecute this individual, dated ddmmaaaaaa (where applicable)

C) Certification of the declaration that the criminal action has not prescribed in accordance with Spanish legislation.

(This declaration is included in this resolution, an account is provided in the preceding legal ground xxxxx and reiterated in point II of the operative provisions of this ruling).

D) Certification issued by the Judicial Administration Clerk of this Court in relation to the legal provisions applicable to the case, including the precepts that classify the crime and the punishment:

a) Precepts of the Penal Code passed via Organic Law 10/1993 of November 23, in effect when the events took place, relating to the crime, punishment and involvement, transcribed in legal ground Three 2.B. a) and b) above.

b) Article 131 et seq. of the Penal Code, regulating prescription, transcribed in legal ground Three 2.B. c) above.

c) Article 23.1 of the Organic Law on the Judiciary, transcribed in legal ground Three B. d) above.

When issuing this documentation, pay close attention to the following:

a) Indicate in the request, in order to inform the individual under investigation, that in exercise of his rights he may lodge any motions envisaged in U.S. legislation, along with a petition for amendment or for appeal, against the rulings to prosecute and the rulings ordering imprisonment and extradition, which will be outlined at the bottom of the rulings, within the deadline and in the manner indicated, with the assistance of the lawyer and representative before the courts assigned to him *sua sponte*, who will also be identified in the request.

b) Adjoin the corresponding translations into English.

c) Ensure that all photocopies presented are of the highest quality and easily read.

d) All documentation is to be adjoined or forwarded in electronic format where possible.

When notifying the State Prosecutor's Office and, where applicable, the appearing parties, of this ruling, inform them that it is not final and is subject to a petition for amendment, to be lodged in writing, bearing the lawyer's signature, within a period of three working days before this court, and that subsidiarily an appeal may be lodged before the Provincial Court of Xxxxx, which will not entail the suspension of the proceedings.

Inform the victims or injured parties where applicable, even where they have not appeared as parties.

Make a record of this ruling in the computer application for procedural management and, where relevant, in the SIRAJ Registry of Precautionary Measures.

Thus it is ordered and signed by the Magistrate Judge of the Court of Xxxxx, on the date indicated in the heading.

ANNEX III: MODEL FOR THE RULING TO REQUEST EXTRADITION (SENTENCED PERSONS)

MODEL SERVING AS A GUIDELINE FOR THE RULING TO REQUEST THE EXTRADITION OF INDIVIDUALS TO HAVE THEM SERVE A SENTENCE[22]

Preliminary advice

As general advice, to promote coordination between the judge delivering the ruling, the judicial administration clerk and the body executing the ruling, and to enable the clerk to issue the extradition form without subsequent consultation with the judge, the ruling must include all elements that later appear in the form or in the extradition package.

Likewise, prior to the ruling, it is advisable to have the case well prepared, in formal terms, and insofar as specifying the charge is concerned, this preparatory or preliminary task must encompass the ruling as closely as possible. Where this course is followed, the judge will not have to intervene in subsequent phases (the form, creation of the package...) and the likelihood that clarification or supplementation will be required at later date is reduced.

...

COURT OF XXXX

Proceedings: xxxx/xxxx-x

EXTRADITION RULING:

Magistrate/Judge: Xxxxx Xxxx Xxxx

Place and date: Xxxxxx x ddmmaaaa

BACKGROUND TO THE FACTS

Provide information on the background to the facts, as appropriate.

One.

_____
_____
_____
_____

Two.

_____
_____
_____
_____

[22] This model was designed by Judge Alfonso Pérez Puerto and we are grateful to him for his collaboration.

LEGAL GROUNDS

One

1. Article 824 *et seq.* of the Law of Criminal Procedure regulates the active extradition procedure. Article 824 refers to the request on the part of the prosecutor in relation to sentenced persons, which applies here.

2. Article 825 of the Law of Criminal Procedure stipulates that for extradition to be requested or proposed, a ruling for imprisonment with grounds must have been issued, or a final judgment against the individuals in question, and the latter applies in the present case, as ruling xxxx/xxxx-x was handed down, which is final.

3. In accordance with the stipulations of article 826 of the Law of Criminal Procedure, extradition can be requested or proposed in relation to the following individuals: 1) For Spanish nationals who have committed a crime in Spain and fled to a foreign country. 2. For Spanish nationals who, in a foreign country, have threatened the exterior security of the State, and then fled to a different country from the one in which they committed the crime. 3) Foreigners who should be tried in Spain but have fled to a country that is not their own.

In the present case, points xxxxxx of this precept apply, insofar as _____
_____
_____
_____
_____

4. Furthermore, article 827. 1 of the Law of Criminal Procedure stipulates that an extradition request is applicable under the following circumstances: 1. In those cases determined by the Treaties currently in force with the State in which the individual sought is to be found. 2. Where no Treaty exists, requests for extradition will apply in those cases wherein extradition is apposite in accordance with the written or customary law in force in the nation to which the extradition request is to be addressed. 3. Where neither of the two aforementioned cases are relevant, requests for extradition will apply where extradition is apposite in accordance with the principle of reciprocity.

Two

a) In accordance with the stipulations of article 828 and article 829 of the Law of Criminal Procedure, the Judge hearing the case has competence to request extradition, to be ordered via a ruling with grounds, from the point at which it proves apposite, in keeping with the provisions of article 826 and 827 of the Law of Criminal Procedure, respecting the formal requisites of article 832 and 833 of the Law of Criminal Procedure and the applicable treaties.

b) In accordance with article 830 of the Law of Criminal Procedure, this ruling is subject to appeal.

c) In accordance with the stipulations of article 831 of the Law of Criminal Procedure, in the present case it proceeds to send a petition to the Ministry of Justice.

d) (i) In the present case, given that extradition is requested from the United States of America, the following instruments are applicable:

1. The Agreement on Extradition between the United States of America and the European Union signed on June 25, 2003 and the instrument envisaged in article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed on June 25, 2003 for the application of the Extradition Treaty between Spain and the United States of May 29, 1970 and the Supplementary Extradition Treaties of January 25, 1975, February 9, 1988, and March 12, 1996 (Official State Gazette no. 22, January 26, 2010), (Consolidated texts of the provisions of the EU-U.S. Extradition agreement that will apply upon the entry into force of this instrument).

2. Bilateral Extradition Treaty between Spain and the United States of May 29, 1970 and the Supplementary Extradition Treaty of January 25, 1975, Second Supplementary Extradition Treaty of February 9, 1988 and Third Supplementary Extradition Treaty of March 12, 1996 (hereinafter collectively referred to as the "Bilateral Extradition Treaty").

(ii) In accordance with the aforementioned consolidated text, extradition for the purpose of serving a sentence (article I) is apposite where the sanction entails more than four months of imprisonment (article II.A in fine), even if the crime is not classified in the same category or using the same terminology in the two countries (article II.C), the requesting party having stated that the crime has not prescribed, even if it may be subject to a statute of limitation in accordance with the legislation of the party addressed (article II. bis), demurring of the basis of nationality is not applicable (article IV), the proceedings do not involve political, military or other types of crime excluded in article V, and, finally, the formal requisites and requirement of translation, as outlined in article X and article XI, have been fulfilled.

Three

In these proceedings, all legal requisites are in place, as outlined above and as we have indicated, to enable us to propose to the Government of Spain that it call on the corresponding U.S. authorities to have the sentenced person who is sought, identified above, extradited.

1. The purpose of the enforcement process is as follows:

A) Legal precepts:

a) Classification of the crime and punishment:

The text of the Penal Code, in force when the events occurred (October 5, 1998), in accordance with the original wording provided via Organic Law 10/1995, of November 23, concerning the Penal Code, which entered into force on May 24, 1996 (Official State Gazette no. 281, November 24, 1995).

Article xxxx of the Penal Code:

Content of the article

Article xxxx of the Penal Code:

Content of the article

b) Involvement:

Content of the article

c) Prescription of the sentence:

Content of the article

d) Jurisdiction: international competence in criminal matters of Spanish courts:

Article 23 of Organic Law 6/1985, July 1, on the Judiciary (Official State Gazette no. 157, July 2, 1985).

"1. Within criminal law, the hearing of proceedings relating to crimes and misdemeanors perpetrated on Spanish territory or on board Spanish vessels or aircraft falls within Spanish jurisdiction, subject to the provisions of international treaties to which Spain is a signatory."

2. The sentence or sentences that were imposed, which is/are final and not subject to prescription, is/are as follows: _____ _____ _____ _____ _____ _____

(Provide a detailed outline of the sentence, conviction...)

3. The competence of the judicial body issuing the request to enforce the sentence imposed derives from the following: (Xxxxxx regulatory reference)

In view of the matters outlined above and the grounds provided, having considered the cited legal precepts and concordant precepts,

OPERATIVE PROVISIONS

I. I petition the Government of the Kingdom of Spain, via the Ministry of Justice, to request, through diplomatic channels, from the corresponding Authorities in the United States of America, the EXTRADITION to Spain of the sentenced person sought, Xxxxx Xxxx Xxxx, who is currently to be found in Xxxxxxx, Xxxx XX, for the following purpose:

The sentenced person is to be arrested by the Authorities of the aforementioned country as soon as possible and having transferred the individual to be extradited to Spain, he is to be brought before this court in order to enforce, in accordance with Spanish legislation, the sentence/s imposed in the judgments referenced above.

II. I DECLARE THAT THE SANCTION/S are not time-barred in these proceedings.

III. Issue a petition in due form to the Ministry of Justice, via legal channels, adjoining the following documentation:

—A cover letter or heading.

(Along with an acknowledgement of receipt form that can be separated)

Include the full details of this court in both of these documents (address, contact details – telephone number, fax number, e-mail –, etc.)

— The completed form currently provided in the *Vade Mecum of International Judicial Assistance*, adapted to the nation in question and the applicable treaties, along with the following appendices:

— A list of documents with reference to adjoined documents and their page numbers or appendix number within the documentation as a whole.

A) Identifying details:

a) Identifying and personal details of the person under investigation (outlined in the first point within the Background to the Facts)

b) Photographs (of the highest possible quality) of the person concerned

c) Fingerprints of the individual in question (of the highest possible quality) and any other details relating to physical description

d) Comparative facial analysis (where such analysis exists and proves necessary)

B) Certified copies of the following elements within the proceedings:

1) The ruling ordering extradition (this resolution)

2) The report issued by the State Prosecutor's Office in relation to the petition to request extradition

3) The provisional detention order of the individual sought, dated ddmmaaaa

4) (a) The national and international arrest warrant with an extradition commitment; and (b) The European Arrest Warrant (EAW) with international validity

5) The final judgment or judgments convicting the individual that are to be enforced (in full)

C) Certification of the declaration that the criminal action has not prescribed in accordance with Spanish legislation.

(This declaration is included in this resolution, an account is provided in the preceding legal ground xxxxx and reiterated in point II of the operative provisions of this ruling).

D) Certification issued by the judicial administration clerk of this Court affirming that the sentence/s has/have not been served or indicating the portion that remains to be served.

E) Certification issued by the Judicial Administration Clerk of this Court in relation to the legal provisions applicable to the case, including the precepts that classify the crime, the punishment and its prescription:

a) Precepts of the Penal Code passed via Organic Law 10/1993 of November 23, in effect when the events took place, relating to the crime, punishment and involvement, transcribed in corresponding legal ground.

b) Article 133 *et seq.* of the Penal Code, regulating the prescription of sentences, the calculation of deadlines and the suspension of countdowns.

c) Article 23.1 of the Organic Law on the Judiciary.

When issuing this documentation, pay close attention to the following:

a) Indicate in the request, in order to inform the individual under investigation, that in exercise of his rights he may lodge any motions envisaged in U.S. legislation, along with a petition for amendment or for appeal, against the rulings ordering imprisonment and extradition, which will be outlined at the bottom of the rulings, within the deadline and in the manner indicated, with the assistance of the lawyer and representative before the courts assigned to him *sua sponte*, who will also be identified in the request.

b) Adjoin the corresponding translations into English.

c) Ensure that all photocopies presented are of the highest quality and easily read.

d) All documentation is to be adjoined or forwarded in electronic format where possible.

When notifying the prosecutor and -where applicable- the appearing parties of this ruling, inform them that it is not final and that it is subject to a petition for amendment to be lodged in writing, bearing the lawyer's signature, within a period of three working days before this court, and that subsidiarily an appeal may be lodged before the Provincial Court of XXXXX, which will not entail the suspension of the proceedings.

Inform the victims or injured parties where applicable, even where they have not appeared as parties.

Make a record of this ruling in the computer application for procedural management.

Thus it is ordered and signed by the Magistrate Judge of the Court of Xxxxx, on the date indicated in the heading.

ANNEX IV: EXTRADITIONS CHECKLIST

EXTRADITIONS CHECKLIST

- Discuss the matter with the Office before drawing up and preparing extradition documents.
- Prepare the ruling to issue the extradition request (refer to the form and Guides).
- Draw up, where applicable, a supplementary report on probable cause (refer to the form and Guides).
- Call on the judicial police to provide high quality photographs and fingerprints. This photographic and fingerprint report is to be sent along with the remaining extradition documents, in color and in PDF format. It must be fully useable by the corresponding scientific police services in the United States.
- Prepare transcriptions of the applicable precepts.
- Determine whether an arrest warrant or ruling ordering imprisonment exists. The European Arrest Warrant format is not accepted by U.S. authorities.
- Determine whether there is a need to provide evidence or proof in the form of appendices and, where applicable, prepare them.
- Forward drafts of all extradition documents to the Office for analysis and to identify possible problems. The e-mail address to which you can send this information is consejería.washington@mjusticia.es
- Once the draft copies have been checked by the Office, proceed with translation.
- Produce each dossier containing the extradition documents in PDF format: one in Spanish and one in English.

PRACTICAL GUIDE TO THE TRANSFER OF SENTENCED PERSONS BETWEEN THE UNITED STATES AND SPAIN

(Convention on the Transfer of Sentenced Persons)

Introduction: This guide aims to provide a series of guidelines and general recommendations of a practical nature in relation to the transfer of sentenced persons between the United States and Spain, within the framework of the applicable Council of Europe Convention. Therefore, it does not represent an exhaustive judicial study of the legal aspects of such matters, which must be consulted and analyzed before any decisions are made. Moreover, the guide itself is not in any way prescriptive in nature: it simply attempts to provide guidelines that may contribute towards improving the efficiency and results of transfer dossiers.

Structural premises

Objective: An individual who has been convicted by the sentencing State may be able serve all or part of the sentence in his or her home State (the administering State), assuming that the latter is party to the Convention.

Request: At the behest of the convicted party, or issued by the sentencing or administering State.

- However, where the request is addressed only to the administering State, in practice, problems can arise.
- In this regard, the U.S. Government has already formulated a communication outlining that when dealing with prisoners in a given state, it is advisable to contact the authorities of the state in question, even on an informal basis, prior to requesting transfer.
- In addition, in relation to federal prisoners, the Department of Justice appears to take the view that they must receive a formal request from the inmate.
- It short, it is strongly advised that the request for transfer also be directly formulated to the United States authorities by the sentenced person, who can obviously also address this request to the Spanish authorities.
- These procedures do not require the presence of a lawyer in any event, either in Spain or in the United States, although there is nothing to prevent the person in custody or his or her family from obtaining advice from a lawyer if they so desire."

Requisites:

- The conviction must be final and not subject to appeal.
- Agreement must be reached between the three parties: The States concerned (sentencing and administering States) + sentenced person.
    - In this regard, it should be stressed that transfer does not operate as an unconditional right of the sentenced person, but rather as a possibility that might be fulfilled, providing that agreement can be reached between the three parties. The sentenced person has the right to request transfer, but the request

itself does not automatically mean that transfer will be conferred. Indeed, under exceptional health or family-related circumstances, a State may refuse to transfer.

- The acts or omissions that gave rise to the sentence must also represent a criminal offence in the administering State.

Moreover, at a general level, upon receipt of the request, the sentence that remains to be served in the sentencing State must be at least six months (or be indeterminate in nature).

This intends to avoid the bureaucratic and economic impact entailed in requests that are difficult to justify due to their inconsequential nature, given that very little time remains to be served. Furthermore, from the point of view of the resocializing or rehabilitating objective of the sentence, the treaty appears to take the view that it is not logical to transfer where only a minimal part of the sentence is to be served in another State.

Nevertheless, under exceptional circumstances, requests entailing periods of less than six months can be considered. In the case of the United States, in view of the contacts made with the central authority of this country, it is generally not foreseeable that such requests for transfer involving short periods will be accepted. In practice, there are cases where, despite involving periods of more than 6 months, the U.S. authorities have refused to transfer on the grounds that only a small portion of the sentence remains to be served.

Rights of sentenced person:

- To be informed of the possible application of the Convention. The informing is to be carried out by the sentencing State, although there is no legal impediment preventing the sentenced person's home state (the administering State), providing it is party to the Convention, from informing and providing the support that it deems appropriate. In our view, informing can be carried out by the competent consular authority, amongst other bodies.
- Expression of the desire to be transferred.
  - Before the sentencing State: Once the desire to be transferred has been expressed before the sentencing State, it must inform the administering State as soon as possible.
  - Given the federal configuration of the United States, this communication may take time, due to the fact that if the sentence has been issued by a State and the penitentiary center pertains to it, no communication will be forthcoming from Department of Justice until the authorities of the State in question have made a pronouncement on the transfer.
  - It is highly recommended that the sentenced person request some form of acknowledgement of the request that has been formulated. Practical experience has shown that in certain cases U.S. authorities have been reluctant to provide acknowledgment of this nature.

- Before the administering State: The administering State must inform the sentencing State, in order to have the latter forward all necessary information.

- Verification, validity and efficacy of consent
  - Transfer is a right of the sentenced person operating on the basis of consent. It falls to the authorities before which the consent is affirmed to verify its validity and efficacy. Consent provided by individuals who, as a result of age or psychological or physical conditions, are unable to comprehend or understand its significance or the meaning of their acts cannot be considered valid. In such cases we must turn to the figure of the legal representative; in its absence, we must proceed in accordance with the law to compensate this lack of capacity. To this end, it is enough for one of the two States (the sentencing State or the administering State) to request that matters proceed in this manner.

- To be notified in writing of any action taken in accordance with the Convention, by the sentencing or administering State that affects them, and to be notified of any decision adopted in this regard.

General criteria that, in practice, are observed in the United States to grant or refuse transfer:

- Transfer will not be granted where the sentence imposed entails life imprisonment.
- In addition, transfers will not be granted where the sentenced person has already been previously transferred.
- The existence of prior deportations or of various illegal recent entries will considerably hinder the approval of a transfer.
- It is extremely unlikely that transfers will be granted in the case of crimes of terrorism.
- The acknowledgment of responsibility by the prisoner may have a positive influence in terms of the granting of the transfer.
- The gravity of the crime or crimes and the prior criminal record of the prisoner are taken into consideration and may mean that transfer is deemed inadvisable. The United States holds that the more serious the crime and the criminal record of the sentenced person, more must and should be done in terms of his or her rehabilitation, taking the view that transfer does not always provide the guarantee that rehabilitation can be undertaken with the desired intensity.
- Criminal record in the administering State. Where the United States becomes aware that the convict has a significant criminal record in the administering State it may refuse to transfer on the basis that this would allow the sentenced person to re-establish contact with an environment that endangers his or her rehabilitation.
- Where the prisoner has roots in the United States, understood as family members or individuals with a similar close relationship, in general, the U.S. authorities will usually refuse to transfer on the grounds that they prefer to directly undertake the task of resocializing. In such cases they hold that, in view of these roots, it is likely

that the prisoner, having served the sentence in another country, will attempt to return to the United States, which they deem to be of greater risk than the risk entailed by directly undertaking the task of resocialization. The casuistry of personal roots can be extremely varied: therefore we recommend consulting the following link.

- Where significant restitution or liabilities relating to assets remain pending, in general, the transfer will be refused. However, where the liability relating to assets is of little consequence, the transfer may be granted.
- The existence of other processes in the United States in which the intervention of the sentenced person could be required may also lead to a refusal to transfer.
- Where only a small portion of the sentence remains to be served, even if this period exceeds six months, this can easily be employed as grounds to refuse to transfer. The reason is that U.S. authorities consider transfer to be pointless, in terms of the resocializing role of the sentence.
- Illness or serious family situations can provide grounds to grant transfer on humanitarian grounds. Where the sentenced person is ill, it must be of a truly serious nature and, in general, terminal. In such cases, transfer is normally authorized. Serious family situations can arise as a result of a terminal illness or other circumstances, and will be borne in mind when reaching a decision on the transfer request.
- Where the sentenced person is elderly, this factor may be considered, which also applies where his or her closest relatives are of an advanced age and are located in the administering State. In general, such considerations are not determining factors.
- Finally, another extremely important factor is the length of time that the sentenced person has been residing in the United States. If this entails a considerable length of time, whereby he or she might be considered a member of North American society, it is highly unlikely that the transfer will be authorized as it will not be seen to facilitate rehabilitation.

In general, victims do not intervene in the transfer dossiers that are processed in the United States; however, this does not imply that they cannot or should not be heard in certain cases. Within the framework of criminal proceedings, victims can request that they be informed of important developments, even in relation to the serving of the sentence. In this sense, a request for transfer can be considered as an important development and, in such cases, they will be informed and heard. The view of the victim is not decisive and will be evaluated as an additional factor within the circumstances as a whole.

Notwithstanding all of the above, the website of the Department of Justice offers guidelines that can be consulted via the following link.

The question of reiterating or reformulating requests:

Where a request for transfer is refused, this does not prevent the prisoner from exercising this right afresh; however, U.S. authorities always require a minimum period of time to transpire before this is undertaken.

These periods are normally indicated in the ruling outlining the rejection.

In the case of federal prisoners, the period is two years. If the prisoner falls under the jurisdiction of any of the States, this period can go up to five years.

The new request for transfer, once the corresponding periods have transpired, must be grounded on a "significant change of circumstances".

U.S. authorities usually accept the following as "significant changes of circumstances":

- Significant changes to situation of personal rootedness in the United States. For example, where family members or those to whom the prisoner is closest have left the U.S.
- A diagnosis involving a serious illness that is terminal.
- Fulfilment of civil liabilities and the ordered restitutions.

Thus, significant changes of circumstances must arise that, when analyzed in terms of the general criteria followed to grant or refuse transfer, may lead to an affirmative response. As a result, simply reiterating without a significant change of circumstances will, in all likelihood, lead to refusal.

Concerning the federal structure in particular and its impact on the matters addressed in this guide.

It is common knowledge that the United States is a country with a federal structure and this is reflected in its Judicial Administration and in its criminal and penitentiary system.

Where the convict is serving a sentence for a federal crime in a federal prison, the decision on whether or not to transfer falls to the Department of Justice.

In contrast, where the convict is serving a sentence as a result of a crime envisaged in the legislation of any of the states, in a prison pertaining to one of the States, the initial decision falls to the state in question and the following situations may arise:

- The state refuses to transfer: in this case, the Department of Justice will never approve the transfer.
- The state approves the transfer: in such a case, the Department of Justice will usually approve the transfer; however, it may be refused on the basis of a more significant federal interest. More significant federal interests include the following:
    - The risk that the convict, in view of his or her roots in the United States, may attempt to return once the sentence has been served in the administering State.
    - At a general level, the protection of borders, to prevent illegal entry.

Where doubts arise, and as a guiding criteria, to determine who is to act and in what manner it is essential to ascertain to which authorities the penitentiary center where the sentence is being served pertains. If it is a federal center, the Department of Justice will act directly. Where this is not the case, the state will intervene first.

It is important to bear in mind that communication between the federal and State authorities is not always as fluid and comprehensive as we might initially assume. Therefore, cases involving states may give rise to additional complexities that will need to be considered.

Practical aspects to be borne in mind:

- It is always important to inform the sentenced person that transfers do not take place automatically simply because they are requested. It is not the case that a Spanish citizen has the right to demand that the sentence be served in Spain where they are convicted in the United States. Transfer always requires the two countries involved, the country that convicted the individual and the country where sentence is to be served, to reach an agreement. Without this requisite there is no possibility of transfer.
- It is also important to encourage the sentenced person to seek advice on the legal consequences of transfer. Indeed, transfer does not only entail a change of geographical location, but rather, also involves a change in the legal system governing the serving of the sentence (prison system), which can have a greater or lesser impact, according to the case in question. In any event, it must be borne in mind that Spain declared that it excludes the procedure outlined in article 9.1 b) of the Convention, that is, the so-called conversion of the sentence.
    - A point that bears particular attention is that the transfer of the sentenced person to Spain will give rise to a criminal record in Spain deriving from the sentence that is to be served.
- The Ministry of Justice is the competent authority for the processing of such dossiers, acting as a central authority. Via the Office of Justice Affairs at the Embassy of Spain in Washington D.C. information can be gathered on a particular dossier, although no action can be taken before the U.S. authorities until a dossier for transfer has been opened.
- Despite this, the Office can provide essential information and clarify any matter relating to the practical aspects outlined in this guide.

Specific recommendations for consular offices:

- It must be borne in mind that federal prisons inform prisoners of their right to request transfer. The request must be issued via the prison's case manager and forms are available for this purpose. The inmate must always be reminded of the advisability of requesting formal acknowledgement of the request in writing.
- In the case of state prisons there is no statistical certainty that prisoners will be so informed in all cases. Therefore, it is important in such cases to provide any additional assistance that proves necessary and provide the relevant information,

where it has not been afforded by the prison authority. Once again, it is important to advise prisoners to request formal acknowledgement of the request.

- In either case, it is important to advise the inmate to request transfer before the prison authorities, notwithstanding the possibility of formulating another request directly addressed to the Ministry of Justice of Spain, if desired. Failing to formulate the request before the prison authorities can have negative consequences in practical terms.
- The inmate and his or her family members should be informed in realistic terms. As stated, the Convention of the Council of Europe does not envisage automatic transfer of cases wherein transfers must be approved. In the end, this depends on the States involved.
- When an inmate is serving the sentence in a U.S. state prison (and not in a federal prison), it should be borne in mine that the dossier should first be initiated and substantiated at that level. The central authority of the United States (the Department of Justice) will not intervene until the authority of the state in question has made a pronouncement. If the competent state does not deem transfer appropriate, nothing can be done by the central authority. If, on the other hand, the state approves the transfer, the dossier will be forwarded to the central authority for authorization; however, the latter is not necessarily bound by the view previously expressed by the state.
- There is nothing to prevent the taking of steps at an informal level before the state authorities in relation to the viability of the request, criteria, formal aspects, etc. Where desired, such steps can be taken via the Office of the Ministry of Justice in the Embassy.
- Certain States may lack the legislation authorizing them to approve transfers and this can undoubtedly lead to problems. We recommend consulting the communication issued by the United States on September 2, 1997, in relation to this point, when acceding to the Convention, along with the list of States therein contained.

Recommendations for the Spanish central authority:

- Where the inmate is in a state prison, the procedures for forwarding documentation can be fairly lengthy. In general, the Department of Justice will not forward documentation until the state in question has made a pronouncement and the official communication has been sent.
- In the cases outlined in the previous point, it is recommended that, upon becoming aware of the request for transfer, the matter be communicated to the Office of the Ministry of Justice in the Embassy, in order to enable it to monitor and provide information on the specific procedures that are employed in the state in question and the current phase of the process.
- The information outlined in the previous point may also enable the Office to ascertain the general criteria employed in this state and this information can prove useful when drawing up a strategy.

- Within the framework of official visits involving high-ranking officials and members of the government, time can be set aside to address a specific case or cases. In general, U.S. authorities will not place impediments in this regard. In the case of a state prisoner, we recommend addressing the matter with the governor of the state in question.

Additional information and resources:

General information issued by the U.S. on the international transfer of prisoners

Information on the criteria employed in the United States to approve or refuse transfers

Information provided on the website of the Ministry of Justice

Applicable convention

PRACTICAL GUIDE ON RESOURCES FOR CLAIMING FREE LEGAL OR ECONOMIC ASSISTANCE IN THE UNITED STATES

1. The problem

Often, there are inquiries both at the consular offices and the Department of Justice itself on how to obtain assistance for litigation in the United States.

These inquiries come from Spanish residents in the United States, from citizens in Spain or in other countries and even from occasional visitors who, for some reason, need to litigate or receive legal advice in the United States.

The cost of legal services in the United States is high. Trial lawyers charge by the hour and by fractions and, depending on the case, on the professionals involved, on their level of experience, geographic location and numerous other factors, their fees can range between approximately $200 to $1,200 per hour.

Guidance fees can be similar. In addition to the above, for certain proceedings (*e.g.*, damages and injuries) the so-called *quota litis* (charging a percentage of the compensation received) is quite frequent, which in these cases could facilitate access if it really is the lawyer who assumes the risk and, therefore, fees would only be charged if compensation is secured.

In addition to the cost of guidance services, it should be noted that, if the matter is taken before the courts, U.S. courts charge fees for these proceedings. Federal-level fees can be consulted via the following link.

Within the context of criminal proceedings in the U.S., and in a significant number of situations, individuals who are formally accused and who have no resources , whatever their nationality, have the right to free legal aid during the proceedings. However, in other jurisdictions, and even in the criminal jurisdiction, beyond the process and the proceedings which are closely related, there may be proceedings that are not covered (*e.g.*, guidance for requesting the transfer of a convicted individual).

Moreover, the United States is an extremely complex country and this is also true from a Justice point of view. Along with the Federal Judiciary, each state has an independent Judiciary, with independent competencies.

There is no general free legal aid model for those who do not have sufficient resources to institute legal proceedings for civil matters or disputes (unlike in the criminal field), but it would be wrong to think that within the social and institutional fabric there are no formulas or solutions for this type of circumstances. The problem is that there are various formulas and they vary from state to state.

Therefore we will encounter Judiciaries that have created legal access programs that envisage assistance; or non-governmental foundations or organizations with objectives that include projects or actions aimed at providing free legal guidance services or services at a very low cost. There are also private law firms that devote part of their economic and professional resources, or which receive state subsidies, in order to provide *pro bono* services and non-profit organizations that, in certain cases, can hire totally private law firms for specific cases. Finally, a large proportion of law schools have

so-called legal clinics, in which professors and students provide *pro bono* legal services, which also serve as practical experience for future lawyers.

All of the above means that there is a varied range of resources. However, eligibility conditions may vary, so it is of the utmost importance that information be gathered on this subject from the very beginning for each specific case.

The resource map below has been initially verified by the Office of Justice Affairs at the Embassy of Spain in the United States. It should be noted that this information is highly dynamic and is therefore subject to change without notice.

2. Resource map

The resources available in order to receive some type of subvention or aid for legal assistance can be outlined as follows:

- Institutional alternatives in universities: legal clinic.
- Institutional alternatives within the actual justice system: access to Justice programs developed by the judiciaries of certain states.
- Social and charitable alternatives: they can be of a varied nature and origin. Bar associations, foundations, non-governmental organizations, *pro bono* initiatives of large firms, etc.
- Private alternatives: in these cases we are referring to law firms, or companies whose purpose is to finance legal services.

Below we will discuss each of the aforementioned alternatives.

2.1 Legal clinics

Almost all law schools have legal clinics composed of students and professors who provide advocacy services for free or at a very low cost.

Here are some examples:

- Georgetown Law
- Yale Law

For further information, please consult the website of your nearest law school or the one based in the area where it is understood that the guidance services are to be provided. However, take into account that the clinics of each law school usually prioritizes some type of specialty in its offices, so it is important to be clear on the nature of the problem and its specific translation in certain legal specialties when selecting a clinic.

You can also consult the Official Guide to American Bar Association-Approved Law Schools.

A list of clinics can be found via an Internet search for “legal clinics” or “law clinics” in the state in question.

2.2 Access to justice programs set up by the Judiciary. Other programs from official institutions, non-governmental organizations, charitable organizations and foundations. Law firms. Particular mention to migration cases.

2.2.1 Resources at federal level or that cover several states

The Department of Justice has an informative list of *pro bono* legal service providers. A similar list can be found on the National Center for State Courts website, which is an organization that supports state justice organizations.

One of the best known accesses to justice aid institutions in the United States, which operates throughout the country, is the Legal Services Corporation. They have a large number of programs for different situations.

LawHelp.org should also be taken into account, which now has a network spanning over 25 states. LawHelp.org was set up by Probono.net. In fact, the latter (ProBono) has developed two web tools, one aimed at lawyers (Probono.net) and the other at clients (Lawhelp.org).

It is also important to consult the American Bar Association website, on which there is a section specifically devoted to *pro bono* services. Likewise, the Commission on Domestic & Sexual Violence offers a specialized resource.

For solvency matters (bankruptcy, foreclosures), please see the following link.

For matters concerning migration, please consult the following link, and this website.

2.2.2 Resources in each state

There are no doubt other institutions, programs or initiatives with aid resources in your state. They are organizations of different types but they all have in common providing aid for access to justice:

- **Arizona:** consult the Legal Services & Education website, where there is a list of resources. It falls under the remit of ProBono.net and, therefore, it is advisable to search on LawHelp.org.
- **Alabama:** it is advisable to search on LawHelp.org. The State's Supreme Court has created an Access to Justice Commission (Alabama Access to Justice Commission) that has a website with various resources that may prove of interest. It is recommended to consult the Madison County Volunteers Lawyers Program website. Please also refer to the Birmingham Volunteer Lawyers Program, ant the South Alabama Volunteer Lawyers Program websites.
- **Alaska:** it is advisable to start by visiting the website of the Alaska Bar Association, which affords a list of general and specialized *pro bono* service providers. On a general level, take into account the Alaska Legal Services Corporation, a non-profit organization that provides aid and information. Via Legal Handle you can find a list of different organizations and firms that offer *pro bono* resources.
- **Arkansas:** the Arkansas Access to Justice Foundation website may provide a good starting point, offering a lot of information. You could also consult the Arkansas Legal Services Partnership website.

- **California:** refer to this resource provided by the California State Bar, and the following list of non-profit organizations that provide support for access to Justice.
- **Colorado:** it is advisable to search on LawHelp.org. Direct access is available via the following link. Additional resources can be found via the Denver Bar Association, or El Paso County Bar websites. Finally, you can also consult the Bridge to Justice, website, a non-profit organization devoted to providing support for access to legal services.
- **Connecticut:** it is advisable to search on LawHelp.org. Refer to Statewide Legal Services of Connecticut, which brings together a group of non-profit organizations devoted to offering support in legal matters. In relation to civil matters, the Greater Hartford Legal Aid website can also be consulted. You can also visit the Pro Bono Partnership website, a non-profit organization devoted to *pro bono* services. A general list of resources is also available via the following link.
- **Delaware:** see the Delaware Volunteer Legal Services website, as well as that of Legal Services Corporation of Delaware. It also falls under the remit of ProBono.net, and therefore it is advisable to search on LawHelp.org.
- **Florida:** you can consult the Florida Bar Foundation website, a non-profit organization whose objective is to facilitate access to Justice for those who do not have sufficient resources. It is advisable to search on LawHelp.org.
- **Georgia:** A multi-stakeholder initiative exists named Georgia Legal Aid, which is associated with Law Help.
- **Hawaii:** it is advisable to search on LawHelp.org. Consult the Legal Aid Society of Hawaii website. Information is also available on the Hawaii State Bar Association website.
- **Idaho:** it is advisable to search on LawHelp.org. The Idaho Law Foundation is also available. For civil cases and matters concerning the elderly, consult the website of the Idaho firm Legal Aid Services, which specializes in *pro bono* services.
- **Illinois:** a good starting point is the Illinois Bar Foundation. The Illinois Attorney General's Office also has information regarding legal aid resources. There is also an important organization in the state, devoted specifically to legal aid, called Chicago Volunteer Legal Services. Legal services can also be requested via the Land of Lincoln foundation. For services of a specifically civil nature, the LAF, a non-profit specialized institution, provides another option. For people over 60, in the case of civil matters, you can also consult Prairie State Legal Services. A useful guide to *pro bono* services can be obtained via the following link. You can also consult Illinois Legal Aid.
- **Indiana:** it is advisable to search on LawHelp.org. There is also a non-profit organization dedicated to providing *pro bono* legal services, called District 6 Access to Justice. Another organization, the Volunteer Lawyer Program, offers assistance exclusively for civil matters. Furthermore, the Indiana State Judiciary has a website offering "do it yourself" tools, small-claims tools and information

on *pro bono* services. Finally, a mediation center has been created which you can access via the following link.

- **Iowa:** resources are available on the Iowa State Bar Association website, and via Legal Handle. It falls under the remit of ProBono.net and therefore it is advisable to search on LawHelp.org.
- **Kansas:** you can consult the website of Kansas Legal Services, a non-profit organization devoted to providing support for access to Justice. Kansas also falls under the remit of ProBono.net, whereby it is advisable to search on LawHelp.org. The Kansas State Judiciary website provides references to useful information points.
- **Kentucky:** it is advisable to search on LawHelp.org. The Legal Aid Network of Kentucky is also available and offers resources. Furthermore, the State Judiciary and the Kentucky Bar Association have jointly established the Kentucky Volunteer Lawyer Program. On the website you will find information about how to proceed if you need help to access legal guidance services. Finally, the website of the Kentucky State Judiciary provides a map of available resources.
- **Louisiana:** the available resources can be found via LawHelp.org.
- **Maine:** see the website of the Maine Volunteer Lawyers project where it is advisable to see Access Justice Today.
- **Maryland:** you can access the People's Law Library, which includes self-help resources, support for legal proceedings and free services for those that do not have economic resources. The Pro Bono Resource Center of Maryland website and the Maryland Volunteer Lawyers Service website can also be consulted.
- **Massachusetts:** refer to the Volunteers Lawyer Project website and the Justia Lawyers website. It is advisable to search on LawHelp.org or on the MassProBono website.
- **Michigan:** there is a website offering general assistance in legal matters which is a useful starting point for searching for resources; the site in question is called Michigan Legal Help. The website of the Michigan State Bar Association also provides useful information on available resources. The Legal Services of South Central Michigan website may also be consulted, representing the result of the merging of several *pro bono* state organizations that currently receive federal funding. The Legal Aid and Defender Association is another body that offers *pro bono* legal services. Other possible resources can be found via Michigan Community Resources and Legal Aid of Western Michigan.
- **Minnesota:** it is advisable to search on LawHelp.org. There is also a non-profit firm called Access Justice, whose website offers information on services and resources. Another interesting resources is the Volunteer Lawyers Network website. There is also an initiative known as Call for Justice devoted to connecting low-income individuals to suitable legal resources. You can also see the Volunteer Attorney Program, an organization that connects with volunteer lawyers.

- **Mississippi:** it is advisable to search on LawHelp.org. A list of volunteer lawyers can be consulted via the following link.
- **Missouri:** it is advisable to search on LawHelp.org. There is also a non-profit organization called Legal Services of Eastern Missouri, which is devoted to providing support for access to Justice.
- **Montana:** it is advisable to search on LawHelp.org. You can also consult the Montana Legal Services Association website, a body offering *pro bono* services.
- **Nebraska:** visit the Legal Aid of Nebraska website, an organization offering *pro bono* services. Information can also be found on the Legal Handle website. The Nebraska State Bar Association offers a program called Volunteer Lawyers Project through which you can obtain information.
- **Nevada:** a resource with a list of *pro bono* legal service providers maintained by the Nevada Bar Association, is available. There is also a non-profit firm that offers legal services called Legal Aid Center of Southern Nevada. Moreover, for civil cases you can also consult the resource called Civil Law Self-Help Center. The Supreme Court of the State of Nevada has also created a permanent commission for access to Justice which offers a self-help tool on its website. It is also advisable to search on LawHelp.org.
- **New Hampshire:** you can visit the website of New Hampshire Legal Aid. The website of the State Judiciary also provides resources, as does the State Bar Association website.
- **New Jersey:** consult the Volunteer Lawyer for Justice website. The Federal Judiciary website provides useful information on this state. The following list, drawn up by the state's jurisdiction, can also be consulted. You can also consult the LSNJLAW website.
- **New Mexico:** it is advisable to search on LawHelp.org. You can also consult the Center on Law and Poverty, a non-profit organization.
- **New York:** you can consult the Public Program for Access to Justice, which offers different types of aid. It is also advisable to consult the online self-help resources called CourtHelp and Do it Yourself. It is advisable to search on LawHelp.org. A list of public defenders is available via the following link.
- **North Carolina:** refer to the NC Equal Access to Justice, Legal Aid of North Carolina and Veterans Pro Bono Network of the North Carolina Bar Association websites. It is advisable to search on LawHelp.org.
- **North Dakota:** see Legal Services of North Dakota, a non-profit organization offering legal services. Information on resources in this state can also be found on the Legal Handle website.
- **Ohio:** consult the website of Ohio Legal Services. The Toledo Bar Association offers various *pro bono* services, as does the Columbus Bar Association. There is also an organization called Legal Aid of Western Ohio, devoted specifically to *pro bono* legal services.

- **Oklahoma:** it is advisable to search on LawHelp.org. It is also advisable to consult the Oklahoma County Bar Association.
- **Oregon:** it is advisable to search on LawHelp.org. You can visit the website of the Oregon State Bar Association.
- **Pennsylvania:** it is advisable to search on LawHelp.org. You can also visit the website of the Pennsylvania Bar Association. The Pennsylvania Legal Aid Network also provides a good general starting point to obtain resources in this state. You can also consult the Pennsylvania State Bar Association website and the service called Community Legal Services of Philadelphia, created by the city's bar association. Another organization dedicated to free legal assistance is Philadelphia Legal Assistance.
- **Puerto Rico:** consult the Puerto Rico Legal Services website. The website of volunteer services of the Puerto Rico Bar Association, which provides information on *pro bono* services can also be consulted. Certain law firms, such as Mc Connel Valdes, offer *pro bono* services. It is advisable to consult the Justia Lawyers website.
- **Rhode Island:** there is a non-profit organization called Rhode Island Legal Services, specializing in legal services, and it also has agreements with the Rhode Island State Bar Association. Legal Handle provides information on additional resources.
- **South Carolina:** it is advisable to search on LawHelp.org. You will also find a list of resources on this section of the American Bar Association.
- **South Dakota:** refer to the Access to Justice website, a program offered by the South Dakota State Bar Association. There is also a project taking in several organizations called South Dakota Legal Self-Help, where you can find information on resources and aid. Finally, the Legal Handle website also provides information.
- **Tennessee:** visit the Tennessee Alliance for Legal Services website. Via this link the various *pro bono* programs available in the state can be consulted. On the Tennessee Bar Association website there is a list of resources that may be of use.
- **Texas:** you can visit the Texas Access to Justice Foundation website. It is advisable to search on LawHelp.org.
- **Utah:** consult the website And Justice for All, where various resources can be found, and also the Utah State Bar website. You can also check Utah Legal Services.
- **Vermont:** there is a *pro bono* services firm called the Law Line of Vermont that collaborates with Vermont Legal Aid on the Vermont Law Help website. There is also information on the website of the State Bar Association.
- **Virginia:** Legal Services of Northern Virginia is one of the main support organizations. You can also visit the website of the Fairfax Law Foundation, which has a *pro bono* program. In this section of the Virginia Bar Association website there is an interesting information resource. It is advisable to search on LawHelp.org.

- **Washington:** an official legal aid program exists called Northwest Justice Project. Information is available on the Washington State Bar Association website, and consulting the following manual also proves useful. Also consult the King County Bar and Tacoma Bar Association websites. For matters concerning family law, particularly domestic violence, consult the ELAP.org website, a non-profit organization specializing in legal services. It is advisable to search on LawHelp.org.
- **Washington D.C.:** it is advisable to search on LawHelp.org. Also refer to the Legal Aid Society and Catholic Charities Legal Network websites. The Washington D.C. Bar Association offers a *pro bono* program, and for immigration issues you can consult the CAIR Coalition (Capital Area Immigrants' Rights) website, a non-profit organization that collaborates with a number of specialized lawyers who offer *pro bono* services.
- **West Virginia:** consult the Legal Aid of West Virginia website. An organization specializing in legal aid for the elderly, West Virginia Senior Legal Aid, also exists.
- **Wisconsin:** information is available via the Wisconsin Equal Justice Fund. The state Judiciary, operating in collaboration with bar associations and law schools in Dane County, provides a number of resources. The American Bar Association website provides a fairly comprehensive list of resources. Legal Action of Wisconsin holds a project that connects individuals with volunteer lawyers. For matters relating to healthcare, the Center for Patient Partnerships website can be consulted. Finally, it is advisable to consult the BadgerLaw website.
- **Wyoming:** consult Legal Aid of Wyoming, a firm offering *pro bono* services in the state. Finally, the website of the Teton County Access to Justice Center can be consulted.

2.3 Private alternatives

Large law firms usually select deserving cases at the suggestion of NGOs and other civil society organizations. These cases can be treated on a *pro-bono* basis, even if it is not the general working method of the firm in question. This is not usually a direct resource, as cases are only considered when they are reported and submitted by a trusted external organization, usually a non-profit organization.

A list of *pro bono* service providers is available via the following link.

If the individual is not eligible to receive services from public or charitable clinics or organizations, but has certain economic capacity, then legal financing or litigation funding services are available in the United Sates. They are loans for instituting legal proceedings.

See, for example, Law Finance Group.

3. How to act

If you need legal assistance in the United States or need to undertake proceedings and have a lack of resources or economic difficulties:

- If you are indicted in criminal proceedings, take into account that you will be afforded a public defender. Both the federal system and the majority of state systems have public defender's offices where you can receive information and assistance. There is a National Association for Public Defense, where you can also receive further information.
- It is important to correctly identify the nature of the case (migration, matrimonial, affiliation, labor, minors, etc.), because in some cases there are specialized non-governmental organizations and bodies through which you can receive advice and, where necessary, referral to other bodies specifically dedicated to access to Justice.
- The bar associations of the respective state or of a lower geographical scope, as well as the information points of the Judiciary are a good initial source of information, along with this guide.
- In some cases, it may also be important to consult the legal guidance services of Spanish bar associations. In certain cases, the matter may fall under the competence of the Spanish jurisdiction.
- Consular offices and the Office of Justice Affairs at the Embassy can also provide information about existing resources, whether on the basis of those indicated in this guide, or on the basis of any other available resources of which you have knowledge. However, none of these offices provide legal assistance.
- Some of the resources indicated in the guide are part of the do it yourself programs which have been implemented in some states. These types of programs enable the implementation of certain proceedings without the attendance of a lawyer. Online resources will guide the individual and will explain the procedures to be followed, including drawing up the document or report concerned. All of this will be carried out by the system, after introducing the required data and information. However, it should be noted that these types of proceedings have risks, so it is very important that information or guidance are obtained by other means as far as possible.
- If you are resident in Spain it is possible that there may be difficulties in terms of eligibility to receive *pro bono* or similar services in the United States. However, this situation does not always have to represent an impediment. It is important to remain informed and to do so in different organizations, if possible.
- The language issue does not necessarily have to be a problem. A good part of web resources is also available in Spanish.
- If the resources offered in this guide are not sufficient, you can also search on the Internet and to do so we recommend that you use the following terms: "legal aid" (+name of state); "legal assistance" (+name of state); "legal help"; "pro bono".

You can also introduce the type of problem as additional search terms: “criminal”, “civil”, “family”, “bankruptcy”, “civil liability”, etc.

- Finally, if you are not eligible for a *pro bono* program, you can still resort to a specialized service for financing legal services.
- When calculating the costs involved, it should be borne in mind that, in addition to lawyer’s fees, there may also be other expenses, such as court fees or fees for expert witnesses, etc. It is important to seek advice in this regard.

4. Help us to improve this resource

The Office of Justice Affairs at the Embassy of Spain in Washington has identified access to Justice as a particularly strategic aspect of its responsibilities.

It involves providing information to Spanish citizens who for some reason may need legal assistance in the United States and lack the necessary resources to cover the expenses.

We will be happy to receive information regarding additional or new resources in each state, in order to include them in this guide.

We would also like to encourage those using this guide to provide us with information about their experiences when using one or several resources included in the guide. Including this type of experiences will improve the quality of the product for the benefit of all users.

Any other suggestions are also welcomed.

The Office of Justice Affairs undertakes to keep this guide up-to-date, as far as possible, but cannot guarantee the accuracy of information.

PRACTICAL GUIDE TO THE PRESERVATION AND ACQUISITION OF INTERNET DATA IN THE UNITED STATES

Introduction

The objective of this guide is to offer some general guidelines and recommendations of a practical nature regarding the preservation and collection of data from Internet accounts, or stored electronic communications at a general level, in the United States for use in legal proceedings. It is therefore not an exhaustive legal study of applicable law in the matter, which must be consulted and analyzed before making decisions.

Furthermore, the Guide *per se* is not of a prescriptive nature, and solely aims to provide guidelines in order to improve the coordination, efficiency and results in the practice of international legal assistance proceedings.

Likewise, and before going into the procedures for obtaining data by judicial means (direct requests and letters rogatory—MLATS), we believe that it is important to highlight that there are also other less complex channels that can sometimes produce results of interest. We refer to the obtaining of data by the owner himself, either directly or with prior consent, through an official action, as well as to the obtaining of data through online open access resources or by subscription.

In any case, it is not advisable to try other ways, without having exhausted, if possible, the previous two. Let's refer to them in more detail.

Consent

Under the heading consent we refer to two possible actions:

A) Downloading of data by the data subject

Some services or platforms allow the data subject to download their own data and even provide tools and instructions to do so. In some cases, this may be a form of data input to the process, and data validation or authentication by the provider may not be necessary if the source of the download is indeed clearly demonstrated.

B) The actual consent to be operated by a third party

The data subject may officially give his consent for certain information to be obtained from the provider. Some providers may be able to respond to requests from the police, the court or the Prosecutor's Office, operating on the basis of a duly formalized, accredited and sufficient consent.

However, until now, in most of the policies we have analyzed from the most well-known providers, these usually refer, when there is such consent, to a download carried out by the owner of the data, which is the procedure indicated in section A. If this download is not possible for any reason, there will be no choice but to use the direct request or the MLAT.

A separate issue is the collection of post-mortem data

Some providers have begun to recognize the so-called "digital will", and even some procedures for obtaining data where there has been no will as such, or where, having existed, there is no reference to it. Given that this reality is eminently dynamic, in case of doubt please contact the Office for the study of the issue.

Data collection using open source online resources

Under this heading we refer to a heterogeneous multitude of online resources that can be used to obtain information that may be of interest for an investigation or cause:

- Monitoring of social network platforms:
  - https://onemilliontweetmap.com
  - https://www.trendsmap.com
  - https://tweetdeck.twitter.com
  - http://graph.tips
- Information on domains:
  - https://www.whois.com
  - https://whois.domaintools.com
  - https://dnsdumpster.com
  - https://www.easywhois.com
  - https://www.robtex.com
- Information on IP address location:
  - https://whatismyipaddress.com/ip-lookup
  - https://www.iplocation.net
  - https://www.whois.com.au/whois/ip.html

These resources vary over time. From the Office in Washington D. C. we are in permanent contact with the Department of Justice and we exchange information on this type of resources. In case of doubt, we can respond to requests for identifying new resources that may be of interest for the specific case.

Preservation. Obtaining data through direct requests or letters rogatory.

In principle, the preservation and collection of Internet data in the United States for use in Spanish legal proceedings is governed in the criminal sphere by the bilateral convention on mutual legal assistance, within the framework of the Agreement on Mutual Assistance between the United States of America and the European Union signed on June 25, 2003.

More specifically, reference should also be made to the Budapest Convention on Cybercrime of the Council of Europe published in 2001, as it has been ratified by both countries, Spain and the U.S.

In this regard, the preservation of data is a measure specifically set out in Article 16 of the Convention, the practical application of which in the various States is regulated in Article 29 thereof as one of the mutual assistance mechanisms in terms of provisional measures. Article 29 sets outs a detailed regulation of how to make a request when the data to be preserved are stored in a country other than that of the requesting State.

Furthermore, the aforementioned Convention also addresses access to stored data on the part of competent authorities.

The content of this guide essentially matches the provisions of the cited Convention.

However, a large proportion of the major Internet service providers on a global level are located in the United States, or at least their head offices are located in this country. Therefore, in addition to the aforementioned international legal frameworks, a number of aspects of the U.S. legal system must be borne in mind, which, as outlined below, in practice have considerable bearing on matters of this nature.

Furthermore, the U.S. Department of Justice has received and continues to receive a large number of requests for assistance, via international requests concerning data regarding Internet accounts located on servers or networks owned by multinational companies based in the country.

This high demand has led to practical problems in terms of its management. As a result, the Department of Justice has decided, in terms of data preservation, to call on the different agents to address these requests directly to the companies concerned, which means that requests are often addressed to the main headquarters in the United States by necessity.

Once preservation has been implemented, data requests can proceed.

In general, requests to obtain this data must be forwarded in the form of an international request, following the channels normally employed for this purpose. The only exceptions to this rule arise, although not in all cases, in relation to requests for account subscription data and transactional data.

A better understanding of the latter requires attention to the definition of the different types of data that can be obtained in relation to a telematic or computer-based communications service:

- Subscription data refers to the following: user name, street address and other contact details, along with billing information in the case of services requiring payment.
- Transactional or technical data refers to the following: all data relating to the communication generated by the system that indicate the origin, destination, route, time, date, size or duration of the communication or the nature of the underlying service.

- Content data refers to the following: all data relating to the messages that parties send to one another within a communication.

The U.S. Department of Justice has opened up a number of interesting possibilities for direct cooperation in this regard which, whilst they may appear superfluous, could actually take in a large portion of requests.

Therefore, in terms of access to data, two channels exist:

- If only subscription or transactional data is required, an international request can be employed (processing requires an average of 10 months); or, via the Office, a request addressed directly to the provider can be attempted, grounded on the U.S. legal system, which permits data of this nature to be voluntarily handed over by the providers without the need for a court order. If the second option proves successful, the data can be obtained in one or two weeks. However, the direct channel, which ultimately depends on the criterion of the provider, will not always get results and is not really predictable, although given its celerity, it is worth attempting this procedure prior to issuing an international request.
- Where data relating to the content of communications is required or if for any reason the channel outlined above to obtain subscription or transactional data is not employed or proves unsuccessful, the only possible means of obtaining the data is via an international request.

Finally, data preservation, as a measure preceding the remainder of the actions to access registries, in addition to proving extremely useful to ensure that the outcome of the proceedings is not finally impeded due to the disappearance of the information, is considered compulsory by the Department of Justice, whereby no international request to obtain data will be processed if the preservation of the data has not been previously sought.

Data preservation in particular

"Data preservation" is understood to refer to the conservation or retention of specific digital information, contained on the servers of the Internet service provider. This information can therefore not be deleted or modified while this measure is in place.

The information preserved may be made up of technical and operational data (IP address, temporary IP, MAC address, etc.), metadata (of accounts or activity) and communication content (for example, the body of an electronic mail or of a telematic message).

It must be noted that in the United States there is no general legislation referring to data conservation or retention. Therefore, while all companies do conserve information about their clients and the traffic generated by their clients for a certain period of time (for commercial reasons in terms of invoicing, complaints, etc.), the period of time may vary as, in the end, such decisions usually fall to the company itself.

In general, traffic data relating to an account (IP addresses, logs) is not normally conserved for more than 180 days, or 2 years, depending on the provider.

Furthermore, each company has its own policies regarding matters of this nature and regarding how to deal with requests from the authorities for data conservation or access.

Finally, we must not lose sight of the fact that the preservation of information is always by definition retroactive, so if it is necessary to obtain potential evidence resulting from future communications, then preservation would not be a suitable means.

Therefore, we are faced with quite a complex situation which requires a series of guidelines or recommendations in order to ensure the maximum efficiency possible when issuing preservation requests. They are detailed below:

- Check if the company has a branch or subsidiary in Spain that can address this type of request. If so, that would be the most appropriate course to take, without having to resort to international legal assistance.

  The judicial police can provide the information required for this initial step.

  As stated above, in general, U.S. companies usually require such requests to be addressed to the main headquarters in the United States.

- If it is established that the preservation must be requested from the head office located in the United States, you should first consider the following:

  - Amount concerned and type of offence. US authorities do not usually execute letters rogatory entailing economic amounts of less than $5,000 or involving minor crimes. As a result, it is necessary to evaluate whether or not it is worth requesting data conservation if it will not subsequently be possible to obtain the data in question. Of course, a direct request can be employed, in which case there is no problem. Even so, depending on the nature of the crime, there may be exceptions wherein the U.S. authorities will in any case deal with the letters rogatory. These exceptions usually arise in cases relating to terrorism, organized crime, drug trafficking, violent crime, the sexual abuse of minors, corruption and, above all, where the matter might in some way be connected with the security or interests of the United States. Exceptions are normally applied to requests for subscription and/or transactional data, which, to date, have always been processed irrespective of the nature of the crime or its magnitude. Furthermore, with regards to the type of crime, it should be borne in mind that, as a result of the first amendment to the U.S. constitution and its interpretation in jurisprudence, it is impossible to obtain data where the acts relate to the expression of opinions or evaluations that in the United States are not normally subject to criminal action (slander, defamation, hate speech, the defense of terrorism and even certain types of threats wherein it cannot be accredited that there is an actual and serious intent to cause injury, even though the victim was truly afraid).

  - Identification of the company or provider (ISP). It is important to clearly identify the company to which the preservation request should be made. Initially this may seem simple, and probably will be in most circumstances, but it may not

always be the case[23]. Again, the judicial police can provide the necessary information to make appropriate decisions.

- Likewise, the Offices of the Ministries of Justice and of the Interior in Washington D.C. are available for these purposes.
- Identification of the account. Requests for preservation work on the basis of an official account identifier: e-mail, Twitter, Facebook, etc. This detail must therefore be correct and accurate; otherwise, the request will be declined. In addition, a preservation request must be made for each company or provider, and requests corresponding to the accounts of different providers cannot be joined together. Conversely, requests for data preservation relating to several accounts held with the same provider can be combined, provided that they form a part of the same case. In order to know which identifiers are the correct ones for each provider it is necessary to analyze on the Internet the policies published by the company for this purpose. Normally, the best known suppliers give a very clear information in their policies about the different ways to identify an account. Sometimes, the identifier can be the customer's email address or a fancy name assigned by the customer to his/her account as a username or a code assigned by the provider itself that will appear in the URL or elsewhere.
- Type of service. A number of providers are developing point-to-point encryption systems wherein decryption keys are not maintained. In such cases, the provider will always point out that it is unable to hand over the decrypted content of the communication as the key is held exclusively by the user, whereby data that might be employed within the proceedings will not be obtained without the user's cooperation. To date, no solution has been found in the United States for situations of this nature. It is a controversial issue and the only alternative that exists in relation to a number of services affected by such circumstances (e.g. WhatsApp) is to attempt to obtain metadata.

Important note: Although it can be very difficult for encrypted services to obtain certain data, there are sometimes indirect procedures that have proven to work. In case of doubt on this point, consult with the Office.

- Once the company has been identified and the decision has been made to request the data preservation, it is advisable:
  - Consult the policies established by the company in this regard. Major Internet service providers usually have clearly established policies on their websites (recommended search terms: law enforcement, subpoenas, preservation,

[23] For example, the case may be that a certain company offering courier or social communication services enables the inclusion of photographs in messages. There could be two channels in this case: through the upload of the photograph to the company's server or through a link to another server where the photograph was originally found. In this case, it is clear that if the data to be preserved or one of the items of data to be preserved is the image, it will be necessary to analyse or determine on which server it is located and who is responsible for it. At the same time, it is possible that there is a need to preserve both items of information, i.e., the graphic and the entire message including the graphic, in which case there may be two companies involved.

preservation requests, data retention, records seeking). You can also consult the directory contained in the appendix to this Guide.

- In the case of small companies, or those that have not clearly published their preservation policies for whatever the reason, you can consult the judicial police or the Offices of the Ministry of Justice or the Interior directly in Washington, D.C.
- When consulting these policies special attention should be paid to the transparency of the measure. A large number of companies will inform interested parties of the measure, unless they are justifiably and expressly asked not to do so. Therefore in this respect we must take into account that, if a foreign authority requests preservation, there is not much that can be done if the company decides to make the measure as transparent as possible, even when petitioned not to do so[24].
- In relation to companies that are not well known, it is also advisable to consult the Office beforehand to determine the best approach.

- Having done so, proceed with the drafting of the letter addressed to the company, to which end a template and instructions can be downloaded via the following link. This letter represents the basic instrument to achieve the requested preservation; it is necessary to fill in the blank fields with the utmost accuracy. If you have any queries, please consult the Office of Justice Affairs. Furthermore, if the court would rather the Office take charge of filling out the letter or form this is not a problem, simply let us know.
- Once the letter described in the previous point has been filled in, or if you opt to have the Office take charge of filling it in and forwarding it, send it to the Office of Justice Affairs in Washington via e-mail, where it will be processed. Having received the card duly filled in, the Office will proceed to forward it to the corresponding department in the company in question.

A few days after having submitted the documentation to the company, a formal response is usually received indicating, in the event of a positive response, that the preservation has been carried out and the period of validity, which is often 90 days. Likewise, the notification will include the possibility of renewing said preservation once the initial validity period has expired, should there be grounds to do so. Along with the above, if secrecy has been requested the company will communicate its decision on the matter and a reference number will also be provided.

Finally, the Office will forward a copy of the actions taken, including the response from the Internet service provider, to the requesting authority.

It is important to note, although one of the aims of this guide is to give information on the support that the Office of Justice Affairs in Washington, D.C. can provide for the preservation of data, that this may be requested not only by the court but also by the prosecutor and the law enforcement, in accordance with the new Article 588 octies

[24] In our template letter the request for secrecy is included by default. However, the requesting authority must ultimately decide in which terms to formulate the request.

which, essentially, responds to the need to incorporate the provisions of the Budapest Convention into national law.

In this regard, we would like to highlight the importance of the sharing of knowledge and experience in this area amongst various institutions involved, as this is the only way to ensure greater efficiency in the future. To this end, the Office of Justice Affairs is always at the disposal of the various bodies to document these experiences and to share them through this guide or through similar resources.

Access to data. Direct access and the subsequent or ensuing international request

As outlined above, two channels can be employed to access Internet data:

a) Where only subscription or transactional data is involved, the direct channel can be attempted. This method does away with the need for an international request and avoids the long processing periods that are normally entailed. Where it proves successful, it can be extremely expeditious (one or two weeks). The downside is that the result cannot always be guaranteed beforehand and, depending on the provider, can vary considerably. Bear in mind that direct access operates on the basis of strictly voluntary handing over of data by the provider, and is primarily dependent upon the provider's criteria or policies. To attempt direct access it is recommended that the Office be consulted in order to analyze the situation and determine the best strategy.

For the use of this method, the following should be taken into account:

- The provision of data on direct request is always voluntary for the provider. The provider will therefore examine the request and decide, in accordance with its privacy policies, whether or not to provide this information. There is no action or remedy against the provider's decision.
- There are some providers who, as a matter of principle, almost never provide data by direct means on a voluntary basis. It is difficult to provide an exhaustive list here. Furthermore, we are in an area that is eminently dynamic and under-regulated. Therefore, in the event of a direct request, it is always advisable to consult with the Office in advance. We keep our list up to date and in case of doubt we make the necessary enquiries, including directly with the provider.
- Providers who are willing to voluntarily submit data have some limitations that derive from U.S. law, more specifically from the First Amendment (freedom of speech). Therefore, data will never be obtained (neither by this means nor through letters rogatory) if the crime under investigation in Spain is fundamentally related to the issuing of opinions, thoughts or ideas, no matter how terrible and absurd the latter may be. In the U.S. system, opinions, thoughts or ideas cannot be criminally prosecuted, even if they damage the honor or reputation of a person or institution or are contrary to fundamental or constitutional principles or rights. It is possible to take civil action in certain cases, but not criminal action. This means that the U.S. authorities, and hence the providers, are unable to provide assistance for these types of crimes, which basically include slander, defamation, hate crimes, advocacy of terrorism and disclosure of secrets. When a Spanish authority is in need of obtaining data by direct means for an investigation that affects any of the above-mentioned crimes, it is recommended to consult.

- In the case of direct requests for data, it must always be stated whether or not a confidentiality obligation is imposed on the provider so that he cannot inform the account holder that the request has been made. Remember that we move in a context of voluntariness, so the provider may in some cases consider that it does not have to comply with this restriction. If the matter is particularly sensitive, please consult the Office in advance so that we can take the necessary steps to assure the Spanish authority whether or not confidentiality will be observed.
- In order for a provider to be able to directly submit data, it is necessary for the requesting authority to give information on the investigation it is carrying out and to refer to the evidence at its disposal to substantiate the facts which have hitherto been provisionally established as a result of the investigation. The standard that will generally be required by providers is that, when it comes to subscription data, these are relevant for the investigation, and when it comes to transactional or technical data, these are important. For the rest, some providers will end up referring to the letters rogatory (e.g., Google) if the transactional data or metadata requested are of particular intensity and size.
- The requesting authority should also take into account that in direct requests it will be required to provide the provider with certain information on the cause (general references, facts, etc.), including personal data. In general, the providers fully accept and understand that the requesting authority should minimize the data it transmits, although they will always need a minimum to assess the extent to which the data requested are relevant or important for the investigation.
- It is also important to remember that when it comes to technical data, a time window or request period should always be established based on the facts. In general, it will not be accepted any request that requires ALL the information if this is not very justified.

b) In the case of content, subscription or transactional data where direct access is not viable or for whatever reason is not in the interest of the requesting authority, the letters rogatory is the only course of action.

ATTENTION: Bear in mind that issuing international requests to ask for data stored in electronic documents is a matter that is currently affected by the so-called “Microsoft case”.

> In December 2013, the U.S. federal law enforcement authority was carrying out a criminal investigation relating to narcotics. During the course of this investigation, the government requested a warrant to obtain data from an e-mail account of a Microsoft client, under section 2703(a) of the Stored Communications Act. The company refused to hand over the data relating to the account in question as it argued that it was unable to comply as the data was hosted on a server that it owned in Ireland. Faced with this refusal, the District Court held Microsoft in contempt. Three years later, the Second Circuit Court of Appeals reversed the District Court’s finding of contempt, holding that section 2703(a) of the SCA does not apply extraterritorially.

In relation to international requests to access Internet data, there are certain standards or requirements that serve as guarantees within U.S. law.

To understand this, we must set out from the basis that an international request to access stored electronic communications will always require, on the part of the United States, the instigation of a judicial procedure wherein the District Attorney will call on a federal judge to issue a "warrant" or a "subpoena", as the case may be.

This procedure is precisely concerned with determining whether or not a given request complies with the standard required by law.

The standard in question varies depending upon the nature of the data in question:

1) Subscription data. The data requested must be RELEVANT in terms of the investigation, even if they are not decisive or extremely important.

2) Technical or transactional data. In addition to proving relevant, the requested data must be IMPORTANT in terms of the successful outcome of the investigation.

3) Content data. "PROBABLE CAUSE" must exist to access the requested data, in such a manner that for the "average citizen" sufficient incriminating elements exist to take the view that such data is clearly linked to the alleged criminal activity that is the focus of the proceedings.

- In relation to this matter, we recommend reading the *Practical Guide to the Principle of Probable Cause in the United States Applied to the Acquisition of Data from Communications and the Internet* included in this compendium.

As a result of the need to adequately adhere to standards when issuing an international request to access data in stored electronic communications, it is recommended that the Office be consulted beforehand.

When issuing an international request of this nature, it is also important to link it to the preservation previously sought.

As we explained earlier, it is normal for Internet service providers to allocate a reference number when conducting a preservation. This reference number should be included on the subsequent international request, in order to acknowledge the previously requested preservation and in order to ensure success in the subsequent process of international legal assistance.

It is also advisable to include a copy of the supporting document issued by the company as proof of the preservation with the international request.

Finally, it is essential that the judicial body remembers to renew the preservation where the provider has established a deadline for the conservation of data, as otherwise the data may be lost. To renew it, simply follow the same procedure for the initial preservation request, mentioning the reference or case number of that request.

From a practical point of view, it is recommended to always follow the recommendations below before issuing a letter of request for access to stored electronic communications data:

- The preparation of a letter of request to obtain data from the Internet is a laborious process that will normally involve providing much more information than is required for acts of cooperation at the European Union level.

- The narrative of events is fundamental. It must be clear and precise. A cursory reference to the facts or mere summaries about the type of criminal activity is not sufficient. Expressions such as "there are indications", "it is believed", or "there are well-founded suspicions", usually do not lead to anything if they are not accompanied by the factual elements and the evidence that justify them. It is necessary to be aware that the U.S. prosecutor should prepare a document to be presented before a federal judge in order to authorize the issuance of a subpoena or warrant, as the case may be, and for this purpose he or she will need the Spanish requesting authority to provide him or her with all the necessary factual and legal information.
- With regard to the facts, it should also be borne in mind that the U.S. authorities only require those that are truly relevant in order to cover the legal standard required according to the type of data. Therefore, it will not always be necessary to provide the requested authority with all the available factual evidence, but with that which is truly relevant.
- The facts presented must be capable of proving: a) that a possible offence has been committed and there are rational indications of it, b) that there is a connection between the offence under investigation and the Internet account(s) or other types of communications that are to be investigated, c) that this connection is relevant (if what is to be requested is subscription data), or important for the clarification of the facts (if technical or transactional data are to be requested), d) or that this connection is such that, in the eyes of an impartial viewer, it is very likely that accessing the account or accounts in question will result in data being obtained in order to advance the investigation (on the latter it is highly recommended to read our Guide on probable cause).

Specialties to be taken into account in certain cases

1) First Amendment, freedom of speech

The protection of freedom of speech in the United States is so extensive that it is not possible to criminally punish conduct such as slander, defamation, the forms of hate expression which consist solely in manifestations, advocacy of terrorism, and, in short, any other conduct based exclusively on the externalization of thoughts, opinions, or ideologies, whatever the means employed.

In such cases, the aggrieved party may make a civil claim if the conditions for doing so are met, but the U.S. authorities will not be able to cooperate in the provision of criminal assistance, because if they do so they would be carrying out an unconstitutional act.

Thus, criminal letters rogatory seeking assistance for obtaining information in connection with any of the above-mentioned types of criminal conduct, or any other activity consisting essentially of the externalization of thoughts or ideas, may not be executed, however farfetched or terrible those ideas or thoughts may be.

On the other hand, if, alongside this type of criminal behavior, other forms such as threats, coercion or harassment appear, then it is possible that collaboration may take place, albeit limited to the latter. In such cases it is advisable to consult with the Office so that we can make a more specific assessment.

2) Geolocation data

Geolocation data produced by cell phones is increasingly required in investigations. Access to them involves a number of special requirements and the standard expected will be that of probable cause.

a) A detailed summary of the facts with key dates and times. These facts should lead to the linking of the terminal and its use with the suspect and with the criminal acts.

b) Be able to explain how it was determined that the data provider's service account (e.g. Gmail) was linked to the suspect's phone. It can be done through an expert evidence, or the suspect may recognize it, or witnesses may even be used.

c) Evidence that the phone used by the suspect was running the Android operating system or any other system linking the data provider's account to the generation of geolocation data from that terminal. An expert analysis based on a study of the terminal and its settings is ideal for this purpose.

d) Finally, the letter of request should make it clear whether the court wants that the U.S. process for obtaining the order be conducted in a confidential manner so that the service provider does not inform its client that the information is being requested. If the choice is to ask for confidentiality, the reasons should be given.

3) Data from security intermediaries, VPN providers and the like

Obtaining data from security service providers who usually establish a secure layer between the two extremes of communication can lead to problems in gathering information.

The practical assumptions that can be made here can vary greatly, but in general it will be necessary to be able to prove the existence of that intermediate provider and its relevance in the context of the communication(s) under investigation, as well as the relevance of the latter to the facts and to the alleged perpetrator.

Normally, in these assumptions, the objective will be to know who has been assigned, at a certain point in time, a certain IP provided by the VPN provider or other similar security service. To this end, it is necessary that the letters of request provide for the most accurate possible timing of the exchange of information (in millisecond format, for example).

4) Hosting services

Web hosting providers may provide different types of data, depending on the type of service, the research involved and the information available from the requesting party.

Some of the most requested data are subscription data (e.g., to determine who contracted the service, or some of the services associated with the web or hosted resources). Technical data can also be obtained (e.g., IP from which certain remote management operations have been carried out, logs, connection times, etc.).

Nonetheless, it should be noted that certain services embedded in the web or hosted Internet resources may be provided by third parties, either through the mediation of the web hosting provider, or independently. In such cases, certain data may not be available

to the provider. It is therefore advisable, before issuing the letters of request, to analyze in depth all these questions, making the necessary enquiries.

Web hosting providers do not keep the data of a hosting more than for a certain period of time once the account has been cancelled by its owner or by the service provider itself if the conditions for this are met. Once the account is cancelled it is practically impossible to obtain data. There are some open Internet providers from whom historical data from websites can be obtained: http://archive.org/web/

5) Data from domain name providers

Domain name providers can only provide data that is limited to this particular service they provide, i.e., the temporary allocation of domains. It is therefore important not to confuse this service with hosting or web hosting, although sometimes the same company can provide both services.

It should be borne in mind that Internet domains are temporarily allocated, so that the same domain may have belonged historically to different owners. There are open tools on the Internet that can provide some information about the historical owners of a domain name:

https://www.raymond.cc/blog/finding-old-domain-whois-information-with-domaintools-domain-history/

6) Encrypted services

Certain encrypted services can present enormous difficulties in accessing data. In some cases, it is practically impossible.

However, there are some alternative strategies that may work in some cases. It is recommended to consult.

Processing and use of the data obtained

The method and medium of submission of the data obtained will depend on each provider.

In some cases, special software may be required to read this data. If the requesting authority has any questions about how to obtain it, they can consult us.

Data may also be sent in encrypted form and with passwords. All this information is provided in a timely manner.

If there is any special urgency on the part of the court, the Office may request that the results be sent to it by e-mail in order to transfer them by the same means to the corresponding authority in Spain. Obviously, the final decision on this matter does not depend on us but on the provider in the case of a direct request, or on the Department of Justice in the case of a letter rogatory.

If, for any reason, it is necessary to transmit such data to a third party, there may be legal limitations or limitations from the requested authority. It is always necessary to make sure of this.

ANNEX. DIRECTORY OF THE MOST COMMON COMPANIES AND LINKS TO THEIR SPECIFIC POLICIES

Amazon

Refer to the "How to serve a subpoena" section on the following site:

http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088

The company also offers the following e-mail for information:

subpoena@amazon.com

In their first transparency report in matters of privacy there is a paragraph regarding international legal assistance which states the following:

> Non-U.S. requests. Non-U.S. requests include legal demands from non-U.S. governments, including legal orders issued pursuant to the Mutual Legal Assistance Treaty process or the letters rogatory process. Our responses to these requests depend on the nature of the request. Amazon objects to overbroad or otherwise inappropriate non-U.S. requests as a matter of course.

The company has also stated that under no circumstances will it give information to the Government without a mandatory warrant, and it provides its customers with information regarding the data requested, unless there is an absolute prohibition to do so in the warrant.

Apple

https://www.apple.com/privacy/government-information-requests/

Facebook

https://www.facebook.com/help/133221086752707

https://www.eff.org/files/filenode/social_network/facebook2010_sn_leg-doj.pdf

https://info.publicintelligence.net/Facebook2010-2.pdf

Instagram

https://help.instagram.com/494561080557017/

Twitter

https://support.twitter.com/articles/41949-guidelines-for-law-enforcement#6

WhatsApp

https://www.whatsapp.com/legal/?l=en

Yahoo

https://transparency.yahoo.com/law-enforcement-guidelines/us

.....

Additional resources:

Also refer to the following Internet resource that gathers data on numerous Internet service providers (ISPs).

ANNEX I: DATA PRESERVATION MODEL

FAO: _____

Related account: _____

Proceedings number: _____

Date: _____

Request for the Preservation of Data

Dear Sirs

This letter is a request for the preservation of all stored communications, records, and other evidence in your possession in relation to the following account, pending the issuance of legal process:

ACCOUNT: _____

I request that you refrain from disclosing the existence of this request to the subscriber or any other person, except where it proves necessary to comply with this request. If compliance with this request might result in a permanent or temporary termination of service in relation to the Account(s), or otherwise alert any user of the Account(s) of your actions to preserve the information outlined below, please contact me as soon as possible and before taking any action.

I request that you preserve the information described below currently in your possession in a form that includes the complete record. I understand that, pursuant to U.S. law, records may be preserved for a period of 90 days, with possible extensions. In the event that, when preserving for a foreign government, your company's policy or practice is to preserve for a period of more than 90 days, please let me know the duration of preservation and when it will expire.

This request only applies retrospectively. It does not in any way oblige you to capture and preserve fresh information that arises subsequent to the date of this request. This request applies to the following items, whether in electronic or other form, including information stored on backup media, if available:

- The contents of any communication or file stored by or for the Account(s) and any associated accounts, and any information associated with those communications or files, such as the source and destination e-mail addresses or Internet Protocol ("IP") addresses.
- All records and other information relating to the Account(s) and any associated accounts, including the following:
  - Names
  - Addresses
  - Local and long distance telephone connection records

- Records of session times and durations, and the temporarily assigned network addresses associated with those sessions
- Length of service and types of service utilized
- Telephone or instrument numbers
- Other subscriber numbers or identities
- Means and source of payment for such service and billing records

If you have any questions in relation to this request, please contact me via e-mail, (provide an e-mail address) or telephone, (provide a telephone number).

Yours faithfully,

_____

(NAME AND POSITION)

INSTRUCTIONS FOR FILLING OUT THE REQUEST

To formalize this request, the six fields underlined in red must be filled in, which correspond to the following points:

- Attn: (contact details, name)

  In this section the name of the company to which the request is addressed is to be provided (Facebook, Twitter, Google, etc.).

- Related account: (related e-mail address)

  Indicate the account to which the request for data preservation relates. If there is more than one account, a letter is to be drawn up for each. Particular care must be taken when specifying the account, ensuring that no characters are altered or omitted. Do not provide URL addresses rather than names or account details as such information is useless.

- Proceedings number: (proceedings number)

  Here, the proceedings number should be provided.

- Date: (date)

  In this section, the date on which the request is signed should be provided.

- Account: (account)

  Same as said in point 2.

- Yours faithfully,

(NAME AND POSITION)

In this space the request is to be stamped and signed and the name and position within the court of the signatory is to be provided (Magistrate, Judge, Judicial Administration Clerk).

FINALLY, ONLY THE FILLED IN LETTER, DULY SIGNED AND STAMPED, IS TO BE FORWARDED, WITHOUT THIS SECTION PROVIDING INSTRUCTIONS.

BELOW, A SPANISH TRANSLATION OF THE REQUEST FOR THE PRESERVATION OF DATA IS PROVIDED

A la atención de:

Cuenta relacionada:

Fecha:

Solicitud de preservación de datos

Estimados Sres.

Esta carta es una solicitud para la preservación de todas las comunicaciones almacenadas, registros y otras pruebas en su posesión con respecto a la siguiente cuenta pendiente de la tramitación de un proceso legal:

Cuenta:

Les solicitamos que no revele la existencia de esta solicitud al suscriptor o a cualquier otra persona, salvo cuando sea necesario para el cumplir con los requisitos de esta solicitud. Si el cumplimiento de esta solicitud puede terminar en una finalización definitiva o temporal de la(s) cuenta(s), o alertar a cualquier usuario de la(s) cuenta(s) en cuanto a sus acciones para preservar la información descrita más abajo, por favor, póngase en contacto con nosotros tan pronto como sea posible y antes de tomar otras medidas.

Les rogamos que preserven a continuación la información descrita en su poder, en un formulario que incluya los registros completos. Entendemos que, de conformidad con la legislación de los Estados Unidos, los registros pueden conservarse por un período de 90 días, con posibles prórrogas. Si al hacer la preservación para un gobierno extranjero, la política o práctica de su compañía es la preservación por un período superior a 90 días, por favor infórmenos sobre la duración de la preservación y cuándo expirará.

Esta solicitud se aplica sólo retroactivamente, de ninguna manera se obliga a recoger y preservar nueva información que surgiera después de la fecha de esta solicitud. Esta solicitud, ya sea en forma electrónica o de otro tipo, incluida la información almacenada por medio de una copia de seguridad si está disponible, se aplica a los siguientes elementos:

- El contenido de cualquier comunicación o archivo almacenado por o para la(s) cuenta(s), cualquier cuenta asociada y cualquier información asociada con esas comunicaciones o archivos, tales como las direcciones de correo electrónico de origen y destino o direcciones de “Protocolo de Internet” (IP).
- Todos los registros y cualquier otra información relacionada con la(s) cuenta(s) y cuentas asociadas, incluyendo lo siguiente:
  - Nombres
  - Direcciones
  - Los registros de conexión telefónica, tanto local como de larga distancia

- Los registros, tanto de los tiempos de sesión y sus duraciones como de la red asignada temporalmente asociada con esas sesiones
- Tipo y duración del servicio utilizado
- Números de teléfono o del medio utilizado
- Otros números o identidades de los suscriptores
- Medios y métodos de pago de dichos servicios y registros de facturación

Si tiene alguna duda sobre esta solicitud, póngase en contacto con nosotros por correo electrónico en: xxxxxxxxxx@xxxxx, o por teléfono en: +xx xxx xxxxxxx

Atentamente,

ANNEX II: MODEL FOR THE RULING TO OBTAIN DATA

MODEL FOR THE RULING TO DIRECTLY OBTAIN SUBSCRIPTION AND TRANSACTIONAL DATA FROM INTERNET SERVICE PROVIDERS

v. 3.0

Instructions for filling in the ruling:

- Fill in all spaces highlighted in blue. At times various alternatives may exist, or some of the variables may not be applicable. The casuistry is extremely varied and it would be impossible to provide a model that caters for each and every case. The Court may adapt the provided model as it sees fit, and if any queries arise it can consult the Office.
- The basis for acquiring data is always the correct designation of the Internet account. Designation varies according to the provider, which establishes the manner of designating its accounts: a number, name or series of characters can be employed. Where doubts arise, contact the judicial police or the Office.
- The wording of the description of the events under investigation must be clear and precise. However, companies do not need to be made privy to small details, but rather require a general overview of the events and their legal classification. Try to ensure that the wording is straightforward. Insofar as possible, avoid excessively long sentences and subordinate clauses. Also avoid unnecessary technical language, particularly words that are not frequently used or that may cause translation difficulties or comprehension problems in English. Remember that the ruling has to be translated and the most important aspect is that we are understood!
- Once the ruling is finalized, BEFORE SIGNING IT, it is advisable to send it via e-mail (Word file) to the Office of Justice Affairs in Washington, D.C. in order to enable it to evaluate its suitability, taking the company in question into consideration. Under no circumstances will the Office assess the purely jurisdictional of formal-legal aspects in relation to the ruling, maintaining absolute respect for judicial independence; rather, it limits its actions to analyzing the text with a view to the requirements imposed by U.S. authorities, in an attempt to avoid subsequent problems. In any event, the Office only offers suggestions and the decision ultimately lies with the judicial body.

RULING

Date: In Xxxxx, on xx/xx/xx

FACTS

One. On xx/xx/xxxx, criminal proceedings were instigated (Preliminary Proceedings), as a result of the alleged perpetration of a crime of xxxxxxxxxx. (We recommend using this space to present the literal classification of the crime with a view to facilitating understanding in the U.S.)

Two. The Specialized and Violent Crime Unit (UDEV for its acronym in Spanish) of the National Police/Civil Guard (Official Communication xxx.xxx), (or at the behest of a party, where applicable) has called for a court order to be addressed to the company xxxxxxxx in order to have it provide the subscription and transactional data relating to the following Internet account: provider xxxxxxxxx, account xxxxxxxxxx.

Three. The Office of the Ministry of Justice in the Spanish Embassy in the United States has indicated that Internet service providers, in this case xxxxxxxx, normally comply with direct requests for subscription and technical data on a strictly voluntary basis and in accordance with their internal policies, on the basis of the U.S. Electronic Communications Privacy Act. The U.S. Department of Justice is permissive in this sense, affording authorization to proceed without an international request.

Four. Prior to issuing this ruling, the corresponding request for data preservation was issued and obtained a positive response. Its reference number is xxxxxxx.

LEGAL GROUNDS

One. This investigation relates to an alleged crime of xxxxxxxxxx, outlined in article xxxx, and a crime of xxxxxxxxxx, outlined in article xxxx, and in accordance with the matters investigated to date, notwithstanding definitive proof, probable cause exists to suggest that the following events took place:

_____
_____
_____ (It is important to provide a clear description of the facts, the judicial body may consider the possibility of removing any personal details that it feels it should protect, by employing general references or alternative data, e.g. referring to the victim rather than employing the victim's name; witness X or witness No. ...).

Two. The acts outlined above may constitute _____
_____
_____ (reference to the type of crime, applicable precepts and possible punishment) _____ In accordance with articles Xxxxx of the Law of Criminal Procedure (articles of the Law of Criminal Procedure or other legal text providing the basis for the investigative measure to be carried out).

Three. The subscription and transactional data that are to be requested are essential in order to correctly identify the alleged perpetrators of the acts under investigation, as the content of the corresponding pages of XXXX alone do not identify the specific individual who introduced the criminal content, and at present no other investigative measures exist to enable such identification. (The identity may be apparent, but accreditation is sought via the Internet provider; indicate as relevant).

Four. The provider is expressly called on to refrain from informing the user or third parties of this data access request, as this might prove detrimental to the investigation.

In view of the cited articles and others of a general nature that prove applicable.

OPERATIVE PROVISIONS

A ruling is issued to call on (name of company Xxxxxxx) to provide the subscription, transactional or technical data relating to the account (designation of the account XXXXXXXX), from XXXX to XXXX[25]; and to this end:

Carry out the following measures:

- Send an official communication to the Office of Justice Affairs in Washington, D.C. requesting that it gather from Company Xxxxxxxx, (U.S. address), on behalf and at the behest of this Court, all subscription and transactional data outlined below linked to the following user profile:

  _____

  _____

  _____ Identify the account (it is important to correctly designate the account, where doubts arise, consult the Office).

  This data must include, but is not necessarily limited to the following:

  - Registration details, including full name, associated e-mail addresses and postal address
  - Registration data for the profile
  - Data relating to activity or, where applicable, the date on which activity ceased
  - Associated telephone numbers
  - Connections made between 00:00 on xx/xx/xxxx and 00:00 on xx/xx/xxxx, along with the IP addresses associated with profile users[26]

We expressly request that the provider refrain from informing the subscriber or any other individual of the request for access to data, except where this proves necessary to fulfil the requirements of this request. The consent of this judicial body should be sought prior to any other communication to third parties, to which end a request, duly signed, should be sent[27].

25 In general, U.S. practice frowns upon indiscriminate access to all data, whereby delimiting dates should be provided in accordance with the requirements of the investigation. Even so, the subscription data from the opening of the account and any possible modification to it may be required, in which case this is to be indicated. Nevertheless, if transactional data is also requested, then it is advisable to always establish a date range.

26 Depending on the nature of the investigation, such data may not be required.

27 This paragraph should always be included if the court wishes the provider to refrain from informing its client of the request for access to data. Increasingly, U.S. providers are implementing internal policies geared towards informing clients at all times, where legally viable. As a result, where not expressly prohibited, the provider is likely to inform its client of any access.

Inform the State Prosecutor's Office and other appearing parties of this ruling, indicating that it is not final and is subject to an appeal for amendment, to be lodged before this court within a period of three days to be counted from the date on which notification was served.

Thus it is ordered, signed and delivered by His Honour Xxxxx Xxxxx Xxxxx Magistrate-Judge of the Court Xxxxxxx xxxxx Xxxxx.

THE MAGISTRATE-JUDGE THE JUDICIAL ADMINISTRATION JUSTICE

ANNEX III: CHECKLIST FOR DIRECT REQUESTS FOR DATA ADDRESSED TO INTERNET COMPANIES

REQUISITES OF THE RULING ORDERING THE REQUEST FOR DATA

- CLEAR INDICATION OF THE ACCOUNT OR ACCOUNTS IN RELATION TO WHICH DATA IS REQUESTED. Take great care to ensure that no character is missing (letter, digit, sign, or symbol). Where doubts arise, consult the Office.
- DATE RANGE. (Start date and end date defining the period over which data is requested). In general, requests that fail to specify a date range (all data since the account was created) are inadmissible. The end date cannot be later than the date of the ruling. If the alleged acts did not take place within a clearly defined time frame and this affects the periods to be investigated, a "generous" approximation can be made, without exaggeration.
- REQUEST FOR SECRECY. Where the provider is to be asked to refrain from informing the user of the request for data access, a commitment to secrecy must be outlined in the ruling. Bear in mind that this has nothing to do with the secrecy of the proceedings and is only concerned with preventing the company from informing the client of the request for data access (non-disclosure clause).
- NATURE OF THE DATA. Clearly indicate the nature of data that is sought, be it subscription data, technical data or transactional data. CONTENT DATA CANNOT BE OBTAINED VIA THIS METHOD.
- PROBABLE CAUSE OR RELEVANCE. A clear outline of the events, safeguarding those personal details that are not strictly necessary. A clear relationship between the presented facts or background and the affected account or accounts. In the legal grounds section, clearly and briefly explain the need to obtain the data and its relevance in terms of enabling the investigation to advance. Where doubts arise, raise a query.
- CLASSIFICATION OF THE CRIME AND TRANSCRIPTION OF ARTICLE/S. The ruling must outline the classification of the crime, indicating its designation and reference article. It is advisable to also transcribe the main article or articles in the ruling.
- RULING ISSUED IN SPANISH. PRIOR TO SIGNING THE RULING, FORWARD IT TO THE OFFICE TO ENABLE ANALYSIS IN TERMS OF U.S. LAW.
- ONCE THE RULING HAS BEEN ANALYSED BY THE OFFICE, HAVE IT TRANSLATED INTO ENGLISH.
- FORWARD THE ENGLISH VERSION VIA E-MAIL ALONG WITH AN OFFICIAL COMMUNICATION IN SPANISH AUTHORISING THE OFFICE TO OBTAIN THE REQUESTED DATA FROM THE PROVIDER. THE ENGLISH VERSION OF THE RULING MUST BE SIGNED BY THE JUDGE AND THE CLERK AND BEAR THE STAMP OF THE COURT.

ANNEX IV: CHECKLIST FOR INTERNATIONAL REQUESTS TO OBTAIN DATA FROM INTERNET COMPANIES

REQUISITES OF THE RULING OR RESOLUTION ORDERING THE REQUEST FOR DATA

- CLEAR INDICATION OF THE ACCOUNT OR ACCOUNTS IN RELATION TO WHICH DATA IS REQUESTED. Take great care to ensure that no character is missing (letter, digit, sign, or symbol). Where doubts arise, consult the Office.
- DATE RANGE. (Start date and end date defining the period over which data is requested). In general, requests that fail to specify a date range (all data since the account was created) are inadmissible. The end date cannot be later than the date of the ruling. If the alleged acts did not take place within a clearly defined time frame and this affects the periods to be investigated, a "generous" approximation can be made, without exaggeration. Where IP addresses are requested, bear in mind that many providers only store data relating to the last 180 days.
- REQUEST FOR SECRECY. Where the provider is to be asked to refrain from informing the user of the request for data access, a commitment to secrecy must be outlined in the ruling. Bear in mind that this has nothing to do with the secrecy of the proceedings and is only concerned with preventing the company from informing the client of the request for data access (non-disclosure clause). Refer to the form.
- MAKE REFERENCE TO PRESERVATION. Make reference to the preservation previously requested in the ruling and in the documents within the international request.
- NATURE OF THE DATA. Clearly indicate the nature of data that is sought, be it subscription data, technical data, transactional data or content data.
- PROBABLE CAUSE OR SIGNIFICANCE. A clear outline of the events, safeguarding those personal details that are not strictly necessary. A clear relationship between the presented facts or background and the affected account or accounts. In the legal grounds section, clearly and briefly explain the need to obtain the data and its relevance in terms of enabling the investigation to advance. Where doubts arise, raise a query.
- CLASSFICATION OF THE CRIME. It is important to clearly indicate the classification of the crime under investigation with reference to the article of the Penal Code, and it is also advisable to include a literal transcription of the article in question in the ruling.

- RULING AND DOCUMENTATION ISSUED IN SPANISH. PRIOR TO SIGNING THE RULING, FORWARD IT TO THE OFFICE TO ENABLE ANALYSIS IN TERMS OF U.S. LAW ALONG WITH THE DOCUMENTATION OF THE INTERNATIONAL REQUEST.
- ONCE THE RULING AND OTHER DOCUMENTATION HAVE BEEN ANALYSED BY THE OFFICE, HAVE THEM TRANSLATED INTO ENGLISH.
- FORWARD ALL DOCUMENTATION TO THE MINISTRY OF JUSTICE, THE CENTRAL AUTHORITY.

ANNEX V: MODEL FOR THE RESOLUTION TO OBTAIN SUBSCRIPTION AND INTERNET SERVICES DATA DIRECTLY (Minors Jurisdiction)[28]

MODEL FOR THE RESOLUTION TO DIRECTLY OBTAIN SUBSCRIPTION AND TRANSACTIONAL DATA FROM INTERNET SERVICE PROVIDERS

v. 1.0

Instructions for filling in the resolution:

- Fill in all spaces highlighted in blue. At times various alternatives may exist or some of the variables may not be applicable. The casuistry is extremely varied and it would be impossible to provide a model that caters for each and every case. In this case it falls to the State Prosecutor's Office to employ its own criteria to modify this model as it deems appropriate. If in doubt, please consult with the Office.
- The basis for acquiring data is always the correct designation of the Internet account. Designation varies according to the provider, which establishes the manner of designating its accounts: a number, name or series of characters can be employed. Where doubts arise, contact the judicial police or the Office.
- The wording of the description of the events under investigation must be clear and precise. However, companies do not need to be made privy to small details, but rather require a general overview of the events and their legal classification. Try to ensure that the wording is straightforward. Insofar as possible, avoid excessively long sentences and subordinate clauses. Also avoid unnecessary technical language, particularly words that are not frequently used or that may cause translation difficulties or comprehension problems in English. Remember that the ruling has to be translated and the most important aspect is that we are understood!.
- Once the resolution is finalized, BEFORE SIGNING IT, it is advisable to send it via e-mail (in Word format) to the Office in order to enable it to evaluate its suitability, taking the company in question into consideration. Under no circumstances will the Office assess the purely jurisdictional of formal-legal aspects in relation to the ruling, maintaining absolute respect for the independence of the investigating authority; rather, it limits its actions to analyzing the text with a view to the requirements imposed by U.S. authorities, in an attempt to avoid subsequent problems. In any event, the Office only offers suggestions and the decision ultimately lies with the judicial body.
- Measures to protect the personal details of minors are fully compatible with actions of this nature, although it falls to the investigating authority to adopt the safeguards and necessary measures to this end.

---

[28] This model was designed by the State Prosecutor Miriam Bahamonde Blanco and we are grateful to her for her collaboration.

In Xxxxxx, on mm dd, aaaa

FACTS

One. On xx/xx/xxxx the State Prosecutor's Office instigated criminal action as a result of the alleged perpetration of a crime of xxxxxxxxxx, which has given rise to Juvenile Proceedings XXXXX. (We recommend using this space to present the literal classification of the crime with a view to facilitating understanding in the U.S.).

Two. The Specialized and Violent Crime Unit (UDEV) of the National Police/Civil Guard, etc. (Official Communication xxx.xxx), (or at the behest of a party, where applicable) has called for a court order to be addressed to the company Xxxxxxxx in order to have it provide the subscription and transactional data relating to the following Internet account: provider Xxxxxxxxx, account xxxxxxxxxx.

Three. The Office of the Ministry of Justice in the Spanish Embassy in the United States has indicated that Internet service providers, in this case Xxxxxxxx, normally comply with direct requests for subscription and technical data on a strictly voluntary basis and in accordance with their internal policies, on the basis of the U.S. Electronic Communications Privacy Act. The U.S. Department of Justice is permissive in this sense, affording authorization to proceed without an international request.

Four. Prior to issuing this ruling, the corresponding request for data preservation was issued and obtained a positive response. Its reference number is xxxxxxx.

LEGAL GROUNDS

One. This investigation relates to an alleged crime of xxxxxxxxxx, outlined in article xxxx, and a crime of xxxxxxxxxx, outlined in article xxxx, and in accordance with the matters investigated to date, notwithstanding definitive proof, probable cause exists to suggest that the following events took place:

_____

_____

_____ (It is important to provide a clear description of the acts, the judicial body may consider the possibility of removing any personal details that it feels it should protect, by employing general references or alternative data, e.g. referring to "the victim" rather than employing the victim's name; witness X or witness No. ...).

Two. The acts outlined above may constitute _____

_____

_____ (reference to the type of crime, applicable precepts and possible punishment). In accordance with articles Xxxxx of the Law of Criminal Procedure (articles of the Law of Criminal Procedure or other legal text providing the basis for the investigative measure to be carried out).

Three. The subscription and transactional data that are to be requested are essential in order to correctly identify the alleged perpetrators of the acts under investigation, as the content of the corresponding pages of Xxxxxx alone do not identify the specific individual who introduced the criminal content, and at present no other investigative measures

exist to enable such identification. (Or the identity may be apparent, but accreditation is sought via the Internet provider; indicate as relevant).

Four. The provider is expressly called on to refrain from informing the user or third parties of this data access request, as this might prove detrimental to the investigation.

In view of the cited articles and others of a general nature that prove applicable

OPERATIVE PROVISIONS

A ruling is issued to call on (name of company Xxxxxxxx) to provide the subscription, transactional or technical data relating to the account (designation of the account Xxxxxxxx), from xxxx to xxxx[29]; and to this end:

Carry out the following measures:

- Send an official communication to the Office of the Ministry of Justice in the Spanish Embassy in the US, requesting that it gather from company Xxxxxxx (U.S. address), on behalf and at the behest of this State Prosecutor's Office, all subscription and transactional data outlined below linked to the following user profile:

  _____

  _____

  _____ Identify the account (it is important to correctly designate the account. Where doubts arise, consult the Office).

  This data must include, but is not necessarily limited to the following:

  — Registration details, including full name, associated e-mail addresses and postal address.

  — Registration data for the profile.

  — Data relating to activity or, where applicable, the date on which activity ceased.

  — Associated telephone numbers.

  — Connections made between 00:00 on xx/xx/xxxx and 00:00 on xx/xx/xxxx, along with the IP addresses associated with profile users[30].

[29] In general, U.S. practice frowns upon indiscriminate access to all data, whereby delimiting dates should be provided in accordance with the requirements of the investigation. Even so, the subscription data from the opening of the account and any possible modification to it may be required, in which case this is to be indicated. Nevertheless, if transactional data is also requested, then it is advisable to always establish a date range.

[30] Depending on the nature of the investigation, such data may not be required.

We expressly request that the provider refrain from informing the subscriber or any other individual of the request for access to data, except where this proves necessary to fulfil the requirements of this request. The consent of this judicial body should be sought prior to any other communication to third parties, to which end a request, duly signed, should be sent[31].

Thus it is ordered, signed and delivered by Mr./Ms. Xxxxx Xxxxx Xxxxx State Prosecutor Xxxxxxxxxxx.

[31] This paragraph should always be included if the court wishes the provider to refrain from informing its client of the request for access to data. Increasingly, U.S. providers are implementing internal policies geared towards informing clients at all times, where legally viable. As a result, where not expressly prohibited, the provider is likely to inform its client of any access.

PRACTICAL GUIDE TO STATEMENTS IN THE UNITED STATES VIA VIDEOCONFERENCING

(Criminal process)

Introduction

The objective of this guide is to offer some practical guidelines and recommendations regarding obtaining declarations via videoconference during criminal proceedings. It is therefore not an exhaustive legal study of applicable law in the matter, which must be consulted and analyzed before making decisions.

Furthermore, the Guide per se is not of a prescriptive nature, and solely aims to provide guidelines in order to improve the coordination, efficiency and results in the practice of international legal assistance proceedings.

...

Current status of the issue

The U.S. Department of Justice does not usually place impediments to making statements via videoconference, providing they are to serve in a trial.

In the case of videoconferences for examination or investigation procedures undertaken by the State Prosecutor's Office, the issue is more complicated and, at present, case by case negotiation is required.

In general, with regards to videoconferencing, attention should also be afforded to the restrictions imposed by the Department of Justice according to the nature of the crime: international requests are not normally fulfilled where the economic amount entailed is less than $5,000, or in the case of minor crimes, except in cases relating to terrorism, organized crime, drug trafficking, violent crime, the sexual abuse of minors, corruption and, above all, where the matter might in some way be connected with the security or interests of the United States, or where there are U.S. victims.

However, even where we are dealing with an investigative procedure or crimes of a minor nature that are excluded, the U.S. authorities, as a result of an international request, may authorize a videoconference to take place via consular channels, which therefore is a possible alternative.

For procedures of this nature, the legal basis to be applied is found in the instrument envisaged in article 3(2) of the Agreement on Mutual Legal Assistance between the United States of America and the European Union.

Declarations via consular channels

The Spanish Central Authority holds that videoconferences via consular channels should not be employed to take statements in criminal proceedings, even where the individual or individuals who are to make a statement are of Spanish nationality, except under the following circumstances, with which the U.S. authorities are also in full agreement:

- Where an international request has been sent for the specific intention of setting up an ordinary videoconference.

- Where authorization is sought from and granted by the Department of Justice to carry out the videoconference in any of the Spanish consulates in the United States.
- Where the U.S. authorities inform the individual in question that the statement is to be made in a given consulate.

As a result, where these circumstances apply, the Office can coordinate the taking of a statement via consular channels.

Nevertheless, this possibility faces a number of limitations.

Spain has nine consulates in the United States (Boston, Chicago, Houston, Los Angeles, Miami, New York, San Francisco, San Juan de Puerto Rico and Washington, D.C.). Normally, the individual who is to provide the statement must reside or be located relatively close to the corresponding consular office, otherwise the logistical costs will be difficult to cover.

Furthermore, at present consulates do not possess conventional videoconferencing equipment, whereby Skype or other similar applications must be employed.

Nevertheless, when the declarant has the status of Embassy staff, or of its attaché offices or of the different consular missions, then it is not considered as a case of international legal assistance, given that the act occurred in every respect in the context of the Spanish administration.

In these cases videoconferencing can be carried out, if so authorized by the requesting authority, as if it were taking place within Spanish territory, without applying the Agreement on Mutual Legal Assistance between the United States of America and the European Union.

Declarations solicited through the Mutual Legal Assistance Treaty (MLAT)

In view of the above, MLAT represents the only admissible channel (except in the extremely limited case of personnel attached to the Embassy or Consulates) within the criminal jurisdiction to request a statement via videoconference.

The form, and therefore the content of this type of international request are regulated in the aforementioned Agreement on Mutual Legal Assistance between the United States of America and the European Union.

From a practical point of view, along with the stipulations of the legal instrument, the following aspects should be taken into account:

- The organization of a videoconference requires a certain amount of time and coordination. This generally applies in any country and, in some ways it is heightened in the United States, given the complexity and scope of its legal systems. After receiving the assistance request, the Department of Justice must perform the necessary arrangements and the minimum time limits required are often long. Therefore, if the Spanish judicial authority wants the declaration to take place on a specific date, or before a specific date, it is advisable to issue the letter of request four months in advance. With regards to the dates, it is also advisable to propose more than one alternative, if possible.

- If the Spanish judicial authority anticipates that the declaration should take place at a specific time, or within a specific time frame, it is important to take time differences into account, in order to avoid inconvenient or impossible times, for both countries.
- The United States has a total of up to 9 time zones, based on the Coordinated Universal Time (UTC) offset. Furthermore, so-called daylight saving time is used by the majority of people in the country at some point in the year[32]:

Zones used in the contiguous United States:

- **Eastern Standard Time:** abbreviated by convention as EST. It uses UTC-5 and is also called "Zone R". It approximately comprises the states of the Atlantic Coast and the eastern two-thirds of the Ohio Valley.
- **Central Standard Time:** abbreviated as CST. It uses UTC-6 and is also known as "Zone S". It approximately comprises the Gulf Coast, the Mississippi Valley and the Great Plains.
- **Mountain Standard Time**: abbreviated as MST. It uses UTC-7 and is also called "Zone T". It approximately comprises the states including the Rocky Mountains.
- **Pacific Standard Time:** abbreviated as PST. It uses UTC-8 and is also known as "Zone U". It approximately takes in the States of the Pacific Coast along with Nevada.

Zones used in the non-contiguous states:

- **Alaska Time Zone:** Abbreviated as ALKS. It uses UTC-9 and is also known as "Zone V". It comprises a large part of the state of Alaska.
- **Hawaii-Aleutian Standard Time** (known unofficially as Hawaii Standard Time: HST): It is abbreviated as HAST. It uses UTC-10 and is also known as "Zone W". It comprises the entire state of Hawaii and the majority of the archipelago of the Aleutian Islands.

Zones used outside of the United States:

- **Atlantic Standard Time:** abbreviated as AST. It uses UTC-4 and is also known as "Zone Q". It comprises Puerto Rico and the United States Virgin Islands.
- **Samoa Standard Time:** abbreviated as SST. It uses UTC-11 and is occasionally called "Zone X". It comprises American Samoa.
- **Chamorro Standard Time:** abbreviated as ChST. It uses UTC+10 and is also called "Zone K". It comprises the island of Guam and the Northern Mariana Islands.

[32] The exact time in any part of the country at any time of year can be easily consulted on the Internet. To determine the time, simply use an Internet service, such as 24TimeZones.com.

- The Agreement on Mutual Legal Assistance between the United States of America and the European Union does not call for the forwarding of the questions to be employed in the statement to be taken. However, the American authorities consider that they should always have some information in this regard. This need is justified by the fact that they must provide the individuals implicated in the proceedings with information. This information may consist in a list of questions submitted beforehand, or in a sufficiently meaningful reference to the matters to be addressed. Therefore, it is highly advisable that the Spanish judicial authorities, when requesting assistance to take a statement via videoconference, where they do not forward the questions, at the very least, adjoin a brief outline to the MLAT indicating the topics or issues in relation to which the declarant is to be questioned. Otherwise, there is a risk that the Department of Justice will call for such clarification, thereby occasioning delays.

Operational issues

MLATs are sent directly by the Spanish Central Authority to the U.S. Central Authority.

It is a good idea for the Spanish judicial authorities to resolve any possible queries that may arise before issuing the request for assistance to the Spanish central authority. To this effect, both the aforementioned central authority and the Office of Justice Affairs at the Embassy of Spain in Washington D.C., which is functionally part of the central authority, are available for any queries.

In urgent cases, it is advisable to coordinate the issue with the Office at the Embassy of Spain in Washington D.C. beforehand, while taking into account that, given the scope and complexity of the U.S. Justice system, it may not be easy to coordinate a videoconference in a short space of time.

In any case it is advisable to request and arrange a preliminary test in order to ensure the correct functioning and the suitability or compatibility of the technological resources.

To this end, and in the case of consular declarations, the Office can coordinate this issue with relative ease, if so desired by the requesting authority, as it already has practical experience in the matter and has knowledge of the existing resources in the different consulates.

With regards to statements sought via international request, the issue of technical evidence will largely depend on the conditions established by the U.S. authorities.

Regarding this matter, the Department of Justice states that tests will only be carried out if solicited by the requesting party, and it is recommended that tests are carried out a few days before or a week before the date established for the proceedings. Therefore, the Office recommends that dates are proposed on all international requests (it is important to establish two or three alternatives) for tests, at least three days in advance of the date anticipated for the videoconference.

Finally, if the statement is to be employed in a trial, it is important that this is specified in the MLAT, including an estimate, if possible, of the likely duration, which will usually depend on the estimated complexity of the questioning and the parties involved. The above guidelines are also recommended when the declarations in the pre-trial phase may be "*ab initio*" especially complex and long lasting.

Specific issues of legal assistance. Statements provided by individuals under investigation and defendants

When the statement is to be provided by a defendant it is essential that this be indicated in the MLAT, also outlining that the individual in question has a designated lawyer, providing his or her contact details.

In the case of declarations by a defendant, the assistance of a lawyer and his effectiveness must be duly guaranteed, including the appropriate confidential communication between the lawyer and his client, which could also take place via videoconference, the technical elements in order for this prior confidential communication to take place being provided by the authorities.

What is more difficult, based on the consultations, is that there are technical resources available so that the confidential communication can also take place during the declaration.

In the event that the defendant does not have a designated lawyer, it is important to take into account that the United States Department of Justice does not provide the assistance of a lawyer in these cases, even when it is requested in the MLAT.

The justification of the U.S. authorities is that it is not anticipated in the bilateral instrument operating as the legal base, along with the fact that the acting American lawyer or advocate would not have knowledge of the specific process or applicable Spanish law.

Therefore, any request contained in the MLAT to provide the declarant with a lawyer during the declaration will not be fulfilled.

In these circumstances, the recommendation of the Office is that the Spanish court should designate a lawyer to assist the defendant and to act from Spain in order to guarantee, amongst other things, that prior confidential communication can take place with the client in the U.S., so that the right to defense is fulfilled.

This situation should be clearly stated on the MLAT, and in these cases, it is particularly advisable to make prior contact with the Office in order to negotiate this issue with the U.S. authorities.

Specific problems relating to holding videoconferences in prisons

When organizing videoconferences in prisons, the following points must also be taken into consideration:

- Identify the individual (inmate) precisely (name, date of birth, prisoner number...) and the prison in which he or she is located. The Office can provide assistance in this regard.
- Indicate the purpose of the questioning as clearly as possible.
- Provide alternative possible dates for the questioning. Provide at least three.
- Determine whether or not there is any impediment to having the U.S. defense lawyer associated with the proceedings leading to the individual's imprisonment

present during the questioning. Where this proves problematic, sufficient grounds must be provided.

In requests of this nature, the U.S. authorities will evaluate whether implementing the request will interfere with any ongoing investigations, which could provide grounds for refusal or delay.

Statements by minors

At times, the statement of a minor may raise practical problems when carrying out a videoconference.

In general, the U.S. authorities will not see any problem in admitting the statement of a minor via videoconference, providing that the minor is assisted by his or her legal representative or guardian.

The U.S. authorities also usually accept that it is the minor who makes the statement and not his or her legal representative or guardian, notwithstanding that at some time or certain point in the proceedings some help or assistance from the latter may be necessary.

However, it is possible that, in certain cases, an assisted statement is only acceptable with certain professionals (psychologists, educators or similar) or that it is not admitted live before the court and only before a professional team behind closed doors and via a recording.

Thus, in this type of case it is always advisable to consult beforehand and anticipate the statement with sufficient time so that the two central authorities and the Office of the Ministry of Justice in Washington D.C. can conduct a study and analysis of the case, obtain the point of view of the U.S. authorities, and proceed in the best possible and most viable way, with the prime objective of ensuring the best interests of the minor.

Courtesy and operational aspects

The objective of this guide is not to provide guidelines or answers to the judicial or procedural aspects of a videoconference.

The intention is to contribute a series of tips and suggestions on aspects of courtesy and other matters not strictly of a legal nature, related to the course of the proceedings.

Courtesy

Courtesy is an element of conduct present in all cultures, although there are important variants in the way of understanding and practicing it. In other words, it has some very marked idiosyncratic aspects.

U.S. people value and appreciate courtesy greatly. “Polite” conduct is a substantial part of their idiosyncrasy. For this reason, in all videoconferences the following should not be forgotten:

- Initial greetings and introductions
  - They are not a mere formality that can be done quickly just to go through the motions. Take your time over this, it is only a matter of a minute or two, but it is something important for your interlocutors, who will undoubtedly appreciate it and reciprocate.
  - Do not forget to introduce yourself and whoever is accompanying you and introduce successive participants.
- Avoid imperatives, and accompany requests with courteous expressions such as "please" or "if you would be so kind", and always acknowledge replies by thanking your interlocutor.
  - Although in certain cultures it is acceptable for these types of expressions to be omitted, at certain times and under certain circumstances, and even to avoid excessive redundancies, this, generally speaking, is not the case in the United States. "Please" and "thank you" are always present, and at times quite continuously, in conversations.
  - Furthermore, imperative language is used very little in social and professional relations, except in certain very specific circles such as in the military. Generally speaking, do not use imperatives, or expressions that due to an absence of elements of courtesy may be interpreted as imperatives.
- Farewells
  - A correct farewell is an essential part of any personal or professional relationship.
  - Start by expressing gratitude for the collaboration received. Do so in a restrained but sincere manner. Never in a forced or banal fashion. Think that the people who are on the other end have had to dedicate an important part of their time, as you have, to the proceedings.
  - Do not restrict the farewells and the thanks to the professionals or colleagues who are on the other end of the videoconference. Do the same with the witnesses and other participants, although obviously adapting to each circumstance.
  - Do not rush or make it obvious that you are in a hurry to finish. An appropriate farewell does not take very long. On the contrary, a rushed farewell may create a bad impression.

Operational aspects

A videoconference with the United States is also a dialogue between two different legal cultures. Although an effort has been made to anticipate everything ex ante, eventualities can always occur. We therefore recommend that you take the following points into account:

- Following the start of the proceedings and the corresponding greetings, try to establish a preliminary dialogue with the person responsible for conducting the

proceedings on the other end of the communication. This dialogue or exchange of views should be geared towards checking that both parties have a common understanding of what is to be done and how it is to be carried out.

- In the event of doubts or problems arising, whether as a result of the prior exchange of views or during the proceedings, adopt a constructive attitude. Once again establish an open and frank dialogue with your counterparts and bear in mind that in general a solution can always be found.
- Both the Office of Justice Affairs in Washington, D.C. and the Department of Justice's International Affairs Office keep us vigilant and ready to provide support in the event of any incident on the days we have videoconferences scheduled. A simple e-mail or a call will suffice for us to be ready to act in a matter of minutes in order to contribute to the search for solutions.
- It is also recommendable, in the face of problems, to interrupt the proceedings and wait for a solution to be found. Simply considering the proceedings to be a failure or unproductive, with undue haste, may give rise to irreversible situations.

And remember, courtesy is an important pillar of the image of our country abroad.

Appendix

Below you will find several practical guidance materials. It is advisable to consult these materials before issuing an international request to obtain declarations via videoconference:

State General Prosecutor's Office. Conclusions from the meeting organized by the Centre for Legal Studies (CEJ) and the State General Prosecutor's Office regarding the use of videoconferencing in criminal proceedings and in international legal cooperation.

PRACTICAL GUIDE TO THE PRINCIPLE OF PROBABLE CAUSE IN THE UNITED STATES APPLIED TO OBTAINING DATA FROM COMMUNICATIONS AND THE INTERNET

1. Introduction and scope of the guide

The principle of probable cause derives from the Fourth Amendment to the U.S. Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

The application of this principle extends to different aspects of investigations and criminal proceedings.

The principle basically comes into play when determining the source of arrests of persons, deciding on indictments or on searches or access to communications. It also extends to seizures of goods or rights.

The application of the principle in question was developed through case law by the Supreme Court.

In this guide we will focus exclusively on the principle of probable cause in relation to searches or access to communications data, when requested from Spain.

These are searches or access destined towards the obtaining of evidence, solicited via requests for assistance (letters of request), whose purpose is to obtain the content of private communications that occur on the Internet or other similar networks (*e.g.*, content of e-mails, chats, etc.).

As a general strategy in this matter, it is important to take into account that when there is an interest in accessing the contents of private communications, and therefore it is necessary to adjust to the standard of "probable cause", it is possible that this cannot always be done initially, and thus it is first necessary to request metadata (subscription and/or technical data) and, with the information thereby obtained, together with the rest that we already have from the investigation, we are now in a position to formulate a request for content well-adjusted to the standard of probable cause and with possibility of success. Note that in order to request subscription and transactional data the standard is far more demanding.

It is true that the indicated procedure is rather time consuming, since it is a two-step strategy (gradual approximation), which will require two successive requests: first metadata, then content; but sometimes there is no alternative.

In other cases, it will be the U.S. authorities themselves that convert a request for content data into a first request for metadata (subscription and transactional data) and, once these have been provided, they will ask our authorities to analyze them and try to see if this may help to provide grounds for the standard of probable cause to access the content. In these kinds of cases the Department of Justice authorities will allow the same letter of request to operate, thereby avoiding the issue of a second request for assistance.

In order to understand this better, here is an example: Court X issues a letter of request to ask Google to disclose the contents of several e-mails in an account. However, the grounds for the letter of request fall short of covering the standard of probable cause, and the court does not have more factual elements or evidence to provide. With the information provided, the Department of Justice manages to access several technical data of the e-mails within the requested period of time (in the case of metadata the legally enforceable standard is less), such as the days and hours in which the account has been more active with respect to the sending of e-mails and the IPs they have been sent from. With these data, along with the rest of the evidence in the possession of the court, the U.S. authorities may now provide grounds for, in accordance with the standard of probable cause, the issue of a warrant to access the contents initially requested.

2. Preliminary distinction: probable cause does not apply to everything involving access to information from communications in a broad sense.

In spite of what was stated above it must be taken into account from this point onwards that not every request related in some way to access to communications is subject to the principle of "probable cause".

In order to determine when we need to use the standards required by probable cause the following must be taken into account:

- If we want to acquire the *subscriber details of* an Internet account, i.e., the information used to open or update the account (name, address, phone, email), U.S. legislation allows us to obtain them directly from the service provider, merely by arguing and justifying that this information is relevant to the investigation or the proceedings[33]. The "consideration of relevance" is based on the need for the information, even if it is not absolutely essential. Some Internet service companies (*e.g.*, Facebook) have online forms for authorities anywhere in the world to ask for this information without needing to resort to a MLAT, others require direct contact with their main offices in the United States. It should be noted that in practice, and although U.S. legislation does not prevent it, some companies will not provide this information in response to a direct request from the Spanish authorities. We should only resort to MLATs when this occurs. The Office of the Ministry of Justice is able to answer any questions on this point as they arise and should be consulted if anyone has the slightest doubt.

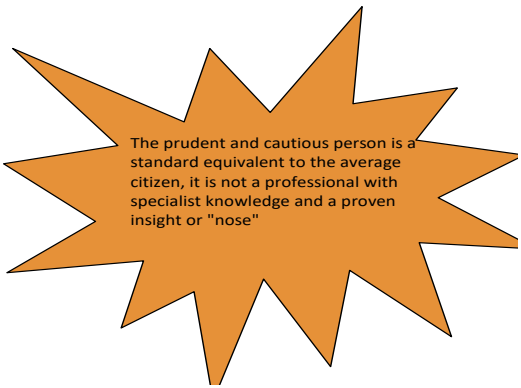
- If what we want to know is "transactional data" or metadata (IPs, connection logs, session logs), we do not need to resort to the standard of probable cause either. It is sufficient to argue and justify that this information is not only relevant but IMPORTANT for the investigation or proceedings. The standard applied to such cases is in a manner of speaking a little higher than the previous one, so we have to substantiate (but also document) that without this information it is very difficult

[33] One aspect to be taken into account in reference to obtaining information about account subscription details (called "subscriber information" in the Budapest Convention) is that under Article 18 (1)(b) of the Treaty, the States Parties should anticipate the possibility that the competent authorities may make a direct request (therefore without needing letters of request) to the offices of those services providers to send the requesting country the subscriber information they have at their disposal as a result of that activity, even if they are based in another State Party. As such, this possibility of obtaining subscriber information direct should in principle be the general rule.

Existing information, well documented and justified + the prudent and cautious person standard

Beliefs
Experiences
Professional knowledge

for the investigation or proceedings to continue successfully. Until recently it was considered that a MLAT was always necessary to ask for this type of information, however some companies are now beginning to provide it (Microsoft, Google, Facebook) if the following conditions are met: a) ongoing legal proceedings in the jurisdiction of origin, b) an agreement or decision by the competent authority, c) a short justification of the importance of the information.



• As such we only need to meet the requirements of probable cause *per se* when we want to access the content of communications (contents of emails, chats, posts articles published, etc.). In this instance we always need to issue a letter of request, but we must also follow all the requirements of probable cause as explained below. In these cases, it is also highly recommendable to prepare a REPORT on probable cause, to which we will refer again later, to be attached to the letter of request along with the other documents, which should always make reference to the data retention requested previously.

Therefore, and from a practical viewpoint:

- If we only need information on an account subscriber (email, chat, social media, telephone, etc.), it can be requested directly on the basis of a decision from the competent Spanish authority. If in doubt as to the specific procedure to follow, please consult the Office.

- If we also or only need transactional data, i.e., metadata (connection IPs, logs, etc.), we may be able to request it directly (Google, Facebook, Microsoft). If in doubt as to the specific procedure to follow, please consult the Office.
- If we also or only need content (reading emails, chats, posts, etc.), then a letter of request is ALWAYS necessary under the standard of "probable cause".

3. Delimiting the principle of probable cause. "Probable cause" is one thing and mere suspicion is another of lesser intensity (even when the latter makes sense for a professional on the investigation).

From the perspective of U.S. law (the Constitution and case law) probable cause in relation to searches or access to communications exists where there is sufficient information, properly obtained and supported, to warrant a prudent person's belief that the search or access may produce evidence that the alleged offense was committed.

First of all, it is important to note that probable cause is a standard of greater magnitude than mere suspicion.

In other words, probable cause requires a reasonably high and objective level of suspicion; i.e., it is the existence of sufficient information capable of generating a justified level of suspicion supported by circumstances of significant magnitude such as would warrant a prudent and cautious person to establish the well-grounded belief that certain facts are probably true.

In U.S. legal terms: "a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true".

The projection of the principle of probable cause to obtain certain evidence in the United States is crucial and these are the rules that judicial authorities will also apply when that evidence is sought by means of international judicial assistance.

Finally, to understand the idea fully we should start from the premise that the prudent or reasonable person who is the basis for establishing probable cause is NOT a professional or an expert in criminal investigation, but a citizen unconnected to these matters who will weigh up the available evidence in order to make a reasonable determination of probability. Without doubt this raises the requirements to a significantly higher level.

4. Development through case law

The U.S. Supreme Court has stated[34] that reasonable suspicion based on the training and special knowledge of the police is not the same as probable cause, which is based on the knowledge and perceptions of a normal or standard person.

As such it is generally not sufficient that the police's suspicions be grounded on the basis of their professional experience. The determination of reasonableness will need to be correct based on the standard of a normal person, which, as we said above, sets the requirements at a notably higher level.

[34] *Aguilar v. Texas, 378 U.S. 108 (1964), Spinelli v. United States (1969), Illinois v. Gates*, 462 U.S. 213 (1983).

More precisely the required test consists of the following:

- The judge must be informed of some of the underlying circumstances relied on by the person providing the information (informant). In other words, the components of the informant's knowledge.
- The judge must also be informed of some underlying circumstances from which the declarant (the police officer requesting the search) reached the conclusion that the informant was reliable and credible. The components of the police officer's assessment.
- A third component adds some flexibility to the previous two-pronged approach and derives from *Illinois v. Gates*, 462 U.S. 213 (1983), indicating that when only one of the two earlier conditions is met but there are other circumstances which contribute to determining probability it can be considered that there is probable cause[35].

However, the Supreme Court itself has made it clear that this is not a "mathematical" concept, but rather a case-by-case analysis of probabilities closely tied to the specific circumstances of the case, which could hardly be reduced to a kind of "mechanical" or strictly logical application:

> Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. The process does not deal with hard certainties, but with probabilities. The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. Probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules. *Illinois v. Gates*, 462 U.S. 213 (1983).

A later opinion reiterates this idea:

> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized. *Maryland v. Pringle*, 540 U.S. 366 (2003).

But, notwithstanding the circumstantiality of probable cause, the fact is that we can draw two guidelines or directives from the case law of the Supreme Court itself that we feel are very important:

- Probable cause is considerably less than "beyond reasonable doubt", in the sense necessary to convict a person.
- Probable cause is considerably more than "reasonable suspicion", meaning, for example, a suspicion that can be enough to begin an investigation.

[35] However, we should not forget that in some state jurisdictions the undoubtedly less flexible two-pronged test, also called Aguilar-Spinelli, is still in place. These jurisdictions are: Alaska, Massachusetts, New York, Tennessee, Vermont and Washington.

5. Practical difficulties and suggestions regarding requests for assistance.

These are the practical problems that we have generally detected in requests for assistance from Spain directly related to probable cause:

- Sometimes, requests for assistance to obtain e-mails, Internet account profiles, etc., are based more on reasonable suspicion by the authorities than on probable cause in a technical sense, or the factual elements on which the determination of probability is to be built are not provided. A different, but no less important problem, occurs when information is provided that could be sufficient, but it is not communicated clearly enough to the U.S. authorities. In this case the problems have more to do with language and translation, but they should not be underestimated as they can lead in the end to a failure of cooperation or significant delays.
- Sometimes there is also a mistaken belief that the existence of a bilateral instrument for mutual assistance is the single, sufficient legal basis to obtain what is requested. The bilateral instrument is certainly the starting point, but we should not forget that once the request reaches the United States, the U.S. Attorney's Office must apply to a Judge for access to communications in accordance with the standards of U.S. law, and will therefore require all the elements needed to prove the existence of probable cause.
- On other occasions, or also in conjunction with one or more of the circumstances described above, there are no set time limits consistent with the possible probable cause on which the assistance request could be based (e.g., the alleged offense was committed in 2014 and ALL emails are requested without a time limit).

As such, from a practical point of view it is important to note the following points:

- Mere suspicions, even when based on the professional experience of law enforcement agencies, are not usually enough:
  - Juan Pérez is arrested in possession of a certain amount of a narcotic substance. A document containing some email addresses (address book) is taken from him. The Police think it is perfectly possible that these email accounts can be used to discover information of value to the investigation into a possible offense of trafficking (other contacts, links, incriminating conversations, etc.), as this type of trafficker generally uses email to coordinate his or her actions, and so access to the email accounts is requested. In the United States the request for assistance will almost certainly be denied based on the absence of probable cause. For it to succeed it will be necessary to provide well documented factual elements from the current stage of the proceedings, linking the e-mail account to the allegedly criminal act. For example, the transcript of a telephone conversation showing that the email account in question has been used as a tool for criminal strategy or logistics. The Police will explain to the judge how the conversation was obtained and what elements of it are relevant in their opinion.
  - A police informant says he knows that Juan Pérez makes his living from drugs. This statement leads investigators to believe that it would be advisable to intercept Juan Pérez's phone to obtain incriminating information. According to

the police the informant in question is reliable. Probable cause would not be considered to exist in this case either unless more details are added. However, let us imagine the following alternative scenario: during an interview, Pedro Martínez explains that he happened to meet Juan Pérez some time ago. After chatting with him for a while they decided to meet another day for a drink. They met on further occasions and a certain relationship developed between them. During one these conversations Juan received a call on his personal cell phone. Pedro states that he heard Juan refer to the next trip and ask for an increase in price saying that everything keeps getting harder and more dangerous with "la María" (marijuana). He also states that he is perfectly aware that it was Juan Pérez´s cell phone # xxx.xxx.xxx because he has called it many times and knows the device.

- As such it is clear that probable cause is based on convincing evidence that should already exist, so it is important to determine what the sources of that convincing evidence might be.

  In general, there are considered to be four sources of probable cause:

  - Observation

  - Based on sensory perception. Provided by law enforcement agencies, witnesses or experts. We are talking about perceptions, not opinions or assessments. From a formal point of view, those stemming from actions by the police are better if they are not limited to police reports, such that ratified statements are also provided or alluded to before the judge. In these statements it is important that the perceptions have been contrasted, questioned and clarified as far as possible, where necessary.

  - Circumstances

  Based on a number of well-documented circumstances which, considered together, lead to a reasonable and prudent conclusion. Evidence may be provided for these circumstances as detailed above (observations) or from documents.

  - Experience

  Based on specialist scientific or practical knowledge. In this instance the route is normally via experts, although we should remember again that the standard that will eventually be applied to determine probable cause will be that of a normal person, not a qualified observer like a law enforcement officer or an expert on the subject.

  - Information

  Based on information obtained legally through communication channels in general or from other people.

- Once probable cause is established in relation to one or more alleged crimes, we must take into account that the mere fact that an alleged crime has been committed does not authorize us to make unlimited "intrusions" into the person's privacy. The *versari in re illicita* doctrine cannot be applied here. Therefore, intrusions must be proportionate and limited in consideration of what is being investigated. These will

usually be limits on type and amount/time. Limits on type are pretty obvious. If I am investigating a terrorist offense and my probable cause is limited to that type of crime, I cannot ask for assistance for a possible investigation into another type of crime, unless I have probable cause to do so. Limits on amount and time can sometimes be less clear-cut, but they are extremely important. If I am investigating someone and I have probable cause to check their e-mails, I will almost certainly not be authorized to look at all their e-mails regardless of their date and time frame. Probable cause refers to one or more crimes and they should be delimited in time with greater or lesser accuracy, including preparations and later effects.

- To elaborate on time limits, it must be said that, in general, requests for assistance to obtain evidence from Internet data or communications in general that do not have formal time delimitations have little chance of success. Every crime, as stated above, is always more or less delimited in time. Limits may be more or less precise, but they will always exist in some form (between 2012 and 2013, the last 6 months, for three years, etc.) As far as probable cause is concerned, it ceases to exist when we request evidence that is hard to justify because of a chronological discrepancy or undue distance in time from the offense. If the alleged criminal activities occurred between August and September last year, does it make sense to request emails or metadata from websites from 5 or 10 years ago? It may, but if it does it needs to be justified very well and, in practice, this is quite exceptional. Generally speaking, requests of the type "all emails, all data, all calls, etc." without giving further time delimitations will lead to problems with probable cause for the reasons indicated.
- It is very important from a formal point of view that the request for assistance to obtain proof should make specific reference to probable cause and the convincing evidence that leads to it. This reference should give particular attention to the components of the "test" referred to above, based on Supreme Court case law. As such, we recommend including a report on probable cause in the request for assistance. The report should be clear and as brief as possible and avoid excessively technical or flowery language if not strictly necessary (remember that the document has to be translated which can lead to new communication problems). If in doubt, please consult the Office.

And remember:

Probable cause requires us to explain the "story" or the part of the story that is wholly interesting for our purpose with details derived from the investigation and also determine what evidence it is based on. If the case or investigation is very complex it is enough to mention the facts or aspects that relate to the access to communications that we are interested in, thus avoiding excess information.

On this basis we need to give an explanation or argument that could convince the average person that there are sufficient "reasonable indications" of possible criminal activity that can be documented by the specific communications that interest us, highlighting the particular evidence on which we base this conclusion (where the specific email account is referred to or mentioned, where our knowledge of the chat comes from and its link to the events under investigation, etc.).

It is worth addressing all these questions before issuing the letter of request, or the Department of Justice will ask for clarifications that will lead to significant delays in the proceedings. To illustrate this point, the following is a real example of the kind of clarifications that may be requested, which may well give us an idea of all the information it is necessary to provide (the personal details and references to the case have been changed):

Subject: MLAT Request from Spain in the case Aaaa Bbbb Cccc (000XX/20YY–CAP)

> Our Office has recently received your request for assistance in the case referenced. In the request, the Spanish authorities appear to request subscriber information and transactional data as well as content for the email account aaabbb@xxxmail.com. However, before we can fulfill the request, our office will require additional information. Specifically, to access the contents of an account we must provide the court with sufficient evidence to establish "probable cause" that: (1) The offense was committed and (2) The evidence of the offense in question is located in the place where it is intended to look. In addition, U.S. courts pay close attention to the period for which account logs are requested, and specific facts should establish "probable cause" for the entire period for which logs are requested.
>
> By our understanding, the application indicates that the Spanish authorities are investigating a person or a "profile" named *Aaaa Bbbb Cccc*; a Spanish resident of Pakistani origin. In the request the Spanish authorities indicate that they have carried out surveillance of some kind on *Aaaa Bbbb Cccc*, based on the suspicion of sympathies on the part of *Aaaa Bbbb Cccc* with Islamic fundamentalism, extremists or jihadist groups. In order to process this request for assistance, our office needs to clarify a number of facts:

- The application refers to a "profile" and to changes in the activity of that profile and messages on social media. However, the request seeks logs from a private email account, Xxxx. Please clarify what "profile" or what social media activities are referred to in the application and how that social media activity or "profile" relates to the email account Xxxx.
- The application states that the Spanish authorities have carried out surveillance on *Aaaa Bbbb Cccc*. What kind of surveillance have the Spanish authorities carried out on *Aaaa Bbbb Cccc*?
    - What specific facts have the Spanish authorities learned through surveillance to support the theory that *Aaaa Bbbb Cccc* is involved in the terrorist offenses listed in the application?
    - For example, what activities were surveilled or monitored by the Spanish authorities? Has *Aaaa Bbbb Cccc* placed content visible to the public on a social media account? If so, what account?
    - What specifically have the Spanish authorities found that leads them to believe that *Aaaa Bbbb Cccc* supports, sympathizes with or tries to help the 4 groups listed in the request? If *Aaaa Bbbb Cccc* has made specific statements that support this suspicion, it would be of great assistance if the Spanish authorities were to provide with us a translated copy of these statements.

- What events first led the Spanish authorities to begin investigating *Aaaa Bbbb Cccc*? For example, were the police informed of suspicious behavior by a witness? If so, please identify the witnesses and how they came upon the information they reported to the police.

- In what way does the email accountaaabbb@xxxmail.com refer to activities on social media or a "profile" linked to the public expression of sympathy for a particular terrorist group?
  - What evidence of criminal behavior do the Spanish authorities believe they can find at the email account address?
  - What facts lead the Spanish authorities to believe that the email account is being used for criminal activities or contains evidence of criminal activity?
  - How did the Spanish authorities come upon the existence of this email?
  - How did the Spanish authorities identify that this email account belongs to the suspect?
- The application also refers to the profile "Nnnnn". Please clarify who "Nnnnn" is or whose profile "Nnnnn" is. Please also explain the relationship between "Nnnnn" and *Aaaa Bbbb Cccc*.
- Please specify the date range for which the Spanish authorities require the logs for this email account and please provide an analysis of the facts that support obtaining the logs between the first and last day of that interval.
  - For example, if the Spanish authorities seek records from January 1, 2015 through January 1, 2016, we will need facts to support the belief that evidence of criminal activity will be found in the email account on January 1, 2015, but also on January 1, 2016.
- In addition, as you will already know, the U.S. Constitution gives a great deal of protection to some acts that are not subject to criminal prosecution, even though they are for some of our European counterparts, including support or defense of controversial political points of view, including some violent ones. In order to ensure that we can execute this application in line with the constitutional guarantees of the United States, please provide information establishing that the suspect is committing or has committed the offenses listed in the application Please provide all the specific facts that establish that the alleged criminal conduct is more than a public expression of sympathy for the organizations listed in the application.
  - Please provide all specific facts establishing that the alleged criminal conduct is more than a public expression of sympathy for the organizations listed in the application.
  - For example, if the suspect has used the account to threaten others with violence, recruit people to join organizations or carry out violent acts on behalf of those organizations identified, it would be most helpful.

Upon receipt of this additional information, we will endeavor to carry out this request as soon as possible. As on previous occasions, an email response would be sufficient and would greatly facilitate processing this application. If we do not receive an answer before mm/dd/YY, we will assume that the Spanish authorities no longer require our help, and so close the file. If you have any questions or concerns, please let us know.

6. Access to information in emergency scenarios

In cases of access to information for emergency reasons the standard is greatly relaxed and, both the Department of Justice and, generally speaking, the companies themselves usually understand that information can be provided very quickly, almost immediately.

In these instances, we must demonstrate that access is necessary to avoid serious danger of major injury or the death of one or more persons. We are thinking primarily of cases of terrorism or minors in serious danger, but not exclusively.

A typical case would be someone who publishes a post on an Internet account referring to a possible imminent cyber-attack on a crucial facility. Clearly, if the post details do not permit identification of the person publishing the information and if determining their identity can be a key factor in avoiding a major threat, the internet service provider will almost immediately provide all the account details and even content, if necessary.

In a case of this kind it is best to act through police channels, without forgetting that the Ministry can offer all the support required and provide advice as necessary, either by contacting the Department of Justice or the legal services of the company in question.

Below we insert a series of practical questions and answers on these types of requests and situations.

ACCESSING INTERNET DATA FROM U.S. PROVIDERS IN THE EVENT OF EMERGENCIES

Q&A

Our Law of Criminal Procedure (*Ley de Enjuiciamiento Criminal* or *Lecrim*) establishes rules for the interception of and access to private electronic (telematic) communications.

To operate interception and access, in accordance with the Constitution, a judicial ruling is necessary.

In the so-called cases of emergency and in relation to certain crimes, which include terrorism, art. 588 ter d. of the Law of Criminal Procedure allows the initial authorization (order) to be issued by the Ministry of the Interior or the Secretary of State for Security, notwithstanding an ex post jurisdictional control of the measure.

How can this measure be implemented where U.S. Internet providers are concerned?

The Department of Justice has offered an especially rapid official communication channel which is specifically via the local FBI attaché. In our case, this is the FBI attaché in the U.S. Embassy in Madrid. Urgent requests for Internet data may be channeled via this U.S. federal law enforcement representative. It is also possible to obtain advice on the matter.

However, many providers accept requests directly from law enforcement agencies of other countries, and may actually disclose content, transactional and subscription data, if there is an emergency situation.

Therefore, in cases of urgency or emergency it is possible to operate via the local FBI attaché or directly with the provider.

What is the legal standard for classifying the situation as urgent or an emergency?

There must be imminent danger of death or serious physical injury requiring disclosure without delay (18 U.S. Code § 2702 - Voluntary disclosure of customer communications or records):

> A provider described in subsection (a), may divulge the contents of a communication—to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

This standard is reproduced with slight variations in providers' policies:

- **Google:** Sometimes we voluntarily disclose user information to government agencies when we believe that doing so is necessary to prevent death or serious physical harm to someone. The law allows us to make these exceptions, such as in cases involving kidnapping or bomb threats. Emergency requests must contain a description of the emergency and an explanation of how the information requested might prevent the harm. Any information we provide in response to the request is limited to what we believe would help prevent the harm.

- **Facebook:** In responding to a matter involving imminent harm to a child or risk of death or serious physical injury to any person and requiring disclosure of information without delay, a law enforcement official may submit a request through the Law Enforcement Online Request System. Note: We will not review or respond to requests submitted by non-law enforcement officials. Users aware of an emergency situation should immediately and directly contact local law enforcement officials.
- **Twitter:** In line with our Privacy Policy, we may disclose account information to law enforcement in response to a valid emergency disclosure request. Twitter evaluates emergency disclosure requests on a case-by-case basis in compliance with relevant law (*e.g.,* 18 U.S.C. § 2702(b) (8) and Section 8 Irish Data Protection 1988 and 2003). If we receive information that provides us with a good faith belief that there is an exigent emergency involving the danger of death or serious physical injury to a person, we may provide information necessary to prevent that harm, if we have it.
- **Microsoft:** Only in limited circumstances. Pursuant to United States law, we are required to report identified or suspected images exploiting children to the United States' National Center for Missing & Exploited Children (NCMEC). We also, on occasion, report some limited information about a user when we have reason to believe the individual is about to harm themselves or someone else due to a public posting on one of our forums, on Xbox Live, or through referrals from other customers. If one of our customers or employees, or Microsoft itself, is the victim of a crime, we may report some limited information to law enforcement. Additionally, consistent with applicable law and industry practice, Microsoft sometimes discloses limited information to law enforcement when we believe the disclosure is necessary to prevent an emergency involving danger of death or serious physical injury to a person as described in our question on imminent emergencies below.

How does the time factor affect the emergency situation?

It should be acknowledged from the outset that under U.S. law an emergency situation is characterized, from a temporal point of view, by the imminence of danger.

The Office has experienced situations in which it has been precisely the passage of a period of time since the situation of danger began that led the U.S. authorities to reject the emergency channel, and this despite the fact that objectively speaking it could be considered that the situation of danger persisted.

One of the cases we are referring to occurred as the result of the disappearance of a minor. The court tried the ordinary letter of request channel to attempt to obtain data from an Internet resource that it was thought could be valuable to the investigation. The letter of request in question gave rise to various incidents due to a lack of sufficient information. After a number of months, the emergency channel was tried, on the grounds that the whereabouts of the minor were still unknown and therefore a situation of danger existed. The U.S. authorities rejected this channel on the basis of the time elapsed since the disappearance.

How can we know whether we can address a provider directly in order to obtain content, transactional and subscription data via the urgent channel?

Most U.S. providers publish what they call "law enforcement policies". A Google search of the following terms associated with the name of the provider will result in the text of the specific applicable policies: "law enforcement requests", "subpoena", "legal process".

Note that U.S. law does NOT oblige providers to disclose data in the event of emergencies. The verb that is used in 18 U.S.C. § 2702(b)(8) is "may". Disclosing data is therefore strictly voluntary.

In the event of doubts or difficulties in contacting the provider, the the Office of Justice Affairs in Washington, D. C. may try to provide the necessary assistance and carry out the relevant enquiries at a local level.

May a court address a provider directly in the event of an emergency?

In our opinion and from the point of view of U.S. law, the answer is yes. Although this may also be done via a governmental entity. The concept "governmental entity" (18 U.S.C. § 2702(b)(8)) is very broad and we do not think that is limited exclusively to the executive.

On the other hand, we have dealt with some emergency requests at the Office on behalf of courts, and this has never given rise to any problem whatsoever.

In short, in our view, the police, the State Prosecutor's Office and the courts may, from the perspective of U.S. law, directly address Internet providers in order to gather data in emergency situations, complying with the guarantees that are applicable in each case in accordance with domestic law.

What type of data may be obtained through recourse to emergency requests?

The data of an Internet account may be classified, from the point of view of U.S. law, as:

- Subscription data: subscriber details of the account (name, address, telephone, e-mail, payment details if applicable, etc.)
- Transactional data: technical data on the operations of the account (logs, types of access, resources used, etc.)
- Content data: the specific messages that comprise private communication

Any of these data may be requested in the event of an emergency.

However, once more it must be made clear that this disclosure of data in emergency situations is voluntary, and thus it will be the provider who determines the extent and limits of the data that are finally disclosed.

What requisites must the communication addressed to the FBI attaché or to the provider contain in order to obtain data in the event of an emergency?

Taking into account the U.S. legal framework and the wording of most of the providers' policies, it is our understanding that the minimum requisites would be the following:

- Description of the emergency
- Limits of the contents or data requested
- A clear explanation of how access to the contents or data requested may prevent the personal harm that it is intended to avoid

In the case of U.S. providers with branches or subsidiaries in Europe, is it possible to address, or must we address, our requests to these branches or subsidiaries in the event of an emergency?

This is a question that does not have an easy or single answer, except the fact that it depends on the specific policies of each provider.

After the so-called "Microsoft" case some U.S. companies have started to look favorably upon breaking the "monopoly" of the U.S. jurisdiction. It is our understanding that the point of view that is valid for ordinary requests for assistance (and which is currently disputed by the U.S. Department of Justice) may also be valid for emergency requests.

In fact, in its policies, Twitter also refers to Irish law as a legal benchmark: "In line with our Privacy Policy, we may disclose account information to law enforcement in response to a valid emergency disclosure request. Twitter evaluates emergency disclosure requests on a case-by-case basis in compliance with relevant law (*e.g.*, 18 U.S.C. § 2702(b)(8) and Section 8 Irish Data Protection 1988 and 2003). If we receive information that provides us with a good faith belief that there is an exigent emergency involving the danger of death or serious physical injury to a person, we may provide information necessary to prevent that harm, if we have it."

Following all the above considerations, in the face of an emergency scenario, is it preferable to operate via the FBI attaché or directly with the provider (ISP)?

It is not easy to give a valid response for all cases.

The direct channel with the provider functions on a strictly voluntary basis. It is the ISP who assesses the situation and decides. However, it must be taken into account that more often than not it is necessary to operate from a distance, although the Offices of the Ministries of Justice and the Interior may provide support from Washington, DC.

Recourse to the FBI attaché certainly leads to official action in the United States and, although this is unable go beyond dealing with the ISP, there are good grounds for considering that it could benefit from the experience and, especially, the institutional proximity of FBI officials in their country.

It must be made clear that if the ISP decides not to disclose all or some of the data, there is nothing the channel of the FBI attaché can do in this respect. In these cases, the Spanish issuing authority must issue a letter of request in order for a court order to be issued to the provider. This letter of request must meet all the requisites of any request for assistance of this type, although it may be transmitted as urgent. When this happens, contacting the Office of Justice Affairs is recommended in order to enable us to support the urgent processing of the request from Washington, D.C.

Nevertheless and notwithstanding the above which, generally speaking, is valid, there is also a possibility that the FBI may request a subpoena or a warrant directly from the U.S. Judge, without need for a letter of request. This would be so in the event of the United States having legal proceedings open for the same case, or for another intimately related case. If it is the understanding of the Spanish operators that, in any case, this state of affairs exists, once again it is recommended they consult the the Office of Justice Affairs in Washington, D.C. immediately.

APPENDIX

Summary table of (approximate) correlation of probable cause with concepts in Spanish criminal proceedings

Spanish criminal proceedings	Correlation with probable cause	Comments
Sospechoso policial [Police suspect]	There may be no correlation.	Mere "technical" suspicion does not meet the standard of probable cause.
Investigado (formerly *imputado*) [person under investigation]	Does not necessarily match the standard of probable cause, although it may be enough.	The standard of probable cause has its own elements, and those that are enough to begin an investigation may not be sufficient to access certain private communications under U.S. Law.
Indicios racionales de criminalidad [prima facie evidence of criminal behavior]	Does not necessarily match the standard of probable cause, although it may be enough.	In general, this may be the same level, but note that there may be reasonable indications that a person has committed a particular crime, independently of whether or not there is probable cause to access a particular account. Probable cause affects the account or specific communication medium, prima facie evidence affects the criminal activity being pursued.
Acusado [accused]	Does not necessarily match the standard of probable cause, although it may be enough.	The previous comment is valid.
Auto de apertura de juicio oral [ruling ordering the opening of an oral trial]	Does not necessarily match the standard of probable cause, although it may be enough.	The previous comment is valid.
Imputado con confirmación de su verosimilitud del Tribunal Jurado [subject under investigation with plausibility confirmed by a Jury Court]	Does not necessarily match the standard of probable cause, although it may be enough.	The previous comment is valid.

In short, when assessing whether or not we have probable cause it is important not to be misled by automatic responses or rigid conceptual correlations.

The fundamental question is understanding that the standard of probable cause has its own rules and when it refers to access to communications it takes into account, not only the alleged criminal activity, but also the specific medium or account and its relationship with it, appraised and backed by evidence.

As such, it is necessary not to comply with standards that are specific to our criminal proceedings, understand that we are going to request information that must be obtained under a different jurisdiction and following different rules and so carry out an analysis of our convincing evidence in reference to those rules.

PRACTICAL GUIDE TO SUSPENSION, WITHDRAWAL OF CONTENTS OR CANCELATION OF INTERNET ACCOUNTS IN THE UNITED STATES

1. Purpose and scope of the guide

The purpose of this guide is to analyze the main problems that the cancelation or suspension of Internet accounts, as well as the removal of content, pose in implementing cooperation with the United States[36].

The hypothesis we start from is the use of an Internet account to carry out illegal criminal activities, where the law authorizes blocking access, interrupting service or suspending the account.

Since the parent companies of much of the Internet industry are based in the United States, the U.S. Department of Justice receives a huge volume of requests for suspension, withdrawal of content or cancelation of Internet accounts, either as a preventive measure or for the enforcement of final decisions.

This, along with other circumstances stemming mainly from case law relating to the First Amendment to the Constitution to which we will refer later, has increasingly led the Department of Justice to advise different international players only to use formal cooperation in these matters, via MLATs, when it is really unavoidable and as such there are no alternative methods that may allow the same result to be achieved while fully respecting rights and legal guarantees.

In these cases the alternative methods are basically recourse to the commercial and contractual policies of the different services set up by the companies themselves. These policies usually contemplate the suspension or cancelation of accounts and the removal of content when the client or user misuses the services provided, making use or taking advantage of them in some way to commit crimes.

This is also consistent with the code of conduct that was recently unveiled in Brussels by the European Commission and a group of U.S. Internet "giants" (Facebook, Twitter, YouTube, Microsoft, etc.), and includes a series of commitments to combat the spread of illegal hate speech on the Internet in Europe.

The scope of application for this code is certainly limited because of the type of crime, but it is undoubtedly a very important point of reference. In addition, the commitments it contains are in line with a practice already initiated previously by some companies, which is much more general in scope and is still operating today.

Moreover, and in order to delimit the scope of this guide, it seems appropriate to define what is meant by "Internet accounts".

[36] This guide forms part of the Compendium of criminal guides. Nonetheless, it seems important to point out by way of information that the measure in question may be requested by authorities other than a judicial body, such as the State Prosecutor's Office or law enforcement agencies themselves, under the provisions of Article 8 (2) of Law 34/2002 on Information Society Services and Electronic Commerce, in cases where there are no ongoing legal proceedings (think for example of removing contents that encourage anorexia or other eating disorders among adolescents) and it is deemed necessary.

By “Internet accounts” we mean any information society service offered by a particular company, organization or institution (ISP or Internet Service Provider), either against payment or free of charge, that takes the form of provision, on the part of the service provider, of a series of utilities or benefits under a specific identifier in favor of a natural or legal person, whom we call “the user”.

Likewise, the concept of “information society service” encompasses, but is not limited to, the following:

- Social media (Twitter, Facebook, Instagram, etc.)
- Hosting and/or online website design
- E-mail
- Communication services such as Chat, IP telephony or similar (WhatsApp, Skype, Paltalk, Snapchat, etc.)
- Blogs
- Cloud Computing services in general
- Any other Internet services, currently in existence or that may be created in the future

Having said that, let us now consider how to proceed when we are required to carry out a decision ordering the cancelation, interruption or suspension of an Internet account.

2. Practical guidance

The procedure proposed here is equivalent to the one laid down in the code of conduct to which we referred in the previous point, since as it points out “the IT Companies will have in place clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content. The IT companies will have in place Rules or Community Guidelines clarifying that they prohibit the promotion of incitement to violence and hateful conduct”.

According to the aforementioned code, these procedures will basically mean that upon receipt of a valid removal notification, the IT Companies will review such requests against their rules and community guidelines and where necessary national laws transposing the Framework Decision 2008/913/JHA, with dedicated teams reviewing requests.

But as the scope of the instrument we mentioned is limited by the types of offense it covers (and also by the stakeholders who signed it), we may ask what happens with all other offenses and all other cases that may arise.

As far as the U.S. Department of Justice is concerned, nothing prevents us from having recourse to the companies’ commercial policies in most of the cases that arise. The clauses governing the provision of services are very generic and refer to illegal activities in general, with no limitations based on the nature of the crime.

As such, the Office of Justice Affairs suggests a practical action protocol as follows:

- Make sure that the company or institution in question actually has its parent company in the United States and does not allow such requests to be processed via its European subsidiaries. Large U.S. Internet companies usually require requests for legal cooperation to be presented via their parent company in the United States. If in doubt on this point, please consult the Office.
- Once it has been established that the procedure should be carried out via the parent company in the U.S., ascertain whether there is an online tool (apart from email or fax) that allows us to send a standardized request to the company from Spain.
- If no such tool exists or if it does and yet doubts arise, contact the Office to analyze the case and define a specific strategy.
- The strategy to be followed will usually include preparation of all the necessary documentation (ruling ordering the suspension or closure, letter addressed to the company requesting collaboration, written by the judicial administration clerk), which should be translated into English by the judicial body concerned.
- The letter requesting collaboration written by the judicial administration clerk should basically consist of an appeal to the policies or terms of use issued by the company. In this way, we try to prevent them thinking they are being asked to enforce a decision from a foreign country, as in this case they would respond by saying that they cannot accept direct enforcement notifications from jurisdictions other than the U.S. jurisdiction. It is ultimately a question of informing the company of the final decision reached in the proceedings so that it be considered in the light of their own terms of use.
- Remittance of all the necessary documentation (decision reached in rulings and letter requesting collaboration, with translations) to the Office.
- Drafting of a cover letter by the Office, signed by the Ambassador or by the Counselor of Justice where appropriate, the content of which is fundamentally the same as the model that can be obtained via the previous link.

The Office is responsible for sending the request for cooperation to the company or institution concerned.

The Office is also responsible for pursuing the issue with the legal department of the company or institution concerned, providing the necessary clarifications, where necessary.

Finally, the results of the procedure will be monitored and reported to the judicial body. If the result is negative, the possibility of issuing a letter of request will be assessed.

We cannot guarantee that this procedure will work in every case. At the time of publication of this guide we have had negative and positive experiences. In the end, the matter depends fundamentally on the specific company involved and its criteria.

3. MLATs as an alternative

If the informal channel referred to above does not provide results, or in any other case where, for whatever reason, the judicial body understands that it is not applicable, the only possibility is to resort to a MLAT to ask for the closure or suspension of the account.

However, it is important to note that, in line with the information we have gathered from the U.S. Department of Justice, it is usually extremely difficult to obtain the closure of a website or an Internet account, fundamentally for constitutional reasons. Consequently, the chances of success for a MLAT of this kind are very limited.

If the request for assistance is finally issued, we understand that the legal basis will either be the principle of reciprocity, if it is the enforcement of a measure ordered in a final judgment, and as such it should expressly appeal to this principle, or the Bilateral Treaty on Mutual Assistance in Criminal Matters if a precautionary measure is to be adopted[37], although in this instance it is also advisable to refer to reciprocity.

Without prejudice to the above, depending on the type of crime concerned, there may be sectoral agreements that apply.

It is suggested that if the informal channel referred to in this guide has previously been tried unsuccessfully, this should be mentioned in the letter of request.

[37] Please also note the instrument provided by the bilateral agreement with the European Union, even though it does not concern this exact point.

PRACTICAL GUIDE TO OBTAINING BANKING AND FINANCIAL DATA HELD IN THE UNITED STATES WITHIN CRIMINAL PROCEEDINGS

Hypothesis, concept of financial institution and territorial competence

This guide deals with access within criminal proceedings to the details of individuals or institutions held by a financial institution based in the United States.

The guide covers access to accounts that are known to exist beforehand and the investigation into the possible existence of accounts and subsequent access to them, where applicable.

In terms of U.S. law, the concept of financial institution is broad and takes in the following: banks, savings and depository institutions (thrifts), credit unions, payment and collection companies, postal service, investment institutions, casinos and other gambling providers.

> "Financial institution", except as provided in section 3414 of this title, means any office of a bank, savings bank, card issuer as defined in section 1602(n) [1] of title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution... (12 U.S. Code § 3401 – Definitions)

From the point of view of territorial competence, for U.S. authorities the financial institution from which data is to be requested must be located in a state or territory pertaining to the United States, the District of Columbia, Puerto Rico, Guam, American Samoa or the Virgin Islands of the United States.

A) Access to the data of identified accounts

Legal requisites (applicable standard)

Without excepting general information relating to an account or the account holder[38], financial data is subject to a guarantee of confidentiality protected by Law.

This guarantee is enshrined in the Financial Privacy Act de 1978, which has been subject to several amendments over time.

To access financial data, the following is required:

- a) The consent of the party in question, or
- b) A court order

The legal standard that is normally employed to access financial data is the requirement that the data in question prove relevant for a legitimate investigation.

[38] Whilst in certain cases bodies may directly provide law enforcement authorities with information of a highly generic nature relating to the existence of an account or the name of the account holder, it is advisable to employ an international request in all cases, even where all that is required, so to speak, is metadata relating to the account or service.

Such data is obtained via a subpoena addressed to the financial body.

> ...subpoena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; (12 U.S. Code § 3407 -Judicial subpoena)

We are therefore dealing with a lower standard than the so-called probable cause.

Therefore, in international requests aimed at obtaining bank data or data held by financial bodies, the requesting authority not only has to identify the data sought, but must also specify or explain the relevance of this data in terms of the investigation it is undertaking (consideration of relevance), and may also provide evidence or certain evidence in support of the aforementioned consideration of relevance[39].

Relevance must be understood as a situation wherein the requested data is effectively connected with the investigation and might serve to enable it to advance and fulfil its objectives. Obviously, these objectives may be of both an incriminatory or exculpatory nature.

Financial data can also be obtained via a warrant; however, in this case it is to all intents and purposes considered a search, and the standard is more demanding, as the same standard for probable cause is imposed in accordance with the U.S. Constitution.

The basic difference between a subpoena and a warrant within U.S. law should be pointed out. A subpoena is processed as a result of a written request presented by one of the parties to a judge in order to obtain authorization to order someone to provide certain documents or data (in this case the District Attorney addresses the judge requesting authorization to issue a subpoena against the bank to have it hand over data). In other words, a subpoena is an order issued by a party once authorization from a judge is obtained. In contrast, a warrant is a resolution issued by a judge via which he or she directly orders a search to be carried out. The standard for a warrant is always higher than the standard imposed for a subpoena.

Description of the data requested

When financial data is sought from a U.S. body, as is the case when a Spanish or European body is addressed, the data sought must be identified.

Data is identified as follows:

- Account number or identifier
- Type of activity records requested, or activity in general, where this is the case
- Time window: The date range within which data is sought

The account number or identifier must be provided with the utmost precision, otherwise the request is doomed to failure. Where doubts arise, consult the Office, and the formats

[39] Evidence is not always required. In general, an explanation of the consideration of relevance will normally prove sufficient for U.S. authorities. Nevertheless, in certain cases, in view of their complexity or other circumstances, it may be advisable to provide evidence to support this consideration. This issue should be addressed on a case-by-case basis with the Office, which will consult with the Department of Justice where appropriate.

currently in use by the body in question to designate accounts will be provided. It is normally also a good idea to provide a statement or official document issued by the body or an intermediary on which the account number appears.

At times, investigating authorities may be unable to precisely identify these elements. U.S. courts permit a certain amount of leeway in terms of the type of account activity and time scale, but solid grounds must be provided, particularly where the request is of a generic nature.

Insofar as possible, phrases such as the following are to be avoided: "all registry entries or activity relating to the account…", or "all book entries recorded in the account". However, where for whatever reason all entries are sought, grounds or an explanation must be provided.

The request must also include the following:

- Full name or names of the account holder or holders
- Additional details relating to the account holder or holders: Social Security number[40], address, date of birth, etc.

Restrictions deriving from data conservation periods

U.S. financial institutions only conserve client data for a period that ranges between 7 and 10 years.

Specific rules for certain banks

Where the request refers to J.P. Morgan Chase Bank N.A. or any of its subsidiaries (Chase Bank N.A., Chase Bank USA…), J.P. is to be included as a witness. Consult the Office should any doubts arise.

Urgent cases and terrorism

In urgent cases and cases relating to terrorism, all stages of the process can be expedited. When such circumstances arise, it is advisable to consult with the Office beforehand, and it will coordinate with the Department of Justice.

Urgent cases refer to situations wherein imminent danger of physical harm to an individual exists, or a risk of serious damage to property or flight to evade Justice.

Other useful data

With a view to avoiding subsequent requests, it may prove useful to request the following information from the outset:

- Contract for the opening of the current account with full identification details of the holder or holders or individuals authorized to use the account
- The account balance, with a view to possibly requesting the freezing of the account in order to guarantee the recovery of defrauded amounts

[40] Social Security numbers are one of the main means of identifying an individual in the United States, along with his or her full name, as is equivalent to the Spanish DNI. It is important to provide this number where available

B) Investigations relating to the existence of accounts

Where we are unaware whether or not a given account exists and specifically need to launch an investigation into the possible existence of financial accounts in the United States, the following resources can be employed:

B.1) Investigation conducted via the sectoral attaché at the Embassy of the United States in Madrid (article 4 of the EU-US Agreement on Mutual Legal Assistance), also denominated via FinCen.

The channel that the United States accepts to implement article 4 of the Agreement on Mutual Legal Assistance is a request for information to FinCen[41] via the sectoral attaché in the U.S. Embassy in Madrid. This channel is envisaged in article 16 bis of the Consolidated Text published in the Official State Gazette of 26 January 2010, and at present is only employed in relation to terrorism and money laundering (article 16 bis, 4), although the possibility exists that information may also be obtained in cases involving organized crime or crimes of particular import or significance for the country. In such cases it is recommended that the Office be consulted beforehand.

Article 16 bis, paragraph 3:

> Unless subsequently modified via the exchange of diplomatic notes between the European Union and the United States of America, requests for assistance in accordance with this article shall be handled between: (a) on the part of Spain, the Spanish Ministry of Justice and (b) on the part of the United States of America, the attaché in Spain responsible for: (a) The Drug Enforcement Administration within the U.S. Department of Justice, in relation to matters falling under its jurisdiction; (b) the Customs and Border Protection agency within the Department of Homeland Security, in relation to matters falling under its jurisdiction: (c) The Federal Bureau of Investigation within the Department of Justice, in relation to all other matters.

To employ this channel, a number of forms drawn up by the U.S. administration must also be filled in. It is recommended that the Office be consulted should any doubts arise.

The aforementioned forms can be downloaded via the following links:

Form 1

Form 2

It is important to remember that FinCEN only allows data on the existence of accounts to be disclosed, not account transactions.

Once the existence of accounts has been established, if there is interest in obtaining information on transactions then it is necessary to resort to a MLAT.

Consequently, in many cases, investigations that require financial data must resort to a strategy that unfolds in two steps, namely: determining the existence of accounts by recourse to FinCEN and then procuring a letter of request to obtain information on transactions.

[41] FinCEN is a supervisory and monitoring body similar to Sepblac in Spain. Its mission is to safeguard the financial system from illicit use, combat money laundering, and disseminate financial and strategic intelligence for the authorities.

Ordinary searches in FinCEN may go back between 6 and 12 months depending on the case, but this institution can actually carry out searches that go back as far as the last 10 years. Nevertheless, the latter requires the request to adequately explain and justify this need for greater retroaction.

It is recommended before formulating any request, that the official guide of the FinCEN 314(a) program be consulted. Furthermore, the Office of Justice Affairs in Washington D.C. would be happy to give advice on any consultation made in this respect.

B. 2) Acquiring FATCA data via the Tax Agency

Information obtained via the FATCA agreement may only be employed in legal proceedings relating to taxes, that is, crimes against the Revenue Authority, and may not be used in legal proceedings of a different nature wherein financial information might be sought.

Therefore, within the context of legal proceedings relating to a crime against the Revenue Authority, it is possible to issue direct requests to the U.S. authorities invoking the FACTA agreement, but not where crimes of a different nature are involved.

This is due to the wording of article 27.1 of the Double Taxation Treaty that does not allow such information to be employed for ends other than those established in the treaty. Nevertheless, the OECD is promoting the revision of these conventions and, amongst other matters, a number of the agreements recently signed envisage the possible use of such information for other ends, with the authorization of the Country of origin. However, at present, this is not the case with regards to the United States.

When employing this request for information, the recommended channel is via the Tax Agency. It is advisable to contact the Office prior to employing this channel.


MINISTERIO DE JUSTICIA MINISTE
STICIA MINISTERIO DE JUSTI
USTICIA MINISTERIO DE
TERIO DE JUSTICIA
INISTERIO DE
ERIO DE
CIA