Greece-OECD Project: Technical Support on Anti-Corruption

Mutual Legal Assistance: Assessment and revision of the current legal and regulatory framework
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About the Greece-OECD Project

The Greek government is prioritising the fight against corruption and bribery and, with the assistance of the European institutions, is committed to taking immediate action. Under the responsibility of the General Secretariat against Corruption, Greece’s National Anti-Corruption Action Plan (NACAP) identifies key areas of reform and provides for a detailed action plan towards strengthening integrity and fighting corruption and bribery. The OECD, together with Greece and the European Commission, has developed support activities for implementing the NACAP. This project is carried out with funding by the European Union and Greece.

www.oecd.org/corruption/greece-oecd-anti-corruption.htm
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Introduction

Under the responsibility of the General Secretariat against Corruption, Greece’s National Anti-Corruption Action Plan (NACAP) identifies key areas of reform and provides for a detailed action plan towards strengthening integrity and fighting corruption and bribery. Through its Greece Technical Assistance Project, the OECD has committed to supporting the Greek authorities and to provide technical guidance to implement the reform agenda in a series of pre-identified areas.

This document has been produced under Outcomes 9.3 – 9.4 of the Technical Assistance Project. It contains technical proposals with the view to improving the Greek mutual legal assistance in criminal matters (MLA) framework and in strengthening Greece’s capacity to request, obtain and provide evidence for cross-border criminal investigations and prosecutions that relate to corruption cases. It deals not only with the several issues noted in the Greece Phase 3 and Phase 3bis reports on “Implementing the OECD Anti-Bribery Convention” concerning Greece’s ability to provide MLA in foreign bribery cases,1 but extends beyond the foreign bribery sphere, to all corruption related cases. The analysis and proposals in this document are based on information obtained from independent research by the OECD; responses to a questionnaire submitted by Greek authorities in January-February 2017; and consultation meetings with Greek authorities in Thessaloniki and Athens in mid-February 2017.

In line with the Terms of Reference of the Outcomes 9.3 – 9.4 of the Technical Assistance Project the analysis conducted in the present report pertain primarily to MLA requests that Greece transmits or executes in the absence of relevant bilateral treaties or multilateral conventions. Accordingly, the technical and legislative proposals are focusing on improving, amending and streaming the relevant legislation that regulates the transmission and execution of non-treaty MLA requests with the objective of bringing them in line with the international standards. The present report and its proposals do not deal with extradition issues. Issues concerning MLA to trace, freeze, confiscate and repatriate the proceeds of corruption are covered in a separate publication on international asset recovery.

As further explained in this report, Greece’s non-treaty-based MLA framework is mainly found in the Greek Code of Penal Procedure. In most cases, these provisions fail to provide sufficient guidance for executing MLA requests and hinder the seeking and providing of MLA in corruption cases in practice.

Greece would stand to benefit significantly from a comprehensive and streamlined mutual legal assistance regime which enables effective collaboration and communication across entities involved in the execution of both incoming and outgoing requests for mutual legal assistance. The proposed legislative amendments and other proposals target to ensure coherence across the board as well as adequate yet simplified procedural mechanisms that would allow Greek authorities and their counterparts to yield great benefits in the field of international cooperation.

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I. Overview of the existing Mutual Legal Assistance in Criminal Matters (MLA) framework in Greece applicable to corruption cases

1. The purpose of this section is to provide a brief but comprehensive overview of the legal and regulatory mutual legal assistance (MLA) framework in Greece. In doing so it highlights international good practices and standards to which Greece has already adhered and also highlights the main deficiencies of the existing MLA framework in Greece. The first section describes the different legal bases for seeking and providing MLA, including both treaty and non-treaty MLA requests. This is followed by a description of the procedure for executing non-treaty MLA requests.

1. Legal framework related to MLA

2. The principal bases for seeking providing MLA are (a) the Greek Code of Penal Procedure (CPP) for non-treaty-based MLA requests; (b) multilateral and bilateral international treaties that provide for MLA. Ratified treaties become part of domestic law;² (c) Greek laws implementing European legislation, such as in the area of the European Investigation Order or the Joint Investigation Teams.

1.1. Greek Code of Penal Procedure

3. Greek domestic law applies to the execution of incoming and outgoing MLA requests in the absence of a bilateral MLA treaty or a multilateral instrument or convention.³ The current legal framework in Greece for seeking and providing MLA in the absence of a relevant international agreement is described in Articles 457 to 461 CPP. These Articles date back in the 1950s and were added to the very first CPP with Law 1493/1950 with limited changes since then.

4. Article 457 CPP⁴ governs outgoing requests for MLA, or in other words, requests sent by Greek judicial authorities for execution by foreign authorities. Article 457 CPP makes it possible for outgoing requests to seek the following types of MLA: (i) the examination of witnesses and defendants (including subpoenas); (ii) onsite inspections; (iii) expert opinions; and, (iv) the seizure of evidence. On the other hand, Article 458 CPP⁵ governs requests received by foreign judicial

² An international treaty is ratified in Greece through implementing legislation, after which the treaty becomes an integral part of the domestic law and prevails over any contrary statutory provision (Constitution Article 28(1)).
⁴ Article 457 Requests for investigative acts
(1) Requests by the Greek judicial authorities to foreign authorities for the examination of witnesses and defendants, viewing of premises, expert reports and confiscation of exhibits are forwarded by the competent public prosecutor of the court of appeals to the Ministry of Justice that initiates their performance through the Ministry of Foreign Affairs by observing international conventions and customs. In urgent cases, such requests may also be forwarded directly to the local consular authorities exercising investigative duties; however the Ministry of Justice is notified accordingly.
(2) Summons are forwarded in the same way in order to be served to the defendants.
⁵ Article 458 Requests by foreign judicial authorities for investigative acts
(1) Requests by foreign judicial authorities for the carrying out of one of the investigative acts listed in article 457 paragraph 1 are forwarded by the Ministry of Justice and executed by order of the competent public prosecutor of the court of appeals by the competent investigative judge in whose district the investigative act will be carried out, unless such act contravenes the provisions of the code or the law on the organisation of courts. Witnesses are always sworn prior to their examination. In all other matters, the relevant provisions of the code, international conventions and customs are followed.
(2) Summons to witnesses, experts and defendants, decisions or other documents of the penal procedure are served by care of the public prosecutor of the court of misdemeanours in accordance with articles 155-164. If the relevant request refers to the summoning of witnesses or experts, it is accepted only when the foreign authority that submitted it explicitly undertakes the obligation not to prosecute or detain the defendant for a crime committed prior to his appearance before the foreign authority who has summoned him.
authorities for execution by the Greek authorities. The types of MLA under Article 457 CPP are also the ones available for execution under this Article. In addition to Article 458 CPP, Article 459 CPP enables Greek authorities to execute request seeking the transfer of a defendant for examination abroad and Article 461 allows for the transfer of exhibits, judicial records and other objects kept by the Greek judicial authorities.

5. Article 458 CPP provides that incoming MLA requests shall be executed unless they run contrary to the provisions of the code or the law of the organisation of courts. Witnesses shall always take an oath before examined. In all other matters, “[t]he relevant provisions of the CPP, the international conditions and customs shall be observed”. That being said, Article 458(3) CPP authorizes the Minister of Justice, following a concurring opinion of the Judicial Council of the competent Court of Appeal, to deny the execution of an incoming MLA request if, in accordance with Articles 437 and 438 CPP, the defendant may not be extradited for a relevant criminal offence. This provision is relevant to MLA requests when dealing with issues such as reciprocity and the non-execution of requests relating to criminal offenses of a political or military nature.

6. When compared to other countries, the framework in Articles 457 to 461 CPP is limited at best. The specific issues and proposed recommendations will be discussed in more detail in Section II.

1.2. European Convention on MLA of 1959

7. Greece is Party to the European Convention on Mutual Assistance in Criminal Matters (ratified by Law No. 4218/1961, and entered into force on 15 June 1962), otherwise known as the 1959 European MLA Convention. Under the Convention, the Parties agree to afford each other the widest measure of MLA in criminal cases with a view to gathering evidence, hearing witnesses, experts and prosecuted persons. The European MLA Convention does not apply to arrests or to the enforcement of verdicts or offenses under military law which are not offences under ordinary criminal law. Greece is a Party to the Additional Protocol to the European MLA Convention (entered into force on 12 April 1982) and has signed but not ratified the Second Additional Protocol to the European Convention on MLA.

8. Article 26 of the European MLA Convention provides that the Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing MLA in criminal matters between any two contracting Parties. However, the Convention does not apply to bilateral or multilateral international conventions which contain or may contain clauses governing specific aspects of mutual assistance in a given field. The scope of legal assistance that can be provided in criminal matters between Greece and other Member countries of the European MLA Convention is regulated by Articles 1, 3, 7, 11, 13 of the Convention. When Greece signed the Convention it formulated a reservation with regard to Article 11 (transfer of persons in custody to provide evidence or for confrontation), which it deemed incompatible with Article 459 CPP.

9. Under the Convention on MLA, letters rogatory and requests concerning witnesses, experts and judicial records shall be transmitted between the relevant Ministries of Justice. Exceptionally, such requests may be transmitted directly between the judicial authorities (a) in urgent cases, (b) to
seek evidence for investigations preliminary to prosecution, and (c) for judicial records needed in a criminal matter (Article 15). Finally, regarding translation and authentication, which are often the cause of serious delays in Greece, Article 16 permits Parties to reserve the right to request that all documents be accompanied by a translation into their own language whereas Article 17 exempts Parties from any form of authentication of the requests.

1.3. Schengen Convention

10. The Convention implementing the Schengen Agreement (ratified by Law No. 2514/1997, and entered into force on 1 December 1997) supplements the European MLA Convention and allows direct the direct transmission of MLA requests and evidence gathered between judicial authorities. However, the direct transmission of MLA requests is still without prejudice to the option of addressing them through the Member countries’ central authorities. This practice seems to be followed also in the case of Greece; the Central Authority has stated that in principle it is not responsible for receiving such requests. In the rare case that this happens, the request is transmitted to the relevant prosecutorial or judicial authority after the Central Authority checks whether the request is complete and satisfies the necessary legal requirements, as it would with MLA requests in the absence of a treaty. The Schengen Convention also modified the requirements for letters rogatory seeking search and seizure, as well as the methods of service of procedural documents.

11. Regarding outgoing requests, the Ministry of Justice issued in 2008 and in 2012 guidance to all judicial authorities in Greece. According to the document the prosecutorial authorities should in principle send MLA requests directly to relevant foreign relevant judicial authorities of Parties to the Schengen Convention. However, the guidance states that a number of countries i.e. Cyprus, Estonia, Ireland, Latvia, Malta, Norway, Romania and the United Kingdom, have invoked Article 53(2) and have chosen to receive the MLA request via their Central Authorities as they have done so under the European MLA Convention. For those countries the Greek authorities do need to send their request via the Greek Central Authority to the foreign Ministry of Justice. The guidance then specifies that outgoing requests should always be translated by the Ministry of Foreign Affairs with the cost to be borne by the Ministry of Justice and that the Greek authorities should always consult the Eurojust website in order to identify the relevant foreign authority competent to execute the request.

12. From the responses of Greek authorities in the questionnaires and the consultation meetings the European Convention on MLA in conjunction with the Schengen Convention seems to be the most often used legal basis for MLA in Greece. In the OECD Phase 3 evaluation, Greek authorities stated that the MLA system under the Schengen Convention works “efficiently and effectively” and that “most requests are executed immediately”.

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7 Article 53(2), Convention Implementing the Schengen Agreement (“Paragraph 1 shall not prejudice the possibility of requests being sent and returned between Ministries of Justice or through national central bureaux of the International Criminal Police Organisation.”)
8 Central Authority – MLA questionnaire, 6 q. 3.3.
9 Article 51, Convention Implementing the Schengen Agreement.
10 Article 52, Convention Implementing the Schengen Agreement.
11 Ministry of Justice, Guidance of 7 October 2008 on Mutual Legal Assistance, Protocol No. 99197; Guidance of 25 September 2012 on Mutual Legal Assistance, Protocol No. 78698
12 Note by Turkey: The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the “Cyprus issue”. Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.
1.4. European Investigation Order

13. The Directive 2014/41/EU (transposed into Greek legislation with Law 4489/2017) was adopted by the European Parliament and the Council of the European Union with a view to establishing a comprehensive system for obtaining evidence in cases with a cross-border dimension based on the principle of mutual recognition. The system is envisaged to replace all the existing instruments in the area, and therefore harmonise the current fragmented regime, covering as far as possible all types of evidence, containing time-limits for enforcement and limiting as far as possible the grounds for refusal. This new approach is based on a single instrument called the European Investigation Order (EIO), which is defined in Article 1 of the Directive as the “judicial decision which has been issued or validated by a judicial authority of a Member State to have one or several specific investigative measure(s) carried out in another Member State to obtain evidence.”

14. In practical terms, the system of the Directive allows competent issuing authorities to send EIOs directly to the competent authority in the relevant EU Member State for execution. Under the Directive, EU Member States are obligated to recognise and carry out requests from other EU Member States, just as they would with a decision coming from their own authorities. Much like other MLA instruments, the Directive provides practitioners with guidance regarding the scope of an EIO (Article 3), the types of proceedings for which an EIO can be issued (Article 4), the content and form of an EIO (Article 5), and the procedures and conditions for issuing and transmitting an EIO (Articles 6-8). One of the main novelties of the Directive is that it sets time limits for recognition or execution (Article 12). If the executing authority cannot meet the time limit obligates then it must inform the requesting authority by any means, giving the reasons for the delay, estimating the necessary additional time and consulting with the issuing authority on the appropriate timing to carry out the investigative measures. The Directive also provides in its Annex for a standardised template which should be used by all national authorities in requesting MLA requests.

15. At the time of drafting this report, many EU countries were still in the process of transposing the Directive into their national laws. There is also much discussion whether the Directive’s regime will supersede all other legal bases for requesting and executing MLA requests among other states. Moreover, with regard to Greece there is a question whether the appropriate mechanisms and facilities are in place in order to accommodate hearings by videoconference or other audio-visual transmission.

1.5. Other international instruments

16. Greece has adhered to a number of other multilateral treaties that provide a mechanism by which Greek authorities may request and provide MLA in corruption cases. However, these instruments are used either for MLA in specific types of cases such as transnational organised crime, or are facilitating further requests that Greece transmits to or requests from any of the fourteen countries that has concluded bilateral MLA treaty.

a. United Nations Convention against Corruption

17. United Nations Convention against Corruption (UNCAC)\(^{13}\) (ratified by Law No. 3666/2008, and entered into force on 18 June 2008) enables MLA with other Parties to the Convention in the absence or in lieu of another treaty. Article 46 provides for a very wide range of types of MLA that are sometimes not present in multilateral and bilateral treaties or national legislation.\(^{14}\)

18. Article 46(17) of UNCAC provides that requests for MLA made pursuant to UNCAC are to be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request. In addition, in line with Article 46(13) of UNCAC, each Party


\(^{14}\) See Section II 1.3 below.
shall designate a central authority that shall have the responsibility and power to receive requests for MLA and either to execute them or to transmit them to the competent authorities for execution. Accordingly, all MLA requests made pursuant to UNCAC must be channelled through the Greek Central Authority to the foreign Ministry of Justice before being executed by the competent foreign authority and in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization. The same Article stipulates that the designated procedure is without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels.

19. It is important to note that at the time of ratification, Greece has declared that the competent Central Authority to which applications pursuant to chapter IV of the UNCAC are addressed is the Ministry of Justice and that every relevant request, as well as its accompanying documents shall be translated into the Greek language.

b. **OECD Anti-Bribery Convention**

20. Greece ratified by Law No. 2656/1998 the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.\(^{15}\) The Convention covers the bribery of foreign – not domestic – public officials in international business transactions and related offences. Greece’s obligations under Article 9 of the Convention are two-fold. First, Greece is required to provide prompt and effective MLA to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention. Second, and in conjunction with Article 5, Greek authorities must also be able to seek and use evidence from abroad in an efficient manner in order to effectively investigate and prosecute bribery and corruption. The Greece Phase 3 and Phase 3bis reports on “Implementing the OECD Anti-Bribery Convention” noted several issues concerning Greece’s ability to provide mutual legal assistance in foreign bribery cases. In this light, Greece should revise its current MLA legislative framework and fully implement these recommendations.

c. **Council of Europe Criminal Law Convention on Corruption**

21. Similar to UNCAC, the Council of Europe Criminal Law Convention on Corruption\(^ {16}\) (ratified by Law No. 3560/2007) enable MLA with other Parties to the Convention in the absence of another treaty or when other treaties does not allow for a specific type of MLA. Under the Convention, Greece must afford other Parties the widest measure of MLA by promptly processing requests from authorities that have the power to investigate or prosecute criminal offenses covered by the Convention. The COE Corruption Convention, however, states that such MLA shall be provided in conformity with each Party’s domestic law, thereby leaving it to Greece to establish a robust framework that enables domestic authorities to promptly provide MLA under the Convention.

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\(^{15}\) Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States

\(^{16}\) Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom

22. Greece considers the United Nations Convention against Transnational Organized Crime\(^{17}\) (ratified by Law No. 3875/2010) as a basis for providing MLA in corruption cases involving transnational organised crime. While there has been no clear experience regarding its application vis-à-vis MLA requests made pursuant to UNTOC, Greece has, in the past, conducted a joint investigation on the legal basis of UNTOC in a drug trafficking and money laundering investigation.\(^{18}\) It remains to be seen how UNTOC would be used in cases involving corruption and money laundering.

e. Warsaw Convention\(^{19}\)

23. Greece also ratified by Law 4478/2017 the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention of 2005).\(^{20}\) As its title indicates, the main focus of the Convention is to facilitate international cooperation among its Parties with regard to search, seizure and confiscation of the proceeds from crime. To this end, Article 15(1) provides that Parties shall cooperate with one another to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds of crime, including corruption. The Convention also provides that authorities shall, when requested, assist with asset tracing and execute provisional measures such as freezing and seizure orders.

f. Joint Investigative Teams (JITs)

24. Greece has enacted Law 3663/2008 as amended by Article 62 of Law 4249/2014 to implement the European Council Framework Decision on joint investigation teams (JIT) (2002/465/JHA). A JIT is a group of law enforcement officials from two or more European Union Member States which carries out criminal investigations in one or more of the Member States represented in the team. The Member States sign a written agreement to create the JIT and set out its purpose, duration and composition. The JIT is set up in the Member State where most of the investigation is carried out. The JIT comprises a leader and members from the country in which the JIT is set up, and “seconded members” from other countries. Members may be investigators, prosecutors or even investigative judges. JITs have many advantages compared to traditional MLA as they ensure better quality of evidence and co-ordination. No time is spent on the issue of MLA requests as officials in both states are in constant contact and the evidence is gathered in the presence of officials from both the requesting and requested state helps to ensure that the requirements under the laws of both countries are met.

25. Although strongly promoted by Eurojust, JITs, may not be available in all corruption cases because the list of eligible offences is limited among corruption related crimes it only covers fraud.


\(^{19}\) Please also note the EU Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence; the EU Framework Decision 2005/212/JHA on Confiscation of crime-related proceeds, instrumentalities and property (although relevant to confiscation, it does not provide a legal basis for MLA); the EU Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders (as amended by EU Council Framework Decision 2009/299/JHA); and the EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

\(^{20}\) Albania, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Malta, Moldova, Montenegro, Netherlands, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Turkey, Ukraine, United Kingdom
Under Article 15(2) of Law 3663/2008 the Public Prosecutor of the Court of Appeal of the appropriate territorial jurisdiction is the competent authority in Greece for submitting and receiving requests for JITs and for entering into written JIT agreements. If the investigation is to be conducted in the jurisdictions of more than one Courts of Appeal, then the competent authority shall be the Public Prosecutor of the Court of the Supreme Court (Areios Pagos).

1.6. Bilateral MLA treaties

26. Greece currently has 14 bilateral MLA treaties and ten additional bilateral treaties that are not in use because legal cooperation with those countries is predicated on the Schengen Convention or the European MLA Convention. Bilateral MLA treaties entered into by Greece and foreign countries contain provisions that require Greek governmental authorities and their counterparts to provide assistance. These treaties also establish certain procedures to be followed in providing assistance, the manner in which requests for assistance must be formulated, and what each request must contain in order to be executable. The treaties may also stipulate that a request shall be executed according to the internal laws and procedures of Greece.

27. Based on available information Greece currently has bilateral MLA relations with the following countries: Albania, Armenia, Australia, Canada, China, Cyprus, Egypt, Georgia, Lebanon, Mexico, Russia, Syria, Tunisia, and the United States of America.

2. Procedural framework related to non-treaty MLA requests

28. This section describes the Greek authorities’ procedure for executing MLA requests that are not based on a treaty. As mentioned above, the focus on non-treaty requests is in line with the Terms of Reference for Outcomes 9.3 – 9.4 of the Technical Assistance Project. In practice, however, Greek authorities likely follow a similar procedure for executing treaty requests (apart from those directly transmitted between judicial authorities pursuant to the Schengen Convention). This is because most of the issues described in this section (e.g. the division of responsibilities among Greek authorities for checking and executing requests) are matters internal to Greek law and hence are not described in international treaties.

2.1. Incoming requests

29. Pursuant to Article 458 CPP, all MLA requests made to Greece for the investigative acts referred to in Article 457(1) in the absence of a bilateral MLA treaty or multilateral instrument, are transmitted to the Department of International Judicial Cooperation in Civil and Criminal Cases (Central Authority) within the, Greek Ministry of Justice Transparency and Human Rights. However, the CPP does not stipulate whether these requests are first sent to the Greek Ministry of Foreign Affairs (MoFA) before being transmitted to the Central Authority for execution. The MoFA stated in its responses to the OECD questionnaires that the practice varies. In some cases the foreign authorities may send their request to the competent local consular authorities that then transmit it to the Central Authority via the MoFA. In others the request is sent to the MoFA which then transmits the request to the Central Authority, and lastly, in the majority of cases, the requests are sent directly to the Ministry of Justice.

22 See Annex with the complete list of ratification laws.
23 Examination of witnesses and defendants; onsite inspections; expert opinions; and seizure of evidence.
24 While this is primarily a procedural concern, it is still relevant with regards to understanding how such requests flow in and out of the Greek MLA framework, especially in light of the fact that outgoing non-treaty MLA requests are channelled through the Greek MoFA. Oftentimes, such MLA requests are sent through diplomatic channels (from one Ministry of Foreign Affairs to another) because, unlike treaty requests, there is no framework that establishes specific procedures for sending and receiving requests.
30. Although not envisaged by the CPP the Central Authority plays a role, albeit mainly procedural, in the execution of MLA requests. According to the Central Authority, all MLA requests are recorded in an internal database, assigned a case number/entry and then reviewed to determine whether they meet the requirements of completeness and lawfulness to ensure that they are fit for execution.\(^\text{25}\) A request is defined as complete and lawful if it indicates the relevant legal basis, or the absence thereof, and includes all supporting documents mentioned in the request (including key documents of the case file, the applicable legal provisions of the requesting party and any other documents considered necessary by the operator for the execution of the request). According to the Central Authority it is very unlikely that an incoming MLA request does not pass the completeness and lawfulness test. In the rare case that this happens, such requests usually involve questions relating to national security or other sovereign interests. Such requests are transmitted to the competent Court of Appeal Prosecutor who follows the refusal procedure of Article 458(3) as described below.

31. Unlike other countries’ MLA systems, where the Central Authority sends requests directly to law enforcement agencies for execution, all requests in Greece must be presented to the competent Court of Appeals Prosecutor. Accordingly, the Central Authority identifies the competent Court of Appeals for execution and forwards the request to its public prosecutor.

32. The CPP does not define exhaustively the tasks to be performed by the Court of Appeals Prosecutor. In practice, the Prosecutor examines whether the request contains a sufficient description of the facts of the case and the law of the requesting jurisdiction.\(^\text{26}\) Additionally, for requests that concern summonses to witnesses and experts for examination, Article 458(2) demands that the requesting judicial authority explicitly guarantees that it will refrain from prosecuting or seeking their imprisonment for crimes committed before their appearance before the foreign authority. The Court of Appeals Prosecutor also makes sure that the request is not contrary to the CPP or the Law of the Organisation of Courts 1756/1988 (Article 458(1)).\(^\text{27}\) If these conditions are not met, the Prosecutor is obligated\(^\text{28}\) to submit the request to the competent Judicial Council of the Court of Appeals which decides under the Article 458(3) in conjunction with Articles 437 and 438 CPP and submits a concurring opinion to the Ministry of Justice, not the prosecutor, who may refuse the request. It then submits a concurring opinion to the Ministry of Justice for the non-execution of the request.

33. If the incoming request satisfies the test, the Court of Appeal Prosecutor will seek through the president of the Court of First Instance to have the relevant investigative judge execute the request. In cases where the Court of Appeal Prosecutor considers that it is necessary to open a prosecution for the execution of the MLA request, a relevant order will be sent to the Prosecutor of the Court of First Instance. This step is not envisaged by the CPP but has been developed in practice. For Athens, however, all MLA requests are transmitted to the same investigative judge for execution. The investigative judge executes the MLA request like a request by a prosecutor of the Court of First Instance in a domestic investigation.\(^\text{29}\)

34. After the investigative judge executes the MLA request, the requested assistance is transmitted to the requesting foreign authority backwards through the same path (Investigative Judge – President of the Court of First Instance – Court of Appeals Prosecutor – Central Authority). As a final step, the Central Authority assesses whether the request has been executed (either fully or

\(^{25}\) It has to be noted here that such practice is not required by law and has been criticized by the judicial and prosecutorial authorities during the consultation meetings with OECD.

\(^{26}\) The possibility of requesting additional information from the requesting country is provided only for extradition under the CPP. Article 444 CPP stipulates that where there is doubt about the possibility to make the extradition the competent authorities shall request explanations and that the extradition may not be ordered until such explanations are provided. While one could argue that the application of the provision may apply mutatis mutandis to MLA, this uncertainty creates confusion to Greek authorities.

\(^{27}\) Please see a more detailed analysis and the additional grounds for refusal in Section II 1.6.

\(^{28}\) Court of Appeals Prosecutor of Athens – MLA questionnaire, p. 5, q. 1.

\(^{29}\) Court of Appeals Prosecutor of Athens – MLA questionnaire, p. 24, q. 9 (“The execution of foreign requests is carried out, on the basis of the Greek procedural provisions”).
A request may be executed partially either because full satisfaction will be pursued at a later time or because some of the requested actions could not be carried out. In all cases of partial or non-execution of a request, the competent judicial authority shall clearly state the reasons justifying its decision or the circumstances that did not permit for execution of the request.

35. In addition to the execution of MLA requests for investigative acts, the CPP describes the procedure for executing two other types of incoming MLA requests. Article 459 makes it possible for Greece to transfer a person in custody for examination to a foreign judicial authority. The request should always be sent through the diplomatic channel and is ordered by the Minister of Justice following a concurring opinion of the competent Public Prosecutor of the Court of Appeals. The transfer is ordered on the condition that the person is returned immediately after the examination (Article 459(1)), the explicit guarantee that it not be prosecuted or imprisoned (Article 458(2)). The person may only be transferred to states which by virtue of law or convention provide the same judicial assistance to the Greek state i.e. reciprocity (Article 459(2)). The costs of the transfer and return are borne by the foreign state, and are paid in advance by that state or the competent Greek consular authority on the condition of reciprocity.

36. Finally, under Article 461 a foreign authority may request the transmission of exhibits or other objects in the possession of the Greek judicial authorities through the MoFA. The request is granted if there are no special reasons for refusal, the object would be returned immediately, and the requesting state promises reciprocity. If documents are requested, copies thereof are sent.

2.2. Outgoing requests

38. Article 457 CPP governs outgoing requests for non-treaty MLA. The provision covers requests sent by Greek judicial and prosecutorial authorities to foreign authorities. The requesting authority may therefore be an investigative judge, a Public Prosecutor of the Court of First Instance or a Public Prosecutor of the Court of Appeals including the Prosecutor against Crimes of Corruption (PPAC). It is important to note that MLA may be sought by Greek authorities even at the preliminary investigation stage (i.e., before charges have been brought against a suspect).

39. The requesting authorities are responsible for drafting the MLA requests. If the requesting authority is a judge or a Prosecutor of the Court of First Instance he or she has to transmit the request to the Prosecutor of the Court of Appeals of their region, after which the Prosecutor sends the request to the Central Authority. As in the case of incoming MLA requests, the Prosecutor of the Court of Appeals examines whether the request contains a clear and accurate description of the facts of the case as well as the law of the offence and the possible penalty. This step is not envisaged by the CPP but has been developed in practice.

40. In line with Article 457(1) CPP, and in the absence of a bilateral MLA treaty or a multilateral instrument or convention, all outgoing MLA requests must be transmitted to a foreign authority by the Central Authority, which then submits the requests via the MoFA. All outgoing requests are recorded in the internal database of the Central Authority where they are assigned a case number.

30. Central Authority – MLA questionnaire, p. 4. q. 2.

31. For the purposes of the present report and in line with the Circular 1/2009 issued by the Public Prosecutor at Areios Pagos the term “judicial” in Articles 457-461 CPP shall encompass both judicial and prosecutorial authorities.

32. See Greece’s responses to Phase 3 questionnaire (section 10.1), in which Greek authorities referred to Circular 1/2009 issued by the Public Prosecutor at Areios Pagos, which clarified the issue and eliminated concerns that were raised after the Greek CPP was amended by Law 3346/2005.

33. The role of the MoFA has been characterised as purely procedural during the workshop. Some authorities also mentioned that the MoFA involvement in the process of transmission of an MLA causes further undue delays.
and reviewed to determine whether they meet the relevant requirements of completeness and lawfulness\(^\text{34}\) to ensure that they are fit for execution by the foreign authority. An outgoing request is complete and lawful if it indicates the relevant legal basis or the lack thereof and includes all supporting documents mentioned in the request (including key documents of the case file, the applicable legal provisions of the requesting party and any other documents considered necessary by the execution of the request). The Central Authority may also ask the requesting Greek authority to provide additional documents and information that it considers important for a complete case file and to ensure speedy execution abroad.\(^\text{35}\) This step is not envisaged by the CPP but has been developed in practice.

41. Additionally, Article 457 provides that in emergencies, outgoing MLA requests may be transmitted directly to the competent local consular authorities (located in the foreign country) responsible for performing investigative duties. The types of MLA that are available in this case are rather limited, as the consular authorities are not judicial in nature, and concern only individuals who hold the Greek nationality.\(^\text{36}\) More specifically, the consular authorities may deliver service of process or summons and examine witnesses and defendants. In all such cases, however, the Ministry of Justice must be notified.

42. The availability of other types of MLA not provided for by the CPP for non-treaty MLA requests from Greece to foreign authorities, as well as the procedure to transmit those requests are not known to the drafters of this report.

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\(^{34}\) As with incoming requests, an outgoing request is complete and lawful if it indicates the relevant legal basis or the absence thereof, and includes all supporting documents mentioned in the request (including key documents of the case file, the applicable legal provisions of the requesting party and any other documents considered necessary by the execution of the request).

\(^{35}\) Central Authority – MLA questionnaire, p. 8. q. 5 and 5.2.

\(^{36}\) Ministry of Foreign Affairs – MLA questionnaire, p. 2 out 34.
II. Proposals for improving existing Greek MLA legislation

43. The present Section will take an in-depth look into the deficiencies highlighted in the overview of the MLA framework in Greece. It will provide technical and legislative proposals geared towards improving, modernising, and streamlining relevant MLA legislation and bring it in line with the international standards. Where appropriate and necessary, it will elaborate on specific amendments to the CPP, on the proposal for enacting implementing legislation and on other issues such as language and translation. As already noted in the introduction of the present report, said proposals do not deal with extradition or asset recovery.

1. Streamlining the MLA chapter: Specific amendments to the Code of Penal Procedure

44. In order to streamline the MLA chapter of the CPP it is necessary to discuss the following issues: (i) applicability of the CPP; (ii) structural issues that have a negative impact on the legal certainty and clarity of the chapter; (iii) the available types of MLA; and, (iv) other issues such as dual criminality, reciprocity and grounds of refusal.

1.1. Applicability of the Code of Penal Procedure

45. The CPP does not define the scope of its application. However, there is a general understanding among relevant authorities that the CPP applies to MLA in the absence of a bilateral MLA treaty or a multilateral instrument or convention. Article 458(1) seems to imply that the CPP also applies complimentarily in cases where relevant bilateral or multilateral agreements do not apply exclusively or do not cover exhaustively an MLA request. If the CPP’s main purpose is indeed to govern with legal certainty and clarity the execution or transmission of non-treaty MLA requests, the MLA chapter of the CPP should state upfront the scope of its application.

46. Many OECD countries have similar legal frameworks in place in order to regulate the transmission or execution of non-treaty MLA requests. For example, the Law on International Legal Assistance in Criminal Matters (IRG) that governs MLA in Germany clearly defines the scope of application of the legislation and its relation to international bilateral and multilateral treaties. The IRG also clearly stipulates the legislation’s complementary nature. The same could be said for the Federal Act on International Mutual Assistance in Criminal Matters of Switzerland, the Crime International Co-operation Act of United Kingdom, and the Title 18 of the United States Code Section 3512.

37 Central Authority – MLA questionnaire, p. 3. q. 1.
38 Areios Pagos has adopted the same interpretation in decision 1161/2016.
42 Foreign requests for assistance in criminal investigations and prosecutions, 18 U.S. Code § 3512.
Recommendations

With these international good practices in mind, and in order to enhance legal certainty and clarity with regard to the scope of application of Articles 457 to 461 CPP, the present report recommends an introductory Article be added to the MLA chapter of the CPP stating that “Articles 458 – 461 CPP apply to all mutual legal assistance in criminal matters, both incoming and outgoing in nature, made in the absence of an a bilateral or multilateral treaty that has been duly ratified under Greek law. Where such a treaty is applicable, these Articles may apply complimentary and subject to the provisions of said applicable treaty.”

1.2. Legal certainty and procedural clarity

47. The original structure of the MLA chapter of the CPP and the changes that have been introduced to the law have created a fragmented piece of legislation that does not follow international standards or assist prosecutorial and judicial authorities in effectively seeking or executing MLA requests. The consultation meetings and the questionnaire responses demonstrate that these provisions allow for a range of interpretations and result in confusion and difficulty among the relevant Greek authorities as to how to execute MLA requests.

48. More specifically, Article 457 CPP enables domestic authorities to seek and obtain MLA from foreign jurisdictions. However, the language of the provision is extremely limited and does not provide sufficient guidance regarding the procedure governing an outgoing MLA request. In fact, Article 457 CPP does not identify the authorities that are involved in MLA or their roles. More specifically, the CPP leaves the following quite unclear: (i) whether both prosecutorial and judicial authorities are authorised to seek MLA; (ii) the role of the Prosecutor of the Court of Appeals in transmitting those requests to the Central Authority of the Greek Ministry of Justice, Transparency, and Human Rights (Central Authority); (iii) the content of the substantive check of the MLA request; (iv) whether the translation is sought after the substantive check is completed or when the request is transmitted to the Central Authority; (v) the role of the Central Authority before transmitting MLA requests to the foreign authority; (vi) the content of the completeness and legality check conducted by the Central Authority; and, (vii) whether the Central Authority transmits the outgoing MLA request via the Ministry of Foreign Affairs (MoFA) or directly to the foreign authority.

49. In reverse, Article 458 CPP does not establish whether incoming MLA requests should be submitted to local Greek consular authorities, to the MoFA or directly to the Central Authority. Additionally, Article 458 fails to define the specific role the Central Authority plays before transmitting the request to the Prosecutor of the Court of Appeals. The provision also does not specify whether or how the Central Authority should review of the content, completeness or the legality of the MLA request. The role of the Prosecutor of the Court of Appeals in the execution of MLA requests is also left unclear as is the type of substantive review he or she is expected to conduct and what steps should be taken if the request fails such a review. Lastly, prosecutors are left with no guidance regarding what procedures are available for requesting supplementary information from foreign authorities. The abovementioned issues have evolved in practice in the absence of a comprehensive legal and regulatory framework and seem to lack uniformity.

50. Moreover, as we will see in the analysis below, Article 458(1) CPP seems to permit judicial authorities responsible for executing MLA requests for investigative acts to apply relevant provisions found elsewhere in the CPP on at least some issues. Accordingly, Article 444 CPP, which stipulates

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43 Although Circular 1/2009 issued by the Public Prosecutor at Areios Pagos seems to have extended the possibility of MLA also to the stage of preparatory examination and thereby, authorised also prosecutorial authorities to see and obtain MLA.
that where there is doubt regarding the possibility of extradition the competent authorities shall request explanations, has been applied mutatis mutandis by Greek authorities also to incoming MLA requests.\(^{44}\) However, some authorities have considered that this flexibility extends to the totality of the CPP provisions, which do not establish an exhaustive framework with respect to MLA or an exhaustive list of available types of MLA. This divergence in interpretation and in the application of the relevant provisions creates dubious results.

51. Even when the CPP attempts to describe a procedure, it does so with reference to another chapter of the CPP. For example, Article 458(3) CPP provides the grounds to refuse an incoming MLA request by referring to provisions on extradition (i.e. Articles 437 and 438 CPP). This leads Greek jurists to interpret Article 458(3) CPP in combination with relevant provisions in extradition treaties to which Greece is a party, or worse to consider Articles 437 and 438 CPP as entirely irrelevant to MLA. This issue is further highlighted by the fact that of the authorities who responded to the questionnaires, only the Prosecutor of the Court of Appeals of Thessaloniki and Athens correctly identified the Articles and the process according to which the Minister of Justice may refuse to execute an incoming MLA request.\(^{45}\)

**Recommendations**

Taking into account that an MLA legal and regulatory framework needs to be as detailed and clear as possible in order to enable prosecutorial and judicial authorities to effectively seek or execute MLA requests the present report recommends that:

- The MLA chapter of the CPP be restructured and streamlined in order to provide legal certainty and procedural clarity with regard to the transmission and execution of non-treaty MLA requests;
- Article 457 be amended to describe in detail the process through which domestic authorities seek and obtain MLA from foreign jurisdictions as well as the role of each authority in this process;
- Article 458 be amended to describe in detail the process through which domestic authorities incoming MLA requests as well as the role of each authority in this process;
- Issues such as the types of available MLA, the procedure of seeking complementary information and the grounds for refusing the execution of an MLA request be regulated autonomously in the MLA chapter.

**1.3. Types of MLA**

52. Article 457 CPP provides that Greek authorities may seek non-treaty MLA from foreign authorities for examination of witnesses and defendants, onsite inspections, expert opinions, the seizure of evidence, and the delivery of summons to witnesses and defendants. On the other hand, Article 458, 459 and 461 CPP enable Greek authorities to provide non-treaty MLA for the same types of assistance as well as service of summons to witnesses and defendants, transfer of a defendant for examination, transfer of exhibits, judicial records and other objects kept by the Greek judicial authorities.

53. An assessment of these provisions leads to two conclusions. First, that in the absence of a bilateral or multilateral treaty the CPP does not permit Greek authorities to seek or provide some types of MLA commonly found in more recent international instruments such Article 46 of UNCAC

\(^{44}\) Court of Appeals Prosecutor of Thessaloniki – MLA questionnaire, pp. 6-7, q. 1.2; Court of Appeals Prosecutor of Athens – MLA questionnaire, p. 7 q. 1.2.

\(^{45}\) Court of Appeals Prosecutor of Thessaloniki – MLA questionnaire, pp. 26-27 q. 10; Court of Appeals Prosecutor of Athens – MLA questionnaire, p. 6 q. 1.2.
and the Second Additional Protocol to the European MLA Convention (which Greece has signed but not ratified), or legislation of other countries such as Germany’s IRG or Ireland’s Criminal Justice (Mutual Assistance) Act. These include hearing witnesses via video or teleconference; service or delivery of procedural documents and judicial decisions by post; cross border surveillance of individuals; controlled deliveries; covert investigations; interception of telecommunications; provisional measures to preserve evidence, maintain an existing situation or protect endangered legal interests; examining objects; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; facilitating the voluntary appearance of persons in a requesting State Party; and repatriation of assets.

54. A second conclusion from an examination of these CPP provisions is a lack of symmetry between incoming and outgoing requests. Greek authorities may be required to provide some types of MLA (i.e. transfer of a defendant for examination, transfer of exhibits, judicial records and other objects kept by judicial authorities) that they cannot seek from their foreign counterparts. This asymmetry is difficult to justify.

55. To rectify these shortcomings, Greek authorities have included the following language in Article 458(1) CPP: “In all other matters, the relevant provisions of the code, international conventions and customs are followed”. Greek authorities interpret such language as permitting them to seek types of assistance described in the CPP, international conventions and international customary law that are not expressly described in Articles 457 – 461 CPP.

56. This flexible interpretation is not satisfactory, however. First, it overlooks the fact that the words permitting reliance on the other CPP provisions, international conventions and customs are found only in Article 458 CPP concerning incoming requests, and not in Article 457 CPP on outgoing requests. Second, the interpretation would not permit MLA for investigative techniques that are omitted from the CPP but included in other Greek laws (e.g. Law 3691/2008 on freezing, seizure and confiscation of assets). Third, the approach results in a significantly fragmented and limited MLA regime. The main applicable provisions are in Articles 457-461 CPP, but others are spread throughout the CPP. Additionally, there are other provisions relevant to MLA (e.g. on joint investigative teams) that are found in other legislation.

Recommendations

With these international good practices in mind, the present report recommends that the MLA chapter of the CPP provide clear descriptions of the types of MLA that Greek authorities can seek and provide. More specifically, it is recommended that:

- Based on the principle of reciprocity, the CPP should be amended to explicitly allow Greek authorities to seek the same types of assistance that they provide to foreign authorities.
- The CPP should be amended to expand the types of non-treaty-based MLA to include special investigative techniques that are available in domestic investigations in Greece; joint investigation teams; and freezing, confiscation and forfeiture of assets. For treaty-based requests, the types of assistance available will continue to be circumscribed by the relevant treaty.

1.4. Dual criminality

57. In the context of MLA, the principle of dual criminality requires that the conduct underlying the request for assistance be considered a crime in both the requesting and requested state. The test is

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47 Law 3633/2008 as amended.
whether the conduct that is the subject of the MLA request is criminal in both states, not whether the conduct constitutes the same offence in each state.\textsuperscript{48}

58. Some authors\textsuperscript{49} suggest that dual criminality is a requirement for executing non-treaty MLA requests in Greece. According to this literature, the requirement is found in Article 458(3) CPP which prescribes that the Minister of Justice, following a concurring opinion of the Judicial Council of the competent Court of Appeal, may refuse to execute an incoming MLA request if, in accordance with Articles 437 and 438 CPP, the defendant may not be extradited for the act being investigated by the foreign authority.

59. While the crux of the Article’s language appears to focus on extradition, it is relevant insofar as it relates to the factors that the Judicial Council and the Ministry of Justice consider in deciding whether to execute a request. Such considerations include whether: (i) the act constituting the offence is punishable in Greece and the requesting state by at least two years’ imprisonment or death; and (ii) the individual whose extradition is sought has been convicted of a punishable act constituting either a misdemeanour or felony in both Greece and the requesting country, and has been sentenced to a term of imprisonment of at least six months. The same interpretation has been adopted by the prosecutorial authorities replying to the OECD questionnaires.\textsuperscript{50}

60. That being said, the Greece Phase 3 and Phase 3bis reports on “Implementing the OECD Anti-Bribery Convention” have demonstrated that Greek authorities can at times experience confusion with regard to the requirement of the dual criminality. For example, some authorities stated that Articles 457 to 461 CPP do not explicitly require dual criminality (as the language “may refuse” is more permissive than obligatory) and overlooked the provisions of Articles 437 and 458(3) described above.\textsuperscript{51} This lack of clarity is reinforced undoubtedly by the fact that the law does not explicitly require that dual criminality be met in the context of MLA but points to provisions relevant to extradition.

61. In the UNODC Country Review Report of Greece,\textsuperscript{52} the Greek authorities referred to Supreme Court jurisprudence that in verifying dual criminality, consideration is given to the relevant conduct rather than the strict wording or terminology of the offence, applying in other words, the conduct based approach.\textsuperscript{53} This could not be verified because all of the available case law concerns extradition.

62. Finally, there is an open question as to whether Greece may provide MLA in investigations against legal persons. Given that Greece’s legal system does not recognize criminal liability of legal persons, the present report understands that this is not possible\textsuperscript{54} and that Greece may only provide MLA in relation to the natural persons involved in the criminal activities of the legal person. Whatever the case, it is evident that the CPP fails again to provide for a clear provision regarding dual criminality.

63. That being said, the current practice in many countries is to not require dual criminality for MLA at all, or only for coercive types of MLA.\textsuperscript{55} In fact, as the guide on “Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries” shows, only one country (Japan) requires dual

\textsuperscript{48} UNODC Manual on Mutual Legal Assistance and Extradition, p. 69.
\textsuperscript{49} Γ. Τριανταφύλλου, Διεθνής Δικαστική Συνδρομή στην Ποινική Απόδειξη, 2009, σελ.191-192; Σ. Δασκαλόπουλος, Ζητήματα Δικαστικής Συνδρομής υπό το Σύγχρονο Θεσμικό Πλαίσιο, Ποινικά Χρονικά ΞΒ/2012, σελ. 176.
\textsuperscript{50} Court of Appeals Prosecutor of Thessaloniki – MLA questionnaire, pp. 20-21, q. 6; Court of Appeals Prosecutor of Athens – MLA questionnaire, p. 21-22 q. 6.
\textsuperscript{51} OECD Phase 3bis Report – Greece, para. 163.
\textsuperscript{52} UNODC Country Review Report of Greece, para 438.
\textsuperscript{53} The conduct based approach is primarily stipulated by Article 43(2) UNCAC.
\textsuperscript{54} The conduct bases approach cannot be applied here since Greece’s legal system does not recognise criminal liability of legal persons.
\textsuperscript{55} UNODC Manual on Mutual Legal Assistance and Extradition, p. 69.
criminality for non-treaty MLA, two (Germany and Russia) require dual criminality only for non-treaty MLA involving coercive measures and, the remaining five countries (Canada, France, Italy, United Kingdom and United States) to do require dual criminality at all. For treaty-based MLA, more recent treaties also require dual criminality only for coercive action or not at all.

Recommendations

With these international good practices in mind, the present report recommends that the MLA chapter of the CPP:

- Explicitly require dual criminality only for non-treaty MLA requests seeking coercive measures.
- Define dual criminality using a conduct-based approach.

1.5. Reciprocity

The principle of reciprocity essentially entails a promise that the requesting country will provide the requested country with the same type of assistance in the future, should the requested state ever be asked to do so. Greek authorities have stated in the UNODC Country Review Report of Greece that in the absence of an applicable MLA treaty or administrative arrangement, MLA is provided on the condition of reciprocity. The same assertion was also made by the Central Authority and the MoFA when providing answers to the project questionnaires.

The text of the CPP does not support this conclusion, however. Article 461 CPP indeed provides that requests by foreign authorities seeking the transmission of exhibits or other evidence in the possession of Greek judicial authorities shall be executed on the condition of reciprocity. Article 459(1) (transfer of the defendant for examination) contains the same requirement expressly. However, similar language is missing from Article 458 CPP, which is the principal provision governing the execution of incoming non-treaty MLA requests. Likewise, and despite the reference to international customs in Article 4858(3) CPP, there is no express requirement of reciprocity for MLA seeking investigative measures outside of Articles 457-461 CPP (if such measures are available – see above).

The same question was also raised by the Court of Appeals Prosecutor of Athens and Thessaloniki when responding to the OECD questionnaire. According to the latter, the structure of the CPP is highly problematic and creates confusion regarding the applicability of reciprocity as a general requirement. In fact, according to the Prosecutors reciprocity may not a general condition that is required by the CPP and this position has been supported by considerable academic literature.

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56 Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries, A Step-By-Step Guide, 2011
57 For example, see UNCAC Article 46(9); Greece-United States MLA Treaty Article 1(3); Greece-Canada MLA Treaty.
59 Central Authority - MLA questionnaire, p. 3 q. 1.
60 Ministry of Foreign Affairs – MLA questionnaire, p. 2 out of 34.
61 Please note that the Ministry of Foreign Affairs states in the questionnaires that no request under Article 461 has been received for at least the past ten years.
62 Court of Appeals Prosecutor of Athens – MLA questionnaire, pp. 20-21 q 5.
63 Court of Appeals Prosecutor of Thessaloniki – MLA questionnaire p. 20. q. 5.
64 Μ. Παπαμαρίνη, Κώδικας Ποινικής Δικαιοσύνης, Ερμηνεία κατ’ άρθρο, 2012, σελ. 1872, Α. Καρράς, Επίτομη Ερμηνεία ΚΠΔ, 2005, σελ. 947, Α. Κονταζής, Ερμηνεία ΚΠΔ, 2006, σελ. 2507-2508
Generally, reciprocity is a common precondition for MLA in countries with a civil law tradition. Greece would also benefit from having this condition in its CPP as it would motivate other jurisdictions seeking assistance from Greece to provide similar assistance in the future.

### Recommendations

For these reasons, the present report recommends that the CPP articulate clearly that reciprocity is a general condition for the execution of incoming non-treaty MLA requests.

#### 1.6. Grounds and procedure for refusal

As discussed earlier in Section 1.2, Article 458(3) CPP regulates the grounds and the procedure for refusing the execution of an incoming non-treaty MLA request. This provision points to Articles 437 and 438 CPP (i.e. the provisions relevant to extradition), which enable Greek authorities to deny the execution of a non-treaty MLA request due to the lack of dual criminality, or when the request concerns military, political or tax offences.

Other grounds of refusal may be found in Article 458(1) CPP, which instructs the Public Prosecutor of the Court of Appeals to deny a non-treaty MLA request that contravenes the provisions of the CPP or the law on the organisation of courts (Law 1756/1988). For example, an MLA request to depose an attorney on matters protected by attorney-client privilege would violate Article 212 CPP and thus may be rejected.

Finally, there are grounds of refusal that may be classified as grounds of general public policy and which can be found either in Greek laws or have been developed in practice. These grounds may cover among others requests that: (i) relate to investigations and prosecutions that are politically motivated or refer to a military offence; (ii) would prejudice the sovereignty, security or national interests of Greece; (iii) would violate a fundamental human rights; or (iv) are trivial or disproportionate in nature (de minimis).

The grounds of sovereignty, security or national interests of Greece are always examined by the Central Authority. As such, if the Central Authority determines that a request prejudices any of these grounds, it seeks a concurring opinion of the Judicial Council (through the Public Prosecutor of the Court of Appeals) to refuse the request.

All of the other grounds referred to in the paragraphs above are assessed by the Public Prosecutor of the Court of Appeals during the substantive check that he or she conducts upon receiving the request from the Central Authority. If the incoming request satisfies the test, the Public Prosecutor will seek, through the president of the Court of First Instance, to have an investigative judge execute the request. However, if the incoming request does not satisfy the test, and any of the grounds of refusal are met, the Public Prosecutor is obligated to submit the request to the competent Judicial Council of the Court of Appeals, which pursuant to Article 458(3) CPP will decide whether the request may be executed. The Judicial Council submits then a concurring opinion to the Minister.

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65 France, Germany, Japan, Russia, Switzerland.

66 Please not however, the caveats and the analysis of the Section 1.4.

67 Cf. the practice of international instrument 1959 MLA Convention, Article 2(a); Council of Europe Criminal Law Convention on Corruption Article 37(3); and bilateral treaties covering MLA between Greece and United States, Article 3(1)(a); Canada, Article 3(1)(3); Australia, Article 5(1)(a); Egypt, Article 2(a); Armenia, Article 13(1)(b); Georgia, Article 14(1)(B); Mexico, Article 2(a); Syria, Article 14(1)(a); and Tunisia, Article 2(a).

68 Article 46(21)(b) UNCAC; Central Authority - MLA questionnaire, pp. 4-5 q. 2.2.

69 Central Authority - MLA questionnaire, pp. 4-5 q. 2.2.

70 Court of Appeals Prosecutor of Athens – MLA questionnaire, p. 5, q. 1.
of Justice, not the prosecutor, who may refuse the request. Therefore, according to Article 458(3) CPP the final word in this process is entrusted to the Minister of Justice.

73. The Prosecutor is also obligated to submit the request to the Judicial Council when he or she deems that the MLA request satisfies the test but the judicial authority that has been ordered to execute the request refuses to do so.\textsuperscript{71}

74. In general, the grounds of refusal for incoming non-treaty MLA request in Greece are in line with international standards and do not limit excessively the power of Greek authorities to execute said requests. In addition, it does not include the ground of bank secrecy\textsuperscript{72} nor has there been any indication that Greece has denied MLA requests on this ground.

75. However, the procedure for applying the grounds for refusal to an incoming non-treaty MLA request seems problematic. First, according to the CPP the procedure for refusal described under Article 458(3) CPP only covers grounds relevant to extradition. All other grounds, including the grounds of Article 458(1) CPP, are examined under this procedure as a matter of practice by the Greek authorities and because no alternative procedure has been envisaged by the CPP. The Judicial Council is therefore asked to examine requests that contravene the provisions of the CPP or the law on the organisation of courts, even though it is not required to do so by Article 458(3) CPP, creating much confusion to its members.\textsuperscript{73} The same applies to other grounds of public policy.

76. Second, it is understood that Article 458(3) CPP entrusts the final determination regarding the non-execution of an MLA request to the Minister of Justice. While one could suspect that the legislator chose to do so in order to give to the executive, not the judiciary, the authority to make decisions that may have implications on the diplomatic relationships with a foreign state; this choice opens up a judicial procedure to political influence.\textsuperscript{74} The Central Authority asserts that unlike extradition, it is bound by the decision of the Judicial Council to execute or not an MLA request. However, the decision to include the wording “concurring opinion” in the text of the provision, a notion that is mainly found in administrative law, creates interpretation problems and confusion between the relevant authorities.

\textsuperscript{71} Σ. Δασκαλόπουλος, Ζητήματα Δικαστικής Συνδρομής υπό το Σύγχρονο Θεσμικό Πλαίσιο, Ποινικά Χρονικά ΞΒ/2012, σελ. 176.
\textsuperscript{72} Article 46(8) UNCAC.
\textsuperscript{73} Discussion with the Judicial Council of the Court of Appeals of Athens after sending the questionnaires.
\textsuperscript{74} Σ. Δασκαλόπουλος, Ζητήματα Δικαστικής Συνδρομής υπό το σύγχρονο θεσμικό πλαίσιο, σε Δημήτρης Ζιούβας (επιμ.), Δίκαιο και Πολιτική κατά της Διαφθοράς. Νομική Βιβλιοθήκη, 2016, σελ 205.
Recommendations

With these considerations in mind, the present report recommends that Article 458 CPP should:

Enumerate exhaustively the grounds of refusal for the execution of incoming non-treaty MLA requests so that the rise of developing further grounds through practice is minimised;

Clarify which authority is responsible for considering which grounds for refusal and through which procedure;

Describe clearly and autonomously, and not with reference to extradition, the procedure of refusing the execution of a non-treaty MLA request. Article 458(3) CPP should also clarify the role of the Minister of Justice in the process, if any, with due consideration to the implications and the safeguards of independence that such a role may have.

Reiterate of the obligation of the Central Authority to provide the requesting country with the grounds for refusing execution.

2. Model legal provisions

In order to facilitate the improvement, modernisation and streamlining of the relevant articles of the CPP, the drafters of this report considered helpful to provide actual model legal provisions. These model provisions capture the recommendations made in Chapter II. 1. and incorporate them in the text of the CPP. That being said, the model provisions are by no means complete or authoritative in nature and require further consultation with the competent Greek authorities. They constitute however, a starting point for discussion.

CHAPTER TWO
OTHER CASES OF LEGAL ASSISTANCE

Article 457 - Applicability

Articles 458-461 apply to all mutual legal assistance in criminal matters in the absence of an applicable bilateral or multilateral treaty that is binding on Greece. Where such a treaty exists, these Articles may apply complimentary and without prejudice to the said treaty. The same applies to laws implementing European Union law.

Article 458 - Requests for mutual legal assistance by Greek authorities

1. The Greek judicial and prosecutorial authorities may seek mutual legal assistance from foreign authorities for, among others, service of summons to witnesses and defendants, transfer of a defendant or a person in custody for examination, of exhibits, judicial records and other objects kept by the Greek judicial authorities, any investigative act that is available in domestic investigations in Greece, including special investigation techniques, joint investigation teams as defined in special penal laws, and freezing, confiscation and forfeiture of assets.

2. The request is examined on its legality and forwarded on the responsibility of the competent Public Prosecutor of the Court of Appeals to the Central Authority of the Ministry of Justice.

3. The Central Authority registers and examines the completeness of each request. It makes
the necessary arrangements for the translation of the request and transmits it directly to the competent foreign Central Authority. The Central Authority may ask the Public Prosecutor of the Court of Appeals to provide additional documents and information as appropriate for the execution abroad.

4. In urgent cases, a request by Greek authorities may be transmitted directly to the Competent Prosecutor of the Court of Appeals for execution. A copy of the request is always transmitted to the Central Authority.

**Article 459 - Requests for mutual legal assistance by foreign authorities**

1. Requests by foreign judicial and prosecutorial authorities seeking mutual legal assistance listed in Article 458 paragraph 1 are received by the Central Authority of the Ministry of Justice. The execution of requests that prejudice the sovereignty, security or national interests of Greece, or where the requesting authority does not provide an assurance of reciprocity, may be refused.

2. All requests are accompanied by official translation into the Greek language. The Central Authority registers and examines the completeness of each request and, as appropriate, may ask the foreign authority to provide additional documents and information as appropriate for the execution. Upon being satisfied of the request’s completeness, it forwards the request for execution to the competent Public Prosecutor of the Court of Appeals. Subject to paragraph 3 the Public Prosecutor orders the execution of the request by the competent investigative judge in whose district the act will be carried out.

3. Any request that contravenes the provisions of the Greek laws or the law on the organisation of courts, or concern military, political or tax offences may be refused. The Public Prosecutor of the Court of Appeals may also refuse to execute requests that are trivial or disproportionate in nature. For the execution of requests that involve coercive measures the Public Prosecutor of the Court of Appeals may require that the conduct underlying the criminal offence be criminalised in both countries.

4. The requests are executed in accordance with the procedures and the evidentiary standards required by the present Code and relevant Greek laws. To the extent not contrary, a request may also be executed in accordance with the procedures specified by the foreign authority in the request.

5. The Public Prosecutor of the Court of Appeals, or the competent investigative judge, may ask for additional documents and information from the foreign authority, through the Central Authority, if he deems them necessary for the execution of the request.

6. If the request concerns the summoning of witnesses or experts, it is executed only on the condition that the foreign authority has explicitly undertaken not to prosecute or detain the defendant for a crime committed prior to his appearance before the foreign authority who has summoned him. The cost of travel and accommodation of the summoned individual shall be borne by the foreign authority. The hearing of witnesses and experts by telephone or videoconference may be considered.

7. If the request concerns the forwarding or transmittal of judicial records, exhibits or other objects kept by the Greek judicial authorities it is accepted only on the condition of immediate return. If documents are requested, copies thereof are sent.

8. In urgent cases, request by foreign authorities may be transmitted directly to the Competent Prosecutor of the Court of Appeals for execution. A copy of the request is
transmitted to the Central Authority. The return of the executed request takes place via the same channels.

Article 460 – Transfer of a person in custody for examination

1. Subsequent to a request under Article 459 by a foreign authority for the transfer of a person in custody for examination, and following the decision of the competent Public Prosecutor of the Court of Appeals, the Minister of Justice may order the transfer of the person to such authority upon condition of his immediate return. The foreign authority undertakes explicitly not to prosecute or detain the person for a crime committed prior to his appearance before the foreign authority.

2. The cost of the transfer and return shall be borne by the country requesting the transfer.

Article 461 – Refusal of mutual legal assistance

1. If the Public Prosecutor of the Court of Appeals determines that any of the grounds of refusal referred to in Article 459 paragraph 3 are met, he submits the matter to the competent Judicial Council of the Court of Appeals. The matter is also submitted to the competent Judicial Council of the Court of Appeals if the competent investigative judge refuses to execute the request despite a contrary order of the Public Prosecutor of the Court of Appeals.

2. The decision of the competent Judicial Council of the Court of Appeals is executed by the Public Prosecutor of the Court of Appeals.
3. Thinking ahead

78. Although the analysis of the present report pertain primarily to MLA requests in the absence of bilateral treaties or multilateral conventions, many of the issues identified therein also arise to a certain extent in treaty-based requests. Therefore, a thorough analysis of the legislative and regulatory framework applicable to treaty-based requests will greatly benefit Greece in identifying further problems and streamlining the process for executing such requests with a view to reducing delay.

79. This exercise will equally help Greece to better implement the “OECD MLA Guidelines to Promote Effective Implementation of International Co-operation” that accompany this report. The exercise would also deal with resources constraints that most judicial and prosecutorial authorities face. Finally, as treaty-based MLA is one of the main sources of detection of foreign bribery in Greece, this exercise would raise awareness among Greek law enforcement authorities of the offence of foreign bribery and their obligations to investigate this crime. The OECD stands ready to assist Greece in conducting this exercise.

For these reasons the present report suggests that Greece conduct an analysis of the legal and regulatory framework applicable to treaty-based requests with the view to improve its capacity in providing and requesting MLA in this area.