# Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

**Article**

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**CITATION SUGGESTION**

A. Lach, "Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda", 2009, Vol. 4(3), eucrim, pp107–110. DOI: https://doi.org/10.30709/eucrim-2009-03

Published in
2009, Vol. 4(3) eucrim pp 107 – 110
ISSN: 1862-6947
https://eucrim.eu

# Introduction

The problem of cooperation in gathering and sharing evidence between the EU Member States is not new and has been discussed widely during the last decade.[1] The discussion touched upon the question of gathering evidence as well as the problem of admissibility of evidence gathered abroad. The aim of this paper is to shortly analyze the first aspect and to make some proposals for improving the cooperation.

# Present Situation

The system of gathering evidence among EU Member States is still based on the Council of Europe Convention on mutual assistance in criminal matters 1959,[2] supplemented by its additional protocol from 1978,[3] the Benelux Treaty of 1962, the Schengen Implementing Convention of 1990,[4] and the Convention on mutual assistance between the Member States of EU from 29.05.2000,[5] with its additional protocol from 2001.[6] Some bilateral treaties exist as well. The Nordic agreements[7] should also not be overlooked.

The applied mechanisms are quite old and, despite significant changes introduced by the Schengen Convention and the 2000 EU Convention, they may be regarded as not properly equipped to handle 21st century crime and accommodate the needs of developing a European Area of Freedom, Security and Justice. It still happens that the execution of requests takes several months or even longer or that a request "disappears" without any answer from the requested state for months or even permanently. This is why a new model has been proposed, based on the principle of mutual recognition. Till now, three main instruments have been introduced and implemented:

(1) The most significant one was to be the Council ***framework decision*** 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders ***freezing property*** or ***evidence.***[8] Unfortunately this framework decision was implemented with significant delays and has not been promoted sufficiently as it is in the shadow of the EAW. Perhaps this is why freezing orders are quite rarely issued in practice.

(2) The system of obtaining data from criminal records has also been modified in recent years by introducing the Council framework decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of criminal record information.[9]

(3) In addition, when the crime has a transnational character or there are two or more interconnected investigations in different countries, the possibility exists to create a joint investigation team (JIT).[10]

Those instruments were supplemented last year by the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[11] which entered into force on 19.01.2009 and is to be implemented by 19.01.2011.

# European Evidence Warrant

The European Evidence Warrant will be the most important instrument in the field of evidence gathering based on the principle of mutual recognition in the next years. Work on this instrument was not easy as the proposal was submitted in 2003[12], the general approach was agreed in 2006[13] and the framework decision finally adopted in 2008.

The EEW is to cover objects, documents, and data specified therein.[14] It is *not* designed to handle the information or procedures listed in Article 4 (2), namely:

(a) to conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts, or any other party;[15]

(b) to carry out bodily examinations or obtain bodily material or biometric data directly from

the body of any person, including DNA samples or fingerprints;

(c) to obtain information in real-time, such as through the interception of communications,

covert surveillance, or the monitoring of bank accounts[16];

(d) to conduct an analysis of existing objects, documents, or data; and

(e) to obtain communications data retained by providers of a publicly available electronic

communications service or a public communications network.

Some of these excluded categories are to be regulated later, and the adoption of such an instrument seems to be a far more onerous task than the implementation of the EEW, especially in case of oral evidence, where the differences between the Member States are most visible.

Generally, the EEW may be issued with a view to obtaining objects, documents, or data falling within paragraph 2 where the objects, documents, or data are already in possession of the executing authority prior to the issuing of the warrant (article 4 (4)).

It is therefore visible that the scope of the EEW is limited. Moreover, it may happen that the judicial authority would need evidence both within and outside the scope of the EEW. In such a situation, it would be possible to forward one traditional mutual legal assistance request instead of sending both a MLA and a EEW (Art. 21 (3)). Bearing in mind that such complex requests are sent quite often, this could diminish the significance of the EEW. Beside that it will be possible to send a traditional MLA request when the issuing authority considers in the specific case that this would facilitate cooperation with the executing State (Art. 21 (3)). This provision might be attractive for authorities used to the MLA model.

# Proposals

The author is not against the concept of the European Evidence Warrant, but other solutions besides the EEW can surely be discussed in order to improve the efficiency and quality of gathering evidence in the EU. The author believes that one of the solutions would be to allow direct gathering of evidence on the territory of another EU country. As an example, we can take the mechanism provided a few years ago for civil proceedings in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation among the courts of the Member States in the taking of evidence in civil or commercial matters.[17]

According to Article 17 of the Regulation, a court may request a central body or competent authority to take evidence directly in another Member State. It can be done only on a voluntary basis without using coercive measures. Within 30 days, the requesting court is to be informed of whether the request has been accepted and, if necessary, under what conditions. The requested state may also assign its court to take part in the proceedings and ensure the proper application of the article and set out conditions. Such request may be refused only if it does not fall within the scope of the regulation, if it does not contain all of the necessary

information, or if direct taking of the evidence requested is contrary to fundamental principles of law in the requested Member State.

The direct gathering of evidence would be useful, for example, if the number of victims is residing in the requested country and they are willing to give evidence voluntarily, especially in preparatory (pretrial) proceedings when the principle of immediacy and the need for cross-examination is not an issue. The procedure of direct taking of evidence is used, for example, in intercantonal cooperation in Switzerland[18] and is competitive for JITs or coordinated parallel investigations.

The most serious obstacle to implementing the direct taking of evidence is traditionally the issue of sovereignty but, considering the fact that the cooperation among the EU countries is based on the principle of mutual trust, this issue should be reconsidered as it was done in cooperation in civil matters. The direct taking of evidence abroad would accommodate the best evidence (immediacy) principle and could be regarded as an embodiment of the idea of a European Area of Freedom, Security and Justice.

The next step would be to improve direct communication among the judicial authorities. The author feels that there is some work to be done in this area in certain countries. The delays in executions of rogatory letters are considered the main problem in everyday cooperation, even more pressing than existing legal differences and obstacles.[19] To speed up the proceedings abroad, deadlines should be established, and the promotion of a secure electronic communications system is of great importance.

Concerning oral evidence, some of the difficulties could be overcome via the promotion of hearings per videoconference. This means accommodating the principle of immediacy and is less expensive and more effective than inviting a witness to another Member State. The possibilities of taking oral evidence by videoconference were recently tested in the context of procedural guarantees by the European Court of Human Rights in the cases Marcello Viola against Italy[20] and The Conde Nast Publications Ltd and Carter against the United Kingdom.[21] In both cases, the ECHR expressed the opinion that such means of submission of evidence are not contrary to the rights guaranteed by the European Convention.

On the contrary, the author is skeptical about teleconferences as, in practice, it is difficult for the court to assess the credibility of witnesses without seeing them. This is why the latter mechanism should only be used for the hearing of expert-witnesses, where the risk of bias and false testimony is minimal.

Practice shows that joint investigation teams are seldom used and that they are not going to play a significant role in the EU cooperation in criminal matters. This could be because of insufficiently clear regulations as to the costs of functioning JITs, but it could be also argued that such a complicated mechanism is rarely necessary. The author is convinced that the need for JITs could, in many cases, be replaced by the possibility for authorities of requesting Member State(s) to participate in procedural acts abroad. Again, we can take as an example Regulation No 1206/2001: in Article 12 (2), it is stipulated that, if it is compatible with the law of the Member State of the requesting court, representatives of the requesting court have the right to be present in the procedure of the taking of evidence by the requested court. The requesting court must indicate that its representatives will be present and, where appropriate, that their participation has been requested (Art. 12 (3)). Then, the requested court determines, in accordance with Art. 10, the conditions under which the requesting Member State's representatives may participate and notifies the requesting court of the date and place of the proceedings and, where appropriate, also the conditions under which the representatives may participate. The analogous regulation in CoE Convention 1959 is "weaker" as it states that officials and interested persons may be present if the requested party consents (Art. 4). The attempt to enhance such presence was made in the second protocol to the convention which modified Art. 4 and provides that requests for the presence of such officials or interested persons should not be refused where that presence is likely to render the execution of the request for assistance more responsively to the needs of the requesting

party and is therefore likely to avoid the need for supplementary requests for assistance. Of course, the requesting judicial authority may also quote Art. 4 (1) of the EU 2000 Convention according to which the "requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State". However, this provision is too general to change current practice and the attitude towards the participation of foreign authorities in the execution of requests for assistance.

Looking at the above-mentioned provisions, one may notice some progress, but the provisions still provide a mere possibility to be present, not a right to be present and participate. Of course, observation of the practice shows that, in many cases, the presence of the authorities turns into active participation in procedural acts.

The provisions regarding the presence and participation of the parties in the civil cooperation are also of interest. According to Article 11 (1) of Regulation No 1206/2001, if it is provided for by the law of the Member State of the requesting court, the parties and, if any, their representatives, have the right to be present during the taking of evidence by the requested court. The requesting court shall inform the requested court that the parties (their representatives) will be present and, where appropriate, that their participation has been requested. Then, the requested court may determine the conditions of the participation and inform the parties (representatives) about the date and place of the proceedings and about the eventual conditions of participation. The requested court also has the possibility to ask the parties to be present or participate on its own if such a possibility is provided for in the law of its Member State.

Concerning the participation of parties and representatives, especially the defendant and his or her council, the current situation of cooperation in criminal matters is unsatisfactory as the rights of the parties are not accorded adequate attention. This problem will undoubtedly increase with further developments in the *crime control*- oriented cooperation.

# Conclusion

The improvement of cooperation in evidence gathering is currently becoming one of the most important topics in the third pillar area. This problem encompasses not only legal aspects, but also technical and organizational ones. This is why a wide range of experience is needed to solve these issues. Some resolutions may be found in cooperation in civil matters. According to the author, the experience of federal states and the mechanisms worked out by international criminal tribunals may also be useful. Besides that, improving of effectiveness of the existing instruments could be seen as an alternative to some of the new proposals.

The delays in the implementation of framework decisions and the specific differences in implementation among the Member States call for discussion if framework decisions are indeed the best instrument of building European criminal law. Beside that, they are used for very narrow areas of harmonization which leads to multiplication of legal instruments and unnecessary complication in the system of cross border cooperation. Therefore the reform of the sources of law in the matters regulated in the third pillar seems to be of great importance.

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1. See, for example, J.F. Nijboer, Methods of Investigation and Exclusion of Evidence – A Comparative and Interdisciplinary Perspective [in:] F. Höpfel, B. Huber (ed.), Beweisverbote in Ländern der EU und vergleichbaren Rechtsordnungen, Freiburg im Breisgau 1999, p. 52; J.R. Spencer, The Concept of "European Evidence", Era Forum, no. 2/2003; S. Gless, Die "Verkehrsfähigkeit von Beweisen" im Strafverfahren, ZStW, no. 115/2003, Issue 1; K.

Macdonald, The Reform of Procedures for Dealing with Foreign Evidence: A Practitioner's Agenda [in:] P.J. Cullen (red.) Dealing with European Evidence in Criminal Proceedings: National Pratice and European Union Policy, ERA Forum, Special Issue 2005, p. 9; J.A.E. Vervaele (ed.) European Evidence Warrant. Transnational Judicial Inquiries in the EU, Antwerp – Oxford 2005.↩

2. ETS No 030.↩
3. ETS No 099. Some of the Member States also ratified the second additional protocol from 2001, ETS No 182.↩
4. OJ L 239 from 22.09.2000.↩
5. OJ C 197 from 12.07.2000. Many provisions of the convention are similar to those included in the second additional protocol from 2001 to the 1959 convention, ETS No 182.↩
6. OJ C 326 from 21.11.2001.↩
7. See R. Lahti, Sub-Regional Co-operation in Criminal Matters: The Experience of the Nordic Countries [in:] A. Eser, O. Lagodny (eds.) Principles and Procedures for a New Transnational Criminal Law, Freiburg im Breisgau 1992, pp. 305 – 310.↩
8. OJ L No 196 from 2.08.2003.↩
9. Council ***decision*** 2005/876/JHA. of 21 November 2005 on the ***exchange*** of ***information*** extracted from the ***criminal*** record, OJ L 322 from 9.12.2005. The decision was repealed by the Council framework decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of information extracted from the criminal record between Member States, OJ L 93 from 7.04.2009.↩
10. See Art. 13 of the 2000 EU Convention and Council framework decision 2002/465/JHA from 13 June 2002 on joint investigation teams, OJ L 162 from 20.06.2002.↩
11. Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters , OJ L 350 from 30.12.2008.↩
12. Commission of the European Communities, Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, 14 November 2003, COM(2003) 688 final.↩
13. Council of the European Union, Proposal for a Council framework decision on the European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters, 10 July 2006, 11235/06, COPEN 74.↩
14. At first, data from criminal records were also to be included but, in the end, obtaining this type of data was separately regulated in the above-mentioned decision.↩
15. See, however, the exception provided in Art. 4 (6).↩
16. Real time interception of communications was regulated in 2000 convention and monitoring of bank accounts in its additional protocol.↩
17. Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174 from 27.6.2001.↩
18. See C. Siebert, L'evolution du modèle suisse de l'entraide judiciaire et de la coopération intercantonale en matière pénale [in:] J.A.E. Vervaele (ed.) European Evidence Warrant. Transnational Judicial Inquiries in the EU, Antwerp – Oxford 2005, pp. 187 – 209.↩
19. See P.J.P. Tak, Bottlenecks in International Police and Judicial Cooperations in the EU, European Journal of Crime, Criminal Law and Criminal Justice 2000, vol. 8/4, pp. 352 – 353 and J.R. Spencer, National report of the United Kingdom [in:] M. Delmas-Marty, J.A.E. Vervaele (eds.) The implementation of the Corpus Juris in the Member States. Penal provisions for the protection of European Finances, Intersentia 2001, p. 21.↩
20. Application no. 45106/04. Judgment from 5 October 2006.↩
21. Application no. 29746/05. Decision from 8 January 2008.↩

## * Author statement

Publication financed from research funds for 2006-2008.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

**Co-funded by the European Union**