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FREE MOVEMENT OF EVIDENCE IN CRIMINAL MATTERS IN THE EU

Abstract:

A number of legislative instruments are in force, providing for mechanisms for a Member State of the EU to seek the collection of admissible evidence in criminal matters in a cross-border context. The paper deals with the instruments that are involved in the concept of the free movement of evidence in criminal matters in the EU and answers the question whether it does work. First, it focuses on the development from mutual legal assistance to mutual recognition of judicial decisions in criminal matters in the EU. Second, it deals with the current procedural instruments – an Order freezing property or evidence and a European evidence warrant. Third, it analyses legislative development in this field – a European investigation order.

Keywords:

Mutual legal assistance, Mutual recognition of judicial decisions in criminal matters in the EU, Order freezing property or evidence, European evidence warrant, European investigation order.

1. INTRODUCTION

Jeremy Bentham: "*Evidence is the basis of justice: exclude evidence, you exclude justice.*"[1])

We all use evidence every day. For example, we might look out the window to see what the weather is like and use this evidence to decide what to wear, or scientists conduct experiments and use the evidence to find cures for diseases. Police investigators also try to gather as much evidence as possible. The judge hears all the evidence and decides if the defendant is guilty.[2]) Thus, a wide range of things and many types of documents can be used as evidence.

The EU set itself the objective the establishment of an 'Area of freedom, security and justice'. Free movement of evidence appears to be one of the goals within the establishment of that area and an essential element to fight efficiently against cross-border and organized crime. As pointed out by the European Commission, closer co-operation in this field is a key to the effectiveness of criminal investigations and proceedings in the EU.[3])

[1]) BENTHAM, J.: *The Rationale of Judicial Evidence* : *Specially Applied to English Practice* (from the manuscripts of Jeremy Bentham, in five volumes, edited by John Stuart Mill). London : Hunt & Clarke, 1827. See Fifth Volume, Book IX – *On Exclusion of Evidence*, Part III – *View of the Cases In Which Evidence Has Improperly Been Excluded On the Ground of Danger of Deception*, Chapter I – *Cases Enumerated*, p. 1.

[2]) HAILS, J.: *Criminal Evidence*. 7th edition. Belmont : Cengage Learning, 2011, p. 3.

[3]) Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. COM(2009) 624 final, p. 2.

The concept of the 'free movement of evidence' within the EU is one of the most recent demands coming from Brussels. However, the expression is not used in any official EU document. Even talking about the concept of free movement of evidence may look to some people as a provocation in itself. This concept describes a certain form of mutual recognition of judicial decisions in criminal matters in the EU, during which the competent authorities of one Member State do feed a piece of evidence into the system of 'free movement' and all competent authorities in another Member State can or rather must use it in criminal proceedings.[4])

A number of legislative instruments are in force, providing for mechanisms for a Member State of the EU to seek the collection of admissible evidence in criminal matters in a cross-border context. This paper deals with the instruments that are involved in the concept of the free movement of evidence in criminal matters in the EU and answers the question whether it does work. First, it focuses on the development from mutual legal assistance to mutual recognition of judicial decisions in criminal matters in the EU. Further, it deals with the current procedural instruments – an Order freezing property or evidence and a European evidence warrant. Special attention is focused on procedural issues. Moreover, it highlights the problematic issues of the application of these instruments. In the end, it analyses legislative development – a European investigation order.

2. DEVELOPMENT OF THE FREE MOVEMENT OF EVIDENCE: FROM MUTUAL LEGAL ASSISTANCE TO MUTUAL RECOGNITION

As explained in the introduction, this chapter focuses on the development from mutual legal assistance to mutual recognition of judicial decisions in criminal matters in the EU. Section 2.1 of this chapter deals with mutual legal assistance and presents the basic legal framework for co-operation on obtaining evidence and section 2.2 presents fundamental knowledge concerning the III pillar of the EU. Section 2.3 is focused on Tampere European Council conclusions in the filed of the mutual recognition of judicial decisions in criminal matters, as well as in relation to the admissibility of evidence in a cross-border context within the EU. Further, section 2.4 deals with the principle of mutual recognition as a cornerstone of free movement of evidence and section 2.5 introduces the framework decision as a legal instrument for purposes of approximation of Criminal Law in the EU.

2.1 Mutual Legal Assistance: Basic Framework for Co-operation on Obtaining Evidence

In Europe has been developed the mutual legal assistance. The usefulness of such assistance in the requesting State depends in part upon the nature of its criminal procedures. The more adversarial the proceedings, the greater the

[4]) GLESS, S.: *Free Movement of Evidence in Europe*. In: DEU, T. A. – INCHAUSTI, F. G. – HERNEN, M. C. et al.: *El Derecho Procesal Penal en la Union Europea*. Madrid : Colex, 2006, p. 123.

importance normally attached to witnesses appearing in the courtroom and being subject to cross-examination. Evidence obtained abroad by foreign authorities thus becomes less attractive. In inquisitorial systems, where written evidence is more relied upon, the problem is reduced, although there might be concerns that the evidence was not obtained in a required manner. Consequently, common law jurisdictions were traditionally more hesitant than civil law jurisdictions to make use of mutual legal assistance. But this position has changed and the co-operation is now generally seen as a very important tool for combating crimes.[5])

The 'traditional' mutual legal assistance is provided by the European Convention on Mutual Legal Assistance in Criminal Matters[6]) (hereinafter 'MLA Convention'), adopted by the Council of Europe in 1959. It provides the basic framework for co-operation on obtaining evidence. It stipulates that the execution of requests for mutual assistance must be executed in compliance with the law of the requested State. It has been supplemented by two additional protocols in 1978 and 2001.[7]) Despite the progress generated by these instruments, the provided mechanisms remain characterized by the principle of national sovereignty.

The European communities (hereinafter 'EC') introduced the 'improved' mutual legal assistance within their Member States. Since 1970, there has been a slow movement towards a simplification of the system of mutual assistance. The Convention implementing the Schengen Agreement[8]) (hereinafter 'CISA') of 1990, which has been described as a landmark in the history of the regulation of international police co-operation in Western Europe[9]), is actually part of this improvement. Under the CISA, the grounds to refuse the execution of a mutual assistance request were reduced and the requirement of double incrimination was also restricted.[10]) Moreover, it provided for a simplified procedure for the transmission of the requests, allowing as a general rule the direct contact between judicial authorities of the requesting and executing state.[11])

These were the essential rules regarding the gathering of evidence in criminal matters in another Member State, until the European Convention on Mutual

[5]) CRYER, R. – FRIMAN, H – ROBINSON, D. et WILMSHURST, E.: *An Introduction to International Criminal Law and Procedure*. 2nd edition. Cambridge University Press, 2010, p. 102.

[6]) Council of Europe, European Treaty Series n° 030 (1959).

[7]) Council of Europe, European Treaty Series n° 99 (1978); Council of Europe, European Treaty Series n° 182 (2001).

[8]) Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. OJ, C 239/19 of 22.9.2000.

[9]) See FIJNAUT, C.: *The Schengen Treaties and European Police Co-operation*. In: *European Journal of Crime Criminal Law and Criminal Justice*, Vol. 1, No. 1 (1993), p. 37.

[10]) See Article 51 of CISA.

[11]) See Article 53 of CISA.

Assistance in Criminal Matters[12]) (hereinafter 'EU-MLA Convention') of 2000 was adopted. This Convention is based upon the same principles as the MLA Convention, but it represents a significant step forward in the development of the judicial co-operation in criminal matters.[13]) Notwithstanding the fact that this convention does not replace the existing instruments and does not abolish the principal grounds for refusal, such as the sovereignty of the Member States, it does however strengthen the mechanism of mutual legal assistance. Subsequently, EU-MLA Convention has been supplemented by a Protocol[14]) of 2001.

2.2 III Pillar of the EU

The Three Pillar structure defined the EU's architecture from Maastricht (1993) to Lisbon (2009). It was the Treaty on EU[15]) which formalized and extended the Pillar Structure of the EU. As far as the III pillar is concerned, the Member States wished to have some degree of international police and judicial co-operation in criminal matters, but were not ready for the application of the full supranational machinery that operated in the Community Pillar. Thus, the III pillar gave the Member States an institutionalised forum in which to discuss these matters, without subjecting themselves to supranational controls.[16])

The Treaty of Amsterdam[17]), which performed the first revision of the Treaty on EU, introduced a new policy field of the EU – an 'Area of freedom, security and justice' (hereinafter 'AFSJ'). The EU set itself the objective the establishment of an AFJS, within which European citizens enjoy a high level of safety. Free movement of evidence appears to be one of the goals within the establishment of the AFSJ and an essential element to fight efficiently against cross-border and organized crime.

The AFJS concept has been introduced to reflect the idea that the maintenance of public order, internal peace and security, is shared between the Mem-

[12]) Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU. OJ, C 197/1 of 12.7.2000.

[13]) BACHMAIER-WINTER, B.: *European investigation order for obtaining evidence in the criminal proceedings* : *Study of the proposal for a European directive*. In: *Zeitschrift für Internationale Strafrechtsdogmatik*, No. 9/2010, p. 581.

[14]) Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on EU, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU. OJ, C 326/1 of 21.11.2001.

[15]) Treaty on EU is known as the Maastricht Treaty. It was signed in 1992 and entry into force in 1993. Original version see OJ, C 191/1 of 29.7.1992, current version see OJ, C 83/13 of 30.3.2010.

[16]) CRAIG, P.: *The Lisbon Treaty* : *Law, Politics, and Treaty Reform*. Oxford University Press, 2010, pp. 332-334.

[17]) Treaty of Amsterdam amending the Treaty on EU, the Treaties establishing the European Communities and certain related acts. OJ, C 340/1 of 10.11.1997.

ber States and the EU.[18]) This new integration objective was strengthened by the introduction of a range of new policy objectives and by new and more appropriate legal instruments and improved judicial control. This led to a further expansion of the scope of policy-making in Justice and Home Affairs area, with dozens of new legislative acts being adopted. There is no other example in the history of EU integration process of an area of previously loose intergovernmental co-operation ever having made its way so quickly to the top of the EU's political and legislative agenda.[19])

2.3 Tampere European Council: Call for Admissibility of Evidence in a Cross-border Context within the EU

While the mutual legal assistance was being reinforced and updated through international conventions, the European institutions decided to improve the judicial co-operation by replacing the existing international rules on mutual legal assistance with new European instruments based on the principle of mutual recognition. Since the entry into force of the Treaty of Amsterdam, a number of texts have set out the necessity to facilitate the gathering of evidence in a cross-border context and to promote the admissibility of such evidence before the courts.

The European Council held a special meeting in Tampere (Finland) in 1999 on the creation of the AFSJ. It was determined to develop the EU as the AFSJ by making full use of the possibilities offered by the Treaty of Amsterdam. It sent a strong political message to reaffirm the importance of this objective and agreed on a number of policy orientations and priorities which would speedily make this area a reality. This was set in the framework of a five-year programme (1999-2004) that aimed at setting in stones a proper balance between freedom, security and justice.[20]) According to the Conclusions of the Tampere European Council, it was agreed:[21])

33. Enhanced mutual recognition of judicial decisions and judgements and

[18]) WESSEL, R. A. – MARIN, L. et MATERA, C.: *The External Dimension of the EU's Area of Freedom, Security and Justice*. In: ECKES, Ch. et KONSTADINIDES, T.: (eds.): *Crime Within the Area of Freedom, Security and Justice: A European Public Order*. Cambridge University Press, 2011, p. 274.

[19]) MONAR, J.: *Enlarging the Area of Freedom, Security and Justice – Problems of Diversity and EU Instruments and Strategies*. In: DASHWOOD, A. et al. (eds.): *The Cambridge Yearbook of European Legal Studies*, Vol. 3, 2000. Oxford – Portland : Hart Publishing, 2001, p. 301.

[20]) BALZAQ, T. et CARRERA, S.: *The Hague Programme: The Long Road to Freedom, Security and Justice*. In: BALZAQ, T. et CARRERA, S. (eds.): *Security Versus Freedom?: A Challenge for Europe's Future*. Aldershot : Ashgate, 2006, p. 5.

[21]) Presidency Conclusions, Tampere European Council of 15-16 October 1999. In: VERMEULEN, G.: *Essential texts on International and European Criminal Law*. 4th edition. Antwerpen – Apeldoorn : Maklu, 2005, pp. 327-341. It should be noted, that Tampere conclusions were often subject to various criticisms regarding the unsatisfactory implementation process and for failing to meet the deadlines originally agreed.

the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

38. The European Council invites the Council and the Commission to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment and time limits.

Thus, it was agreed that the principle of mutual recognition should become the cornerstone of judicial co-operation in both civil and criminal matters, including for pre-trial orders in criminal investigations.

The principle of mutual recognition, which is a typical characteristic of the EU, has been recognised as a cornerstone of judicial co-operation in civil and criminal matters since the European Council of Tampere. Mutual recognition has been developed in several EU working programmes, such as the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters[22]) of 2000.[23]) As is stated in this programme, mutual recognition is designed to strengthen co-operation between Member States. In relation to orders for the purpose of obtaining evidence, was introduced following aim: to ensure that evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case.

2.4 Mutual Recognition of Judicial Decisions in Criminal Matters: Cornerstone of Free Movement of Evidence

Free movement within the EU, based on the mutual recognition, worked well in the EC framework of an internal market, transporting goods, persons, services and capital across borders. The reasoning must therefore have been that it could solve the problems of criminal law enforcement across borders in the

[22]) Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. OJ, C 12/10 of 15.1.2001.

[23]) Furthermore, mutual recognition has been developed in The Hague Programme of 2004 and the Stockholm Programme of 2009. See below.

AFSJ, as well.[24]) The impetus for greater co-operation in criminal matters was the belief that criminals were benefiting from the free movement of persons at the heart of the internal market. The UK Presidency of the EU proposed to make the principle of mutual recognition the cornerstone of increased co-operation in criminal justice in Europe. The idea behind the UK proposal was based on an analogy with the internal market of the EU. Following the *Cassis de Dijon*[25]) case, mutual recognition paved the way for the completion of the market.[26])

Mutual recognition of judicial decisions has dominated the development of EU Criminal law. The Treaty on the functioning of the EU[27]) stipulates that judicial co–operation in criminal matters in the EU shall be based on the principle of mutual recognition of judgments and judicial decisions.[28]) As pointed out by *Mitsilegas,* applying the principle of mutual recognition has been the motor of European integration in criminal matters in the recent past.[29])

The central aim of this principle is the quasi-automatic recognition and execution of judicial decisions in criminal matters from Member State 'A' to other Member States of the EU, with minimal formalities and limited grounds for refusal. The political appeal of mutual recognition for the EU Member States lies in the fact that, instead of embarking in a very visible attempt to harmonise their criminal laws under the banner of the EU, they can promote judicial co-operation by not having to change in principle their criminal laws – they 'only' agree to accept judicial decisions emanating from other Member States.[30])

This mechanism is widely understood as being based on the thought that while another Member State may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Based on this idea of equivalence and the trust it is based on, the results the other Member State has reached are allowed to take effect in one's own sphere of legal influence.

[24]) GLESS, S.: *Free Movement of Evidence in Europe*. In: DEU, T. A. – INCHAUSTI, F. G. – HERNEN, M. C. et al.: *El Derecho Procesal Penal en la Union Europea*. Madrid : Colex, 2006, p. 124.

[25]) Judgment of the Court of Justice of the EC of 20 February 1979 – Case C-120/78 – *Cassis de Dijon* (*Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*).

[26]) MURPHY, C. C.: *The European Evidence Warrant: Mutual Recognition and Mutual (Dis) Trust?* In: ECKES, Ch. et KONSTADINIDES, T.: (eds.): *Crime Within the Area of Freedom, Security and Justice: A European Public Order*. Cambridge University Press, 2011, p. 225.

[27]) Treaty on the functioning of the EU (as amended by the Treaty of Lisbon). OJ, C 83/47 of 30.3.2010.

[28]) Article 82(1) of the Treaty on the functioning of the EU.

[29]) MITSILEGAS, V.: *EU Criminal Law*. Oxford – Portland : Hart Publishing, 2009, p. 115.

[30]) MITSILEGAS, V.: *Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance*. In: BALZAQ, T. et CARRERA, S. (eds.): *Security Versus Freedom? : A Challenge for Europe's Future*. Aldershot : Ashgate, 2006, p. 279.

A decision taken by an authority in one Member State could be accepted as such in another Member State, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case.

Mutual recognition is just a method used for exchanging items (judicial decisions, evidence, etc.). As a method it consists in asserting the formal lawfulness of the item at the origin and consequently in permitting it to move freely from one country to another in a certain region, avoiding national authorities from raising barriers due to its "foreignity". In other words, mutual recognition fights against the "foreignity argument", i.e. it avoids an object to be rejected in another country simply because of its alien origin.[31])

In real terms the mutual recognition of judicial decisions comprises the establishment of the free circulation of judicial decisions that have full and direct affect across the entire EU. It is therefore founded on the idea of equivalence between the decision of the issuing State and those of the executing State and reciprocal confidence between Member States in the quality of their respective judicial procedures, a guarantee of judicial security.[32])

The mechanism of mutual recognition is based on mutual trust. It means that the executing State can renounce to exert control upon the grounds that motivate the request for evidence of the issuing state, because the executing State can trust that the requesting authorities have already checked the legality, necessity and proportionality of the measure requested. If there is trust in another legal system and in their judges, there is in principle no problem in executing a foreign request in the same way as if it were a national decision or request. The Court of Justice indirectly argued that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.[33]) However, as pointed out by *Gless*, mutual trust as a prerequisite is not mentioned in the Tampere Conclusions. Perhaps the Council thought it natural, that the Member States trusted each others criminal justice system, at that time.[34])

On the other hand, as pointed out by *Mitsilegas*, the application of the pri-

[31]) ALLEGREZZA, S.: *Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility.* In: *Zeitschrift für Internationale Strafrechtsdogmatik*, No. 9/2010, p. 572.

[32]) GAY, C.: *The European Arrest Warrant and its application by the Member States*. In: *European Issues*, No. 16/2006.

[33]) Judgment of the Court of Justice of the EC of 11 February 2003 – Joined Cases C-187/01 and C-385/01 – *Gözütok & Brügge*, para. 33.

[34]) GLESS, S.: *Free Movement of Evidence in Europe*. In: DEU, T. A. – INCHAUSTI, F. G. – HERNEN, M. C. et al.: *El Derecho Procesal Penal en la Union Europea*. Madrid : Colex, 2006, p. 130.

nciple has not been devoid of controversy. The application of the mutual recognition principle in Criminal law raises significant challenges for the constitutional and criminal justice traditions of Member States and has caused the debate on primacy to resurface – the focus being this time on primacy of III pillar law over national law. The application of mutual recognition may also have significant constitutional implications for the EU, bringing into the fore issues of competence and legitimacy, and the reframing of the relationship between the EU and Member States in the field of Criminal law.[35])

2.5 Framework Decision: Legal Instrument for Purposes of Approximation of Criminal Law in the EU

Free movement of evidence in the EU was introduced in the period of the III pillar. The Treaty on EU provided a specific legal instrument, created purposely for approximation – a framework decision. Approximation is an exclusively EU process, strictly related to the development of the EU policy in the III pillar of the EU. No other policy sector refers to approximation of Criminal law with the same precision. Approximation aims at eliminating differences as far as they are incompatible with the minimum standards set by a framework decision. A national provision directly contrasting with the text of a framework decision has to be removed to ensure the full implementation of the EU legislation.[36])

Decision making under the III pillar was more intergovernmental and less supranational.[37]) Under the Treaty on EU, the framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. However, they shall not entail direct effect.[38]) Framework decisions can best be compared with the legal instrument of a directive. Both instruments are binding upon Member States of the EU as to the result to be achieved but leave to the national authorities the choice of form and methods. However as explained, framework decisions do not entail direct effect. It implies that the EU Member States are required to introduce national legislation to bring "European legislation" into force.

Thus, the focus of the process of approximation is the elimination of differences among legal systems, when these are contrasting with the EU minimum standards. Since Member States are obliged to implement framework decisions into national legislation, the EU minimum standards must prevail on national law. EU standards have a higher position than national criminal legislation

[35]) MITSILEGAS, V.: *EU Criminal Law*. Oxford – Portland : Hart Publishing, 2009, p. 115.

[36]) CALDERONI, F.: *Organized Crime Legislation in the European Union* : *Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime*. Springer : Heidelberg – Dordrecht – London – New York, 2010, p. 5.

[37]) CRAIG, P.: *The Lisbon Treaty* : *Law, Politics, and Treaty Reform*. Oxford University Press, 2010, p. 334.

[38]) See Article 34(2) of the Treaty on EU (as amended by the Treaty of Nice). OJ, C 321/E/5 of 29.12.2006.

contrasting with them.[39]) In addition to that, the Court of Justice of the ES/EU in case *Maria Pupino*[40]) argued that national courts have the obligation to interpret national legislation according to the principle of conforming interpretation also in presence of measures of the III pillar, i.e. framework decisions.

3. CURRENT PROCEDURAL INSTRUMENTS: ORDER FREEZING PROPERTY OR EVIDENCE & EUROPEAN EVIDENCE WARRANT

It is of minimal importance whether the evidence is or not collected under the request of another Member State. Free movement of evidence is unrelated to the State requesting assistance. It is sufficient that evidence is formed or collected lawfully according to the rules of one of Member States.[41]) As pointed out by *Vermeulen*, the EU has categorically opted for horizontalisation of the co-operation, introduced first in the CISA, then further elaborated in the EU-MLA Convention and today close to being fully implemented in the context of the mutual recognition principle. The interstate and political character of co-operation has been abandoned. The obligatory and unique transfer and execution of requests through ministries and central authorities is largely in the past. Locally competent authorities co-operate with each other, in an ever more real European area of justice.[42])

Two instruments based on the mutual recognition principle have been adopted so far: a Council Framework Decision on the execution in the EU of orders freezing property or evidence of 2003 and a Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters of 2008.

The first instrument, the Council Framework Decision on the execution in the EU of orders freezing property or evidence, addresses the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, this deals only with part of the spectrum of judicial co-operation in criminal matters in the EU with respect to evidence. The scope of this instrument is limited to the freezing of evidence located in another Member State. The subsequent transfer of the evidence is left to mutual legal assistance procedures. Thus, the freezing order must therefore be accompanied by a subsequent request of mutual legal assistance when the

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[39]) CALDERONI, F.: *Organized Crime Legislation in the European Union* : *Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime*. Springer : Heidelberg – Dordrecht – London – New York, 2010, p. 6.

[40]) Judgment of the Court of Justice of the EC of 16 June 2005 – Case C-105/03 – *Maria Pupino*.

[41]) SPENCER, J. R.: *The Problems of Trans-border Evidence and European Initiatives to Resolve Them*. In: BARNARD, C. (ed.): *The Cambridge Yearbook of European Legal Studies*, Vol. 9, 2006-2007. Portland : Hart Publishing, 2007, p. 474.

[42]) VERMEULEN, G.: *Free gathering and movement of evidence in criminal matters in the EU* : *Thinking beyond borders, striving for balance, in search of coherence*. Apeldoorn – Antwerp – Portland : Maklu, 2011, p. 19.

transfer of the evidence to the issuing Member State is required. As a result, different rules are applicable to the freezing and to the transfer of evidence. The first is governed by the mutual recognition and the second by the mutual legal assistance. The second instrument, the Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, supplements the first one by applying the principle of mutual recognition to orders with the specific objective of obtaining objects, documents and data for use in proceedings in criminal matters.

Section 3.1 of this chapter deals with the Council Framework Decision on the execution in the EU of orders freezing property or evidence and presents the Order freezing property or evidence, while section 3.2 deals with the Council Framework Decision on the European evidence warrant and presents the European evidence warrant. Special attention is focused on procedural issues. In addition to that, section 3.3 points out the critical remarks in relation to these mutual recognition instruments.

3.1 Order Freezing Property or Evidence

The legal basis of the order freezing property or evidence at the EU level is the Council Framework Decision on the execution in the EU of orders freezing property or evidence[43]) (hereinafter 'FD on freezing orders'). The main objective of the FD on freezing orders is to establish the rules under which a Member State of the EU shall recognise and execute in its territory an order freezing property or evidence issued by a judicial authority of another Member State in the context of criminal proceedings. However, its scope is limited to provisional measures to prevent the destruction, transformation, moving, transfer or disposal of evidence.

Subsection 3.1.1 of this chapter deals with scope of application of the freezing order and presents the key terms. Subsection 3.1.2 deals with the procedure of issuing of the freezing order, while the subsection 3.1.3 deals with its execution. In addition to that, subsection 3.1.4 presents the implementation of the FD on freezing orders.

3.1.1 Scope of Application and Key Terms

The FD on freezing orders applies to freezing orders issued for the purpose of securing evidence or subsequent confiscation of property.[44]) For the purposes of this instrument, the term 'freezing order' shall mean any measure taken by a competent judicial authority in the issuing State in order provisionally to prevent the destruction, transformation, moving, transfer or disposal of property

[43]) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence. OJ, L 195/45 of 2.8.2003 (as amended by the corrigendum – see OJ, L 374/20 of 27.12.2006).

[44]) Article 3(1) of the FD on freezing orders.

that could be subject to confiscation or evidence. The term 'property' includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the competent judicial authority in the issuing State considers: is the proceeds of securing evidence or subsequent confiscation of property, or equivalent to either the full value or part of the value of such proceeds, or constitutes the instrumentalities or the objects of such an offence. The term 'evidence' shall mean objects, documents or data which could be produced as evidence in criminal proceedings concerning securing evidence or subsequent confiscation of property.[45])

As far as competent authorities are concerned, 'issuing State' shall mean the Member State in which a judicial authority, as defined in the national law of the issuing State, has made, validated or in any way confirmed a freezing order in the framework of criminal proceedings. Further, 'executing State' shall mean the Member State in whose territory the property or evidence is located.[46])

3.1.2 Procedure of Issuing

Having regard to the principle of direct communication between judicial authorities, the issuing authority transmits the freezing order directly to the executing judicial authority, i.e. all official communications have to be done through direct contacts between the issuing and executing authorities. Such a communication can be named simply 'from judicial authority to judicial authority'.

A freezing order, together with the certificate, the standard form for which is given in the Annex of the FD on the freezing orders, shall be transmitted by the judicial authority which issued it directly to the competent judicial authority for execution.[47]) The certificate shall be signed, and its contents certified as accurate, by the competent judicial authority in the issuing State that ordered the measure.

3.1.3 Procedure of Execution

The FD on freezing order is based on the mutual recognition of judicial decisions in the pre-trial phase under which a freezing order is recognised without any formality, grounds for its refusal are strictly limited and the principle of dual criminality is partly abolished.

Thus, according to the wording of the FD on freezing orders, the competent judicial authorities of the executing State shall recognise a freezing order without any further formality being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State (unless that authority decides to

[45]) Article 2(c), (d) and (e) of the FD on freezing orders.
[46]) Article 2(a) and (b) of the FD on freezing orders.
[47]) Article 4(1) of the FD on freezing orders.

invoke one of the grounds for non-recognition or non-execution, or one of the grounds for postponement of execution; see below).[48]) However, in relation to term 'immediate' execution, the Member States provide various time limits such as execution 'without delay', 'ruling sent within 24 hours from taking the decision for execution', 'without unnecessary delay, 'forthwith' or 'forthwith and if possible within 24 hours'. Moreover, some Member States have not laid down any time limits.[49])

The principle of mutual recognition implies the removal of the double criminality requirement. The recognition and execution shall not be subject to verification of double criminality. The FD on freezing order sets up a list of offences for which dual criminality checks are abolished, i.e. the 32 mutual recognition offences, known as the 'double criminality list'. The 32 mutual recognition offences, as they are defined by the law of the issuing State, and if they are punishable in the issuing State by a custodial sentence of a maximum period of at least three years shall not be subject to verification of the double criminality of the act. The list is characteristic of established instruments of judicial co-operation in criminal matters based on the principle mutual recognition.[50]) By way of examples we could point at the murder, grievous bodily injury, sexual exploitation of children and child pornography, trafficking in human beings[51]), or laundering of the proceeds of crime (money laundering) [52]).[53]) Moreover, the list is not exhaustive. The Council of the EU may decide to add other categories of offences to the list.

In spite the fact that the executing authority shall recognise a freezing order without any further formality being required, the FD on freezing orders provides for explicit optional grounds for non-recognition or non-execution of the freezing order (optional according the wording 'may refuse'). Thus, the competent judicial authorities of the executing State may refuse to recognise or execute the freezing order only if:[54])

[48]) Article 5(1) of the FD on freezing orders.

[49]) Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence. COM(2008) 885 final, pp. 3-4.

[50]) See for example Article 2(2) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ, L 190/1 of 18.7.2002; Article 6(1) of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. OJ, L 328/59 of 24.11.2006.

[51]) See KLIMEK, L.: *Obchodovanie s ľuďmi vo svetle navrhovanej právnej úpravy EÚ* [transl.: *Trafficking in Human Beings in the Light of Proposed EU Legislation*]. In: *Justičná revue*, Vol. 63, No. 3 (2011), pp. 453-459.

[52]) See KLIMEK, L.: *Legislatívne opatrenia EÚ zamerané voči praniu špinavých peňazí* [transl.: *Legislative Anti-Money Laundering Measures of the EU*]. In: *Karlovarská právní revue*, Vol. 7, No. 2 (2011), pp. 86-96.

[53]) Full list of offences see Article 3(2) of the FD on freezing orders.

[54]) Article 7(1) of the FD on freezing orders.

– the certificate, which is given in the Annex of the FD on the freezing orders, is not produced, is incomplete or manifestly does not correspond to the freezing order;
– there is an immunity or privilege under the law of the executing State which makes it impossible to execute the freezing order;
– it is instantly clear from the information provided in the certificate that rendering judicial assistance rendering judicial assistance would infringe the *ne bis in idem* principle;
– if, the act on which the freezing order is based does not constitute an offence under the law of the executing State – the act must not be on the 32 mutual recognition offences for which execution is automatic; however, in relation to taxes or duties, customs and exchange, execution of the freezing order may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

Moreover, in case it is in practice impossible to execute the freezing order for the reason that the property or evidence have disappeared, have been destroyed, cannot be found in the location indicated in the certificate or the location of the property or evidence has not been indicated in a sufficiently precise manner, even after consultation with the issuing State, the competent judicial authorities of the issuing State shall likewise be notified forthwith.[55])

In addition to the grounds for non-recognition or non-execution, the FD on the freezing orders provides for explicit optional grounds for postponement of recognition or execution of the freezing order. All of them are optional, as well as aforementioned grounds (optional according the wording 'may postpone'). The competent judicial authority of the executing State may postpone the execution of a freezing order:[56])

– where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable;
– where the property or evidence concerned have already been subjected to a freezing order in criminal proceedings, and until that freezing order is lifted;
– where, in the case of an order freezing property in criminal proceedings with a view to its subsequent confiscation, that property is already subject to an order made in the course of other proceedings in the executing State and until that order is lifted; however, such an order would have priority over subsequent national freezing orders in criminal proceedings under national law.

As soon as the ground for postponement has ceased to exist, the competent judicial authority of the executing State shall forthwith take the necessary measures for the execution of the freezing order and inform the competent authority in the issuing State thereof by any means capable of producing a written record.

[55]) Article 7(4) of the FD on freezing orders.
[56]) Article 8(1) of the FD on freezing orders.

As far as the subsequent treatment of the frozen property is concerned, the transmission:[57])

– shall be accompanied by a request for the evidence to be transferred to the issuing State; or
– shall be accompanied by a request for confiscation requiring either enforcement of a confiscation order that has been issued in the issuing State or confiscation in the executing State and subsequent enforcement of any such order; or
– shall contain an instruction in the certificate that the property shall remain in the executing State pending a request referred to in the first or the second option. The issuing State shall indicate in the certificate the (estimated) date for submission of this request.

Requests referred to in the first and the second option shall be submitted by the issuing State and processed by the executing State in accordance with the rules applicable to mutual legal assistance in criminal matters and the rules applicable to international co-operation relating to confiscation.

3.1.4 Implementation

Only seven Member States implemented the FD on the freezing orders before the deadline set in, i.e. by 2 August 2005. In the course of 2006-2008 more Member States transposed it into national legislation.[58]) In general, implementation of the FD on the freezing orders in the national legislation of the Member States is not satisfactory. This conclusion is mainly drawn from the low number of notifications, of which some implementing laws do not even refer to the FD on the freezing orders (provisions were adopted in view of implementation of some other international law instruments). Some States have covered the provisions of the FD on the freezing orders only partly – Cyprus covered only freezing of property and the United Kingdom covered only provisions in relation to evidence. Further, the legislation of Slovenia also shows that this Member State was still using the traditional rules on mutual legal assistance as regards requests for freezing and therefore it has not implemented the principle of mutual recognition in that regard.[59])

[57]) Article 10(1) of the FD on freezing orders.

[58]) Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence. COM(2008) 885 final, p. 2.

[59]) Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence. COM(2008) 885 final, pp. 6-7. Implementation of the FD on freezing orders in the Slovak Republic see ZÁHORA, J.: *Príkaz na zaistenie majetku alebo dôkazov v Európskej únii*. In: *Kriminalistika*, Vol. 39, No. 2/2006, pp. 122-127; or ZÁHORA, J.: *Prínos príkazu na zaistenie majetku alebo dôkazov v Európskej únii pre Slovensko*. In.: *Integrácia a unifikácia práva Európskej únie v oblasti trestného zákonodarstva*. Zborník príspevkov z medzinárodnej virtuálne interdisciplinárnej vedeckej konferencie konanej dňa 30. 12. 2008 na Právnickej fakulte UMB v Banskej Bystrici. Banská Bystrica, 2008, pp. 213-224.

However, the European Commission has no authority to initiate infringement procedures against a Member State alleged of not having taken the necessary measures to comply with the provisions of a Council framework decision adopted under the III pillar.

3.2 European Evidence Warrant

During negotiations on the FD on freezing orders, it was recognised that there was a need for two further initiatives as a consequence of the FD on freezing orders: firstly, an initiative on mutual recognition of confiscation orders[60]), and, secondly, an initiative on mutual recognition of orders to obtain evidence.

The FD on freezing orders addresses, as explained, the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, it deals only with part of the spectrum of judicial co-operation in criminal matters with respect to evidence. Subsequent transfer of the evidence is left to mutual assistance procedures. Thus, the freezing order must be accompanied by a subsequent request of mutual legal assistance when the transfer of the evidence to the issuing Member State is required. As a result, different rules are applicable to the freezing and to the transfer of evidence. The first is governed by the mutual recognition and the second by the mutual legal assistance. As the European Commission pointed out, the European evidence warrant (hereinafter 'EEW') is the first step towards a single mutual recognition instrument that would in due course replace all of existing mutual assistance regime.

Thus, the European Commission introduced a Proposal for a Council Framework Decision on the EEW.[61]) This proposal had a legal basis in the Treaty on EU, which deals with common action on judicial co-operation in criminal matters.[62]) With regard to the proposal, a single consolidated instrument, the EEW, would within the EU replace mutual legal assistance in the same way that the European arrest warrant[63]) replaced extradition. The existing mosaic of

[60]) See Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the EU of confiscation orders. OJ, C 184/8 of 2.8.2002. As a consequence of this initiative was adopted the Council Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. OJ, L 328/59 of 24.11.2006.

[61]) Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters. COM(2003) 688.

[62]) See Article 31 of the Treaty on EU (as amended by the Treaty of Nice). OJ, C 321 E/1 of 29.12.2006.

[63]) The European arrest warrant was introduced by the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ, L 190/1 of 18.7.2002. See KEIJYER, N. et Van SLIEDREGT, E. (eds.): *The European Arrest Warrant in Practice*. The Hague : T. M. C. Asser Press, 2009; or BLEKXTOON, R. et Van BALLEGOOIJ, W. (eds.): *Handbook on the European Arrest Warrant*. The Hague : T. M. C. Asser Press, 2005.

international and EU conventions governing the cross-border gathering of evidence within the EU would thus be replaced by a single EU body of law. Achieving that end objective straightaway by means of a single instrument would, however, be unduly complex. It was pointed out that the Council should adopt by the end of 2005 the Framework Decision on the EEW.[64])

Subsection 3.2.1 of this chapter deals with the legal basis of the EEW – the Council Framework Decision on the European evidence warrant, subsection 3.2.2 presents legal definition of the EEW, its scope of application and related key terms. Furthermore, special attention is focused on procedural issues. Subsection 3.2.3 analyses the procedure of issuing, while subsection 3.2.4 the procedure of recognition and execution of the EEW. In addition to that, subsection 3.2.5 introduces the relation of the EEW to mutual legal assistance instruments.

3.2.1 Legal Basis: Council Framework Decision on the European Evidence Warrant

The legal basis of the EEW at the EU level is the Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[65]) (hereinafter 'FD on the EEW'). The FD on the EEW supplements the FD on freezing orders by applying the principle of mutual recognition to orders with the specific objective of obtaining objects, documents and data for use in proceedings in criminal matters. The EEW provides a mechanism for obtaining evidence and transferring it to the issuing State.

The FD on the EEW, which was first proposed in November 2003, had long gestation period. It was adopted at the end of 2008, i.e. three years after expected deadline. The distrust towards the implementation of the principle of mutual recognition and the particular problems that it poses with regard to the gathering of evidence in another Member State, caused that that the FD on the EEW was not approved until December 2008. Moreover, the fundamental legal issues arising from the European arrest warrant contributed to delays to the EEW. Several governments became concerned that the EU had acted too hastily in case of the European arrest warrant. They were determined not to repeat the mistake. In particular, the Dutch threatened to veto the EEW until they could ensure that they would not be overrun with requests related to drug-trafficking cases.[66])

[64]) See The Hague Programme : strengthening freedom, security and justice in the EU. OJ, C 53/1 of 3.3.2005.

[65]) 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, C 115/13 of 9.5.2008.

[66]) BOMBERG, E. – PETERSON, J. et STUBB, A.: The European Union : How Does it Work? 2nd edition. New York : Oxford University Press, 2008, p. 150.

In comparison to mutual assistance procedures, the mechanism based on the FD on EEW contains following benefits:[67])
– the procedure is based on the principle of mutual recognition (see above),
– simplified and accelerated procedure,
– a request made by judicial decision from another Member State is directly recognised without the need for its transformation into a national decision before it can be enforced,
– direct contacts between judicial authorities,
– political interference is reduced,
– requests is standardised by the use of a single form (see below),
– deadlines are laid down for the execution of requests (see below),
– the grounds for refusing to execute requests are limited (see below).

3.2.2 Legal Definition, Scope of Application and Related Key Terms

The term order to obtain evidence has many different meanings in the Member States' procedural laws. It can range from a prosecutor's request to disclose evidence to more coercive measures such as a court order issued for the purpose of the entry and search of private premises. Mutual recognition of specific types of national orders to obtain evidence could therefore result in the executing State being required to carry out a search and seizure in circumstances in which it would normally use less intrusive mechanisms such as the general powers of a prosecutor or a production order.

Although the FD on the EEW does not directly address the issue of mutual admissibility of evidence, the EEW nevertheless aims to facilitate the admissibility of evidence obtained from the territory of another member state.[68]) With regard to the legal definition, the EEW shall be a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in following proceedings:[69])
1. with respect to criminal proceedings brought by, or to be brought before,

[67]) Explanatory Memorandum to the Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters. COM(2003) 688, p. 5; De HERT, P. – WEIS, K. et CLOOSEN, N.: The Framework Decision 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 – A Critical Assessment. In: New Journal of European Criminal Law, Vol. 0 (Special Edition), 2009, pp. 61 and 78.

[68]) VERMEULEN, G. et van PUYENBROECK, L.: Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union. In: COOLS, M. et al (eds.): EU and International Crime Control : Governance of Security Research Paper Series, Vol. 4. Antwerpen – Apeldoorn – Portland : Maklu, 2010, p. 50.

[69]) Articles 1(1) and 5(a)-(d) of the FD on the EEW.

a judicial authority in respect of a criminal offence under the national law of the issuing State;
2. in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;
3. in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and
4. in connection with proceedings referred to in points 1, 2 and 3 which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

Thus, the FD on the EEW established the types of proceedings for which the EEW may be issued. It is available, in particular, for criminal proceedings, as well as for administrative proceedings for infringements where there is a right of appeal to a court with jurisdiction in criminal matters. Moreover, it is also available for any such proceedings which relate to offences or infringements for which a legal person may be held liable in the issuing State.

The FD on the EEW identifies with precision what is excluded by its scope of application. The EEW shall not be issued for the purpose of requiring the executing authority to:
– conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;
– carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
– obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;
– conduct analysis of existing objects, documents or data; and
– obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

However, the FD on the EEW provides for derogations of this prohibition. The EEW may be issued with a view to obtaining objects, documents or data, where the objects, documents or data are already in the possession of the executing authority before the EEW is issued.[70]) Further, the EEW may, if requested by the issuing authority, also cover taking statements from persons

[70]) Article 4(4) of the FD on the EEW.

present during the execution of the EEW and directly related to the subject of the EEW. The relevant rules of the executing State applicable to national cases shall also be applicable in respect of the taking of such statements.[71])

The scope of the EEW is extremely narrow. The FD on the EEW leaves out significant types of evidence, often the most relevant which are decisive in criminal proceedings (for example the testimony or the DNA test). To this respect even the derogations expressly provided are not of great help.[72])

As far as competent authorities are concerned, the term 'issuing State' shall mean the Member State in which the EEW has been issued. Further, 'issuing authority' shall mean a judge, a court, an investigating magistrate, a public prosecutor, or any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law.[73]) In the past, in case of the Convention on Mutual assistance in criminal matters, the contracting states declared what authorities they considered to be judicial authorities within the meaning of the Convention. This was a good solution, given the differences that exist between them when it comes to defining who is and who is not competent. As a consequence, the term 'judicial authorities' may include certain police authorities, as for example in Denmark. The definition for purposes of the EEW was a step back for them and it was either way too restricted. However, for a group of Member States it was unthinkable that their own national judges would have to act on the orders of foreign policemen. But these Member States also had to recognise that every Member State has a different concept of who or what is a judicial authority.[74])

On the other hand, 'executing State' shall mean the Member State in whose territory the objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State. Further, 'executing authority' shall mean an authority having competence under the national law which implements the FD on the EEW to recognise or execute an EEW.[75])

In compliance with the jurisdictionalization of procedures, it is still possible for each Member State to designate a central authority to assist the competent

[71]) Article 4(6) of the FD on the EEW.

[72]) BELFIORE, R.: Movement of Evidence in the EU: The Present Scenario and Possible Future Developments. In: European Journal of Crime, Criminal Law and Criminal Justice, Vol. 17, No. 1 (2009), p. 5.

[73]) Articles 2(a) and (c) of the FD on the EEW.

[74]) De HERT, P. – WEIS, K. et CLOOSEN, N.: The Framework Decision 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 – A Critical Assessment. In: New Journal of European Criminal Law, Vol. 0 (Special Edition), 2009, p. 62.

[75]) Articles 2(b) and (d) of the FD on the EEW.

authorities (or, when its legal system so provides, more than one). A Member State may, if necessary as a result of the organisation of its internal judicial system, make its central authority responsible for the administrative transmission and reception of the EEW as well as for other official correspondence relating thereto.[76])

3.2.3 Procedure of Issuing

The EEW may be issued only when the issuing authority is satisfied that two following conditions have been met: firstly, obtaining the objects, documents or data sought is necessary and proportionate for the purpose of aforementioned proceedings, and secondly, the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.[77]) These conditions shall be assessed only in the issuing State in each case. Where the issuing authority issues an EEW which supplements an earlier EEW or which is a follow-up to a freezing order transmitted under the FD on freezing orders, it shall indicate this fact in the EEW.

The EEW is a judicial decision issued in the form prescribed by the FD on the EEW. The EEW set out in the form provided for in the Annex of the FD on the EEW shall be completed, signed, and its contents certified as accurate, by the issuing authority. It shall be written in, or translated by the issuing State into, the official language or one of the official languages of the executing State. Any Member State may state that it will accept EEWs or a translation of an EEW in one or more other official languages of the institutions of the EU.[78])

Again, having regard to the principle of direct communication between judicial authorities, the issuing authority transmits the EEW directly to the executing judicial authority, i.e. all official communications have to be done through direct contacts between the issuing and executing authorities. Thus, the co-operation became a purely jurisdictional issue and no longer requires political considerations.

Transmission of the EEW is determined according to two circumstances, namely whether the competent executing authority is known or not. Firstly, the EEW may be transmitted to the competent authority of a Member State in which the competent authority of the issuing State has reasonable grounds to believe that relevant objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State. All further official communications shall be made directly between the issuing authority and the executing authority. Secondly, if the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via

[76]) Article 8(2) of the FD on the EEW.
[77]) Article 7 of the FD on the EEW.
[78]) Article 6 of the FD on the EEW.

the European Judicial Network[79]) contact points, in order to obtain the information from the executing State. Moreover, when the authority in the executing State which receives the EEW has no jurisdiction to recognise it and to take the necessary measures for its execution, it shall, ex officio, transmit the EEW to the executing authority and so inform the issuing authority.[80])

3.2.4 Procedure of Recognition and Execution

Having regard to the principle of mutual recognition of judicial decisions in criminal matters, the executing authority shall recognise an EEW without any further formality being required. It shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents or data. However, these rules do not apply in case that the authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement[81]) (see below). This is the crucial point, the revolutionary mechanism that really makes the difference in legal assistance as conceived so far and that is paradigmatic of the new era in judicial co-operation founded on mutual trust in each other's criminal justice systems rather than purely on the State's prerogatives.[82])

The executing State shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State.[83])

However, it should be noted, as pointed out by *De Bondt*, *Vermeulen* and *Van Damme*, the EEW is an atypical mutual recognition instrument. It does not focus on the ordering/requesting of a specific investigative measure, but rather deals with the obtaining of evidence, regardless of the investigative measures that are required.[84])

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[79]) The European Judicial Network is a network of national contact points for the facilitation of judicial co-operation in criminal matters. It was established by the Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on EU on the creation of a European Judicial Network – OJ, L 191/4 of 07.07.1998. In 2008, a new legal basis entered into force – Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network – OJ, L 348/130 of 24.12.2008. Further information see European Judicial Network online <http://www.ejn-crimjust.europa.eu>.

[80]) Article 8 of the FD on the EEW.

[81]) Article 11(1) of the FD on the EEW.

[82]) BELFIORE, R.: Movement of Evidence in the EU: The Present Scenario and Possible Future Developments. In: European Journal of Crime, Criminal Law and Criminal Justice, Vol. 17, No. 1 (2009), p. 6.

[83]) Article 11(2) of the FD on the EEW.

[84]) De BONDT, W. – VERMEULEN, G. et Van DAMME, Y.: EU Cross-Border Gathering and Use of Evidence in Criminal Matters : Towards Mutual Recognition of Investigative Measures and Free Movement of Evidence? Antwerpen – Apeldoorn – Portland : Maklu, 2010, p. 18.

3.2.4.1 Removal of the Double Criminality Requirement

The principle of mutual recognition implies the removal of the double criminality requirement. The recognition and execution of the EEW shall not be subject to verification of double criminality unless it is necessary to carry out a search or seizure.[85])

On the other hand, if it is necessary to carry out a search or seizure for the execution of the EEW, the 32 mutual recognition offences on the 'double criminality list' shall not be subject to verification of double criminality under any circumstances, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of that State.

The 32 mutual recognition offences are listed on the list in the FD on the EEW. Again, by way of examples we could point at the murder, grievous bodily injury, sexual exploitation of children and child pornography, trafficking in human beings, or laundering of the proceeds of crime (money laundering).[86]) Moreover, the double criminality list is not exhaustive. The Council of the EU may decide to add other categories of offences to the list.

The introduction of some of the typical mutual recognition characteristics has a clear added value for the cross-border gathering and use of evidence and is also widely accepted. Thus, the 32 mutual recognition offences have great potential.[87]) As pointed out by *Murphy*, the Council Framework Decison on the European arrest warrant uses the language 'without verification of the double criminality of the act'. Nonetheless, certain Member States have adopted implementing laws that require verification. The FD on the EEW uses more stringent language to afford less discretion to national legislatures when implementing the legislation. The dual criminality requirement is almost entirely abolished by the evidence warrant. The FD on the EEW legislation is stronger than its predecessor, declaring that evidence warrants requiring search and seizure for such offences 'shall not be subject to verification of double criminality under any circumstances'. Whether this difference in drafting is noted in the transposing measures remains to be seen.[88])

However, the abolition of verification of dual criminality is non-absolute.

[85]) Article 14(1) of the FD on the EEW.

[86]) Full list of offences see Article 14(2) of the FD on the EEW.

[87]) De BONDT, W. – VERMEULEN, G. et Van DAMME, Y.: EU Cross-Border Gathering and Use of Evidence in Criminal Matters : Towards Mutual Recognition of Investigative Measures and Free Movement of Evidence? Antwerpen – Apeldoorn – Portland : Maklu, 2010, p. 18.

[88]) MURPHY, C. C.: The European Evidence Warrant: Mutual Recognition and Mutual (Dis) Trust? In: ECKES, Ch. et KONSTADINIDES, T.: (eds.): Crime Within the Area of Freedom, Security and Justice: A European Public Order. Cambridge University Press, 2011, pp. 233-234.

Germany touched upon the fact that there are no common definitions of the 32 offences on the 'double criminality list'. It is the law of the issuing state that defines these crimes. Germany asked to come up with real common definitions, and made three suggestions to solve this problem. Firstly, it was the horizontal approach with definitions that would also be valid for the other mutual recognition instruments. However, this approach was unacceptable for most of the Member States. Secondly, the introduction of definitions that would only apply to cases that fall within the scope of the FD on the EEW was not successful either. Thirdly, the latter proposal was the one the Member States could agree on. Germany may reserve its right to make the execution of an EEW subject to verification of double criminality in selected cases.[89])

Thus, the FD on the EEW leaves room for a declaration by Germany to reserve the right to make the execution of an EEW subject to verification of dual criminality in selected cases.[90]) Where the execution of a EEW requires search or seizure, Germany reserves the right to make execution subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling, unless the issuing authority has stated that the offence concerned under the law of the issuing State falls within the scope of criteria indicated in a Declaration made by Germany.[91]) In other words, as pointed out by *Vermeulen* and *van Puyenbroeck*, the Council has agreed to allow Germany to return to the traditional system of dual criminality for at least some of the core crime categories featured in the double criminality list, by granting it the possibility of opting-out. In allowing the opt-out clause, which itself is clearly triggered by the growing distrust of at least one of the Member States, the EU seems to have taken a retrograde step.[92])

3.2.4.2 Grounds for Non-recognition and Non-execution

In spite the fact that the executing authority shall recognise an EEW, the FD on the EEW provides for explicit optional grounds for non-recognition or non-execution of the EEW (optional according the wording 'may be refused'). The philosophy of the mutual recognition requires refusal grounds to be limited as

[89]) De HERT, P. – WEIS, K. et CLOOSEN, N.: The Framework Decision 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 – A Critical Assessment. In: New Journal of European Criminal Law, Vol. 0 (Special Edition), 2009, p. 66.

[90]) See Article 23(4) of the FD on the EEW.

[91]) Declaration of the Federal Republic of Germany (in relation to the execution of the EEW). OJ, L 350/92 of 30.12.2008.

[92]) VERMEULEN, G. et van PUYENBROECK, L.: Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union. In: COOLS, M. et al (eds.): EU and International Crime Control : Governance of Security Research Paper Series, Vol. 4. Antwerpen – Apeldoorn – Portland : Maklu, 2010, p. 61.

much as possible.[93]) Recognition or execution of the EEW may be refused in the executing State if:[94])

– execution of the EEW would infringe the *ne bis in idem* principle;
– the EEW relates to acts which would not constitute an offence under the law of the executing State (in cases referred to in Article 14(3) of the FD on the EEW);
– it is not possible to execute the EEW by any of the measures available to the executing authority (in the specific case in accordance with Article 11(3) of the FD on the EEW);
– there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EEW;
– the EEW has not been validated (in one of the cases referred to in Article 11 (4) or Article 11(5) of the FD on the EEW);
– the EEW relates to criminal offences which: under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory;
– in a specific case, execution of the EEW would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; or
– the form of the EEW, provided for in the Annex of the FD on the EEW, is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline set by the executing authority.

The decision to refuse the execution or recognition of the EEW shall be taken by a judge, court investigating magistrate or public prosecutor in the executing State.[95]) Any decision to refuse recognition or execution shall be taken as soon as possible and no later than 30 days after the receipt of the EEW by the competent executing authority. When it is not practicable in a specific case for the competent executing authority to meet the deadline, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the action to be taken.[96])

It should be noted, as pointed out by *Belfiore*, explicit provisions on grounds for refusal clear doubt about "automaticity" as an implication of mutual recog-

[93]) De BONDT, W. – VERMEULEN, G. et Van DAMME, Y.: EU Cross-Border Gathering and Use of Evidence in Criminal Matters : Towards Mutual Recognition of Investigative Measures and Free Movement of Evidence? Antwerpen – Apeldoorn – Portland : Maklu, 2010, p. 18.
[94]) Article 13(1) of the FD on the EEW.
[95]) Article 13(2) of the FD on the EEW.
[96]) Article 15 of the FD on the EEW.

nition.[97]) On the other hand, as pointed out by *De Hert*, *Weis* and *Cloosen*, on the list there is no ground for refusal based on the age of the person against whom the procedure that has led to the issuing of the EEW is aimed. It is thus possible that Member States will have to transfer evidence in procedures aimed against minors, at least minors according to their own national law systems. This ground for refusal does not exist in the FD on the EEW. The same goes for crimes for which amnesty was granted by the executing state.[98])

In addition to the grounds for non-recognition or non-execution, the FD on the EEW provides for explicit optional grounds for postponement of recognition or execution of the EEW (optional according the wording 'may be postponed'). The recognition of the EEW may be postponed in the executing State where, firstly, the form provided for in the Annex of the FD on the EEW is incomplete or manifestly incorrect, until such time as the form has been completed or corrected, or, secondly, in one of selected cases (referred to in Article 11(4) or (5) of the FD on the EEW), the EEW has not been validated, until such time as the validation has been given. The execution of the EEW may be postponed in the executing State where, firstly, its execution might prejudice an ongoing criminal investigation or prosecution, until such time as the executing State deems reasonable, or, secondly, the objects, documents or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.[99]) As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EEW and inform the relevant competent authority.

Unless either the grounds for postponement exist or the executing authority has the objects, documents or data sought already in its possession, the executing authority shall take possession of the objects, documents or data without delay and no later than 60 days after the receipt of the EEW by the competent executing authority. When it is not practicable in a specific case for the competent executing authority to meet the deadline, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the action to be taken.[100])

3.2.5 Relation to Mutual Legal Assistance Instruments

The EEW shall coexist with existing instruments concerning mutual legal

[97]) BELFIORE, R.: Movement of Evidence in the EU: The Present Scenario and Possible Future Developments. In: European Journal of Crime, Criminal Law and Criminal Justice, Vol. 17, No. 1 (2009), p. 8.

[98]) De HERT, P. – WEIS, K. et CLOOSEN, N.: The Framework Decision 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 – A Critical Assessment. In: New Journal of European Criminal Law, Vol. 0 (Special Edition), 2009, p. 71.

[99]) Article 16 of the FD on the EEW.

[100]) Article 15 of the FD on the EEW.

assistance. The FD on the EEW is a more intricate measure than its counterpart, the Framework Decision on the European arrest warrant. As it must fit within the existing mutual legal assistance framework, rather than replace it entirely, its provisions are more restricted. Unlike the European arrest warrant legislation, the EEW legislation did not seek to replace all existing transfer rules and procedures. Rather, it fit within the existing framework of mutual assistance and as such is a less radical and more complicated piece of legislation.[101])

The FD on the EEW shall coexist with existing legal instruments in relations between the Member States in so far as these instruments concern mutual assistance requests for evidence falling within its scope.[102]) In spite the fact that the EEW should coexist with existing mutual assistance procedures, but such coexistence should be considered transitional until the types of evidence-gathering excluded from the scope of the FD on the EEW are also the subject of a mutual recognition instrument, the adoption of which would provide a complete mutual recognition regime to replace mutual assistance procedures.[103])

However, issuing authorities may use mutual legal assistance to obtain objects, documents or data falling within the scope of the FD on the EEW if they form part of a wider request for assistance or if the issuing authority considers in the specific case that this would facilitate co-operation with the executing State.[104]) Thus, in this case, application of the EEW is marginal and even capable of hindering the smooth functioning of existing instruments.

Implementation of the FD on the EEW in the national legislation of the Member States of the EU is not welcomed. For instance, provisions to give effect to the UK's obligations to implement the FD on the EEW are included in the *Policing and Crime Act 2009*. However, the Government, in principle, is supportive of further attempts to improve judicial co-operation amongst Member States, but thought that this must be done through an instrument that will "demonstrably add real value" to mutual legal assistance.[105])

3.3 Preliminary Conclusion: Fragmentation and Critical Remarks

Although analysed instruments introduce the principle of mutual recognition in the field of evidence, they are fully criticised because their restricted range of

[101]) MURPHY, C. C.: The European Evidence Warrant: Mutual Recognition and Mutual (Dis) Trust? In: ECKES, Ch. et KONSTADINIDES, T.: (eds.): Crime Within the Area of Freedom, Security and Justice: A European Public Order. Cambridge University Press, 2011, pp. 230 and 236.

[102]) Article 21(1) of the FD on the EEW.

[103]) Recital 25 of the preamble of the FD on the EEW.

[104]) Article 21(3) of the FD on the EEW.

[105]) Justice Issues in Europe : Seventh Report of 2009-10. Great Britain : Parliament : House of Commons : Justice Committee, 2010, p. 26-27.

application actually complicates the international co-operation, instead of simplifying it.

First, the FD on freezing orders addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the issuing state in accordance with the rules applicable to mutual legal assistance. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of co-operation and is therefore seldom used in practice by the competent authorities. Furthermore, as pointed out above, the implementation of the FD on freezing orders in the national legislation of the Member States of the EU is not satisfactory.[106]) Moreover, the FD on freezing order is considered as too complicated by the practitioners and is seldom used in practice.[107])

Second, also the FD on the EEW was adopted to apply the principle of mutual recognition. As far as the EEW is concerned, it is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial co-operation in criminal matters with respect to evidence. Because of its limited scope, competent authorities are free to use the new regime or to use mutual legal assistance procedures which remain in any case applicable to evidence falling outside of the scope of the EEW. Furthermore, the EEW is fully criticized because it complicates the co-operation instead of simplifying it, due to its limited scope of application. It has created a regime which is more complicated than the mutual legal assistance regime and is a subject of critical analysis. It seems that its advantages are of limited significance in practice as in a majority of criminal cases the EEW needs to be complemented with additional mutual assistance requests. As pointed out by *Allegrezza*, it is unclear whether the EEW will in practice contribute significantly to facilitate the gathering of evidence in cross-border criminal cases and its admissibility in the criminal trial. According to her opinion, the EEW is another piece of a fragmented system, and this piecemeal approach does not help simplify the judicial co-operation between Member States. As the EEW is only applicable to pre-existing elements of evidence, for all other evidentiary materials that might be also needed, practitioners will still have to use the letters rogatory of the mutual legal assistance system.[108]) Moreover, *Murphy* critically analyses the EEW and con-

[106]) Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence. COM(2008) 885 final, pp. 3-4.

[107]) Replies to the questionnaire on the evaluation of the tools for judicial cooperation in criminal matters. Council of the EU document, 5684/09, p. 6.

[108]) ALLEGREZZA, S.: Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility. In: Zeitschrift für Internationale Strafrechtsdogmatik, No. 9/2010, p. 573.

siders what its adoption can tell us about the development of mutual recognition in EU criminal justice. The central argument of his essay is that the EEW demonstrates the tensions of enforcement-led criminal justice co-operation in the absence of mutual trust.[109]) As a consequence of the complexity, it is likely that the EEW will only be used in practice in a few cases, and where it will be used, the lack of experience will create difficulties.

On top of that, as pointed out by *Gless*, the free movement approach sketched in the conclusions of the Tampere Council as a 'mutual admissibility concept' will not work as well in regard to the 'transfer of evidence'. The main source for doubts is the fact that the object of intended transfer is not a real thing, but a legal construct, which serves certain legal, i.e. abstract needs, and not basic needs like those of consumers.[110])

Thus, both order freezing property or evidence and the EEW may be regarded as unsatisfactory.[111]) It has become clear, since the adoption of both instruments, that the existing framework for the gathering of evidence is too fragmented and complicated. The fragmentation and complexity is due to: the coexistence of mutual legal assistance conventions with mutual recognition instruments, and the complexity within the legal framework based on the mutual recognition instruments.

A new approach is therefore necessary. Four political options for solving the problem were known, namely: (A) no new action to be taken in the EU, (B) to adopt non-legislative measures, (C) abrogation of the FD on the EEW, i.e. back to mutual legal assistance, and (D) a new legislative action taken in the EU.[112]) A new legislative action taken in the EU seems to be best solution. Possible is a limited improvement of the EEW ("EEW II"), or replacement of all existing instruments with global scope both of mutual legal assistance and of mutual recognition. This new approach is based on a single instrument called the European investigation order.

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[109]) MURPHY, C. C.: The European Evidence Warrant: Mutual Recognition and Mutual (Dis) Trust? In: ECKES, Ch. et KONSTADINIDES, T.: (eds.): Crime Within the Area of Freedom, Security and Justice: A European Public Order. Cambridge University Press, 2011, pp. 224-248.

[110]) GLESS, S.: Free Movement of Evidence in Europe. In: DEU, T. A. – INCHAUSTI, F. G. – HERNEN, M. C. et al.: El Derecho Procesal Penal en la Union Europea. Madrid : Colex, 2006, p. 124.

[111]) The opinion shares also the European Commission. See Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. COM (2009) 624 final, p. 4.

[112]) Detailed Statement to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 2, pp. 22-23.

4. EUROPEAN INVESTIGATION ORDER: FUTURE LEGISLATIVE DEVELOPMENT?

The Treaty of Lisbon[113]) and the Stockholm Programme[114]) of 2009 aim at overcoming some of the dilemmas of the AFSJ by offering a renewed institutional and policy framework upon which it next generation measures will be built. The Treaty of Lisbon did away with the 'I pillar / III pillar divide' and made the Charter of Fundamental Rights of the EU[115]) legally binding. These changes will revolutionise the way in which the AFSJ works and the paths it is expected to take from now on.[116]) The Stockholm Programme sets out an ambitious set of proposals in relation to Criminal law and criminal justice. It makes itself clear that the volume of EU Criminal law is set to increase in the coming years and provides for a range of new developments in relation to procedural co-operation.[117]) Regarding the free movement of evidence in the EU, closer co-operation is considered as a key to the effectiveness of criminal investigations and proceedings in the EU. Therefore, the European institutions and Member States intend to take further action to promote such co-operation.

The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. A new approach is needed, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned. The European Council invited the European Commission to propose a comprehensive system covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.[118])

The European Commission, in its communication[119]), foresees the establishment of a comprehensive system for obtaining evidence in cross border cases. This would require the replacement of the existing legal instruments in this area by a new single instrument. This instrument would be automatically recognised

[113]) Treaty of Lisbon amending the Treaty Establishing the EU and the Treaty Establishing the European Community. OJ, C 306/231 of 13.12.2006. It was signed in 2007 and entry into force in 2009.

[114]) Stockholm Programme – An open and secure Europe serving and protecting the citizen. OJ, C 115/1 of 4.5.2010.

[115]) OJ, C 83/389 of 30.3.2010.

[116]) GUILD, E. et CARRERA, S.: The European Union's Area of Freedom, Security and Justice ten years on. In: GUILD, E. – CARRERA, S. et EGGENSCHWILER, A. (eds.): The Area of Freedom, Security and Justice ten years on : Successes and future challenges under the Stockholm Programme. Brussels : Centre for European Policy Studies, 2010, p. 8.

[117]) MURPHY, C. C.: The European Evidence Warrant: Mutual Recognition and Mutual (Dis) Trust? In: ECKES, Ch. et KONSTADINIDES, T.: (eds.): Crime Within the Area of Freedom, Security and Justice: A European Public Order. Cambridge University Press, 2011, p. 246.

[118]) Point No. 3.3.1. (Criminal law) of the Stockholm Programme.

[119]) Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen. COM(2009) 262.

and applicable throughout the EU, thereby encouraging prompt and flexible co-operation between the Member States. It implies that the most effective solution to the aforementioned difficulties would seem to lie in the replacement of the existing legal regime by a single instrument based on the principle of mutual recognition and covering all types of evidence. In order to achieve this objective, the Member States introduced a legislative initiative regarding the European investigation order (hereinafter 'EIO').

Section 4.1 of this chapter deals with a Proposal for a Directive on the European investigation order, section 4.2 presents legal definition of the EIO, its scope of application and related key terms. Furthermore, special attention is focused on procedural issues. Section 4.3 analyses the procedure of issuing, while section 4.4 the procedure of recognition and execution of the EIO. In addition to that, section 4.5 focused on the relations of the EIO with other legal instruments and arrangements and to its impact.

4.1 Proposal for a Directive on the European Investigation Order

In order to create a single, efficient and flexible instrument for obtaining evidence located in another Member State in the framework of criminal proceedings, a group of EU Member States introduced a Proposal for a Directive on the European Investigation Order[120]) (hereinafter 'Proposal'; directive is the legislative instrument in the field of Criminal law to be adopted under the Lisbon Treaty). It follows the structure of the FD on the EEW with certain amendments, and with the inclusion of some of the specific rules on mutual assistance set out in the EU-MLA Convention of 2000 and its protocol of 2001. The main expected changes brought by the EIO should be:[121])

- simplification of the procedure through the creation of a single instrument and therefore replacement of all existing instruments as far as obtaining evidence is concerned, including mutual legal assistance conventions and the mutual recognition instruments – i.e. the FD on freezing orders and the FD on the EEW,
- focus on the investigative measure (as in mutual legal assistance) to be executed rather than on the type of evidence to be collected (as in the FD on the EEW),
- limitation of the possibilities to refuse to execute or recognise the EIO,
- acceleration of the procedure,
- practical improvements such as the possibility for agents of the issuing State to assist in the execution of the EIO in the executing State.

[120]) Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of … regarding the European Investigation Order in criminal matters. OJ, C 165/22 of 24.6.2010.

[121]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, p. 2.

Thus, the EIO could replace the fragmented regulation on the gathering of evidence with a comprehensive instrument applicable to all – almost all – elements of evidence, including specific rules on certain type of evidence like the interception of communications or the information related to bank accounts and transactions. The text of the Proposal is on the whole positive, from the perspective of facilitating and speeding up the request and execution of evidence that is available in other Member State.[122])

4.2 Legal Definition, Scope of Application and Related Key Terms

According to the wording of the Proposal, the EIO shall mean a judicial decision issued by a competent authority of a Member State (issuing State) in order to have one or several specific investigative measure(s) carried out in another Member State (executing State) with a view to gathering evidence within the framework of the following proceedings:[123])

1. with respect to criminal proceedings brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
2. in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;
3. in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing state by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters, and
4. in connection with proceedings referred to in points 1, 2, and 3 which relate to offences or infringements for which a legal person may be held liable or punished in the issuing state.

As far as competent authorities are concerned, the term 'issuing authority' shall mean: firstly, a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned, or, secondly, any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law.[124]) Most Member States will probably use first option. However, in order to take into account the various national systems, the second option allows for the designation of another type of judicial authority. A Member State may for example

[122]) BACHMAIER-WINTER, B.: European investigation order for obtaining evidence in the criminal proceedings : Study of the proposal for a European directive. In: Zeitschrift für Internationale Strafrechtsdogmatik, No. 9/2010, pp. 580 and 589.

[123]) Article 1(1) and Article 4 of the Proposal.

[124]) Article 2(a) of the Proposal.

designate a police authority as an issuing authority for the purpose of the EIO but only if that police authority has the power to order the investigative measure concerned at national level. This solution is in line with existing mutual legal instruments as well as with the FD on the EEW.[125])

It has been a polemic issue whether the wording 'in its capacity as an investigating authority' should include a police authority. According to the explanatory memorandum to the Proposal, a Member State may for example designate a police authority as an issuing authority for the purpose of the EIO but only if that police authority has the power to order the investigative measure concerned at national level.[126]) However, the EIO is considered as judicial decision. As pointed out by JUSTICE[127]), it would not accord with the basis of the instrument in the light of the term 'judicial decision' according the wording of the Treaty on the functioning of the EU. JUSTICE does not consider it appropriate for the issuing authority to be as widely defined as the Proposal allows, notwithstanding in some Member States a police authority could order gathering of material. Given the breadth of the instrument and the basis in mutual recognition, JUSTICE considers that a police authority is not sufficiently objective, independent or legally qualified to decide whether issue of a request for evidence to be gathered by another Member State is appropriate.[128])

The term 'executing authority' shall mean an authority having competence to recognise or execute an EIO. The executing authority shall be an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case.[129]) Again, it is also up to the Member States to decide which authority will be designated as executing authority. Member States do not, however, have a complete margin of manoeuvre as it is required that the executing authority be an authority competent to undertake the investigative measure mentioned in the EIO in a similar national case. If the EIO is issued to search a house in a specific location in Member State 'A', the executing authority must be an authority which would be competent, in a similar national case, to decide to search a house in the location concerned.[130])

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[125]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, p. 4.

[126]) Explanatory Memorandum to the Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters. COM(2003) 688, p. 4.

[127]) JUSTICE is a British-based law reform and human rights organisation, whose mission is to advance justice, human rights and the rule of law. See JUSTICE online <http://www.justice.org.uk>

[128]) Briefing on the European Investigation Order (August 2010). JUSTICE, London, para. 19 (p. 8).

[129]) Article 2(b) of the Proposal.

[130]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, p. 5.

As explained, one of the main objectives of the EIO is to facilitate judicial co-operation by replacing all existing instruments in the field of the free movement of evidence by a single framework. Therefore, the EIO must cover, in principle, all investigative measures aiming at obtaining evidence. However, the scope of the EIO is not unlimited. The EIO shall cover any investigative measure with the exception of the following measures:[131])

– the setting up of a joint investigation team and the gathering of evidence within such a team as provided in the EU-MLA Convention and in the Council Framework Decision on joint investigation teams[132]);
– the interception and immediate transmission of telecommunications referred in the EU-MLA Convention; and
– the interception of telecommunications referred in the EU-MLA Convention insofar as they relate to situations referred to in this convention.

Some measures require specific rules which are better dealt with separately. This applies to the setting up of a joint investigation team and the gathering of evidence within it. The exclusion also covers two types of interceptions of telecommunications for which complex rules are provided in abovementioned convention. Incorporating such rules in the EIO would affect the consistency of the new framework and is not necessary because these investigative measures are very separated from others and there is therefore no need to provide for the possibility for a requesting or issuing authority to insert them in the same request as other investigative measures. Only these types of interception of telecommunications are excluded from the scope of the EIO. Standard interception of telecommunication is covered by the Proposal.[133])

4.3 Procedure of Issuing

The Proposal contains an annex, a specimen of the EIO, which is a key for its content and form. The EIO set out in the form provided for in annex shall be completed, signed, and its content certified as accurate by the issuing authority. The form is therefore not a "certificate" which accompanies a separate decision, as it is the case the FD on freezing orders. The solution chosen for the EIO is the same solution found for the European arrest warrant and the EEW where there is only one document to be transmitted by the issuing authority.

All official communications have to be done through direct contacts between the issuing and executing authorities. The EIO shall be transmitted from the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish

[131]) Article 3 of the Proposal.

[132]) Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams. OJ, L 162/1 of 20.06.2002. See KLIMEK, L.: *Joint Investigation Teams in the European Union.* In: Internal Security, Vol. 4, issue 1, pp. 63-77.

[133]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, pp. 5-6.

authenticity. All further official communication shall be made directly between the issuing authority and the executing authority. When the authority in the executing State which receives the EIO has no jurisdiction to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the EIO to the executing authority and so inform the issuing authority.[134])

In spite the fact that the EIO provides a single regime for obtaining evidence, the Proposal contains the specific provisions for certain investigative measures. The objectives of integrating these rules in the Proposal are mainly to provide more details than for the general regime in order to issue an EIO, namely in the following situations: temporary transfer to the issuing State of persons held in custody for purpose of investigation, temporary transfer to the executing State of persons held in custody for the purpose of investigation, hearing by video-conference, hearing by telephone conference, information on bank accounts, information on banking transactions, the monitoring of banking transactions, controlled deliveries, and investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time.[135])

4.4 Procedure of Recognition and Execution

Having regard to the principle of mutual recognition of judicial decision in criminal matters, the executing authority shall recognise an EIO without any further formality being required. It shall forthwith take the necessary measures for its execution in the same way and under the same modalities as if the investigative measure in question had been ordered by an authority of the executing State[136]) (unless that authority decides to invoke one of the grounds for non-recognition or non-execution, or one of the grounds for postponement; see below). The decision to take the investigative measure is taken by the issuing authority in accordance with its national law when it issues the EIO, but, the carrying out of the measure itself will be governed by the law of the executing State. For example, in the case of an EIO issued for the purpose of searching a house, the issuing authority is competent to decide whether or not the search of a house is a necessary measure in the case concerned. However, the modalities of the search will be governed by the law of the executing State. If the search of a house is possible at night in the issuing State but not in the executing State, the Proposal makes it possible for the executing authority to carry out the measure during daytime in accordance with its own legislation.[137])

The fact that the law applicable for the modalities of the carrying out of the measure is the law of the executing State may create problems in terms of

[134]) Article 6(1) and (5) of the Proposal.
[135]) Details see Articles 19-27 of the Proposal.
[136]) Article 8(1) of the Proposal.
[137]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, p. 8.

admissibility of evidence in the issuing State. It provides for a possibility for the issuing authority to indicate in the EIO which formalities will have to be complied with to ensure the admissibility of evidence. There is an obligation for the executing authority to comply with these formalities as long as they are not contrary to the fundamental rules of the executing State. This practical solution reconciles the need to ensure admissibility of evidence and the rule on applicable law.

With regards to the wording of the Proposal, the requested State is obliged to comply the EIO issued by another Member State, even in those cases where the co-operation requested is directed to the investigation of an act that does not constitute an offence in the executing State. The condition of the double criminality has been partially eliminated from the text of the FD on EEW, although it still remains for some cases. The European Commission has clearly stated that the requirement of double criminality is contrary to the principle of mutual recognition and therefore the purpose is to gradually eliminate it from the European instruments of judicial co-operation in criminal matters. Therefore, the double criminality requirement has been directly dropped in the EIO. This means that the executing State is obliged to carry out the investigative measure requested as an EIO even if the evidence is aimed to prosecute an offence which is not punishable under the law of the executing State.[138])

The grounds upon which an EIO may be refused are much more limited than those under mutual legal assistance or the FD on the EEW. The Proposal limits the grounds for refusal of recognition or execution to four optional cases, namely:[139])

– if there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO;
– if, in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
– if, there is no other investigative measure available which will make it possible to achieve a similar result in cases mentioned in Article 9(1)(a) and (b) of the Proposal; or
– if the EIO has been issued and the measure would not be authorised in a similar national case in proceedings referred to in Article 4(b) and (c) of the Proposal.

The Proposal would amount to a 'bonfire' of the key traditional grounds for refusals of mutual assistance requests or the EEW, most notably as regards the *ne bis in idem* principle, territoriality and dual criminality. This would be the first EU measure to abolish fully the possibility of refusal on any of these

[138]) BACHMAIER-WINTER, B.: European investigation order for obtaining evidence in the criminal proceedings : Study of the proposal for a European directive. In: Zeitschrift für Internationale Strafrechtsdogmatik, No. 9/2010, p. 584.

[139]) Article 10(1) of the Proposal.

grounds, never mind all three together. The abolition of the *ne bis in idem* exception takes no account of other EU rules on this issue and status of this principle in the Charter of Fundamental Rights of the EU.[140]) However, it should be noted that the *ne bis in idem* principle as a ground for non-execution the EIO has been a subject of discussions and amendments to the Proposal.[141]) Furthermore, as pointed out by JUSTICE, the Proposal does not confirm that a request can be refused on fundamental rights grounds. For legal clarity, certainty and uniformity across the member states, it is necessary for the directive to specify fundamental rights under this head as a ground of refusal.[142])

In addition to the grounds for non-recognition or non-execution, the Proposal provides for explicit optional grounds for postponement of recognition or execution of the EIO. It provides standard wording in mutual recognition instruments to allow the postponement of the recognition or execution of the EIO. Such postponement is possible if the execution of the EIO would prejudice an ongoing criminal investigation or prosecution or if the evidence concerned is already used in other criminal proceedings. The postponement must be as brief as possible.[143]) The recognition or execution of the EIO may be postponed in the executing State where:[144])

– its execution might prejudice an ongoing criminal investigation or prosecution until such time as the executing State deems reasonable; or
– the objects, documents, or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.

4.5 Relations to other Instruments and Arrangements and Impact of the European Investigation Order

As explained details above, one of the main objectives of the Proposal is to have a single regime applicable to gathering evidence in another Member State. Therefore, the Proposal has to replace the currently existing regimes. At the same time, it is important to note that instruments which are the basis for these existing regimes often provide rules which go beyond the collecting of evidence. To allow co-operation to continue for these measures and for the aspects which do not concern gathering evidence, it is not possible to maintain only a few provisions of these instruments.[145])

According to the wording of the Proposal, without prejudice to their appli-

[140]) PEERS, S.: EU Justice and Home Affairs Law. Oxford University Press, 2011, p. 715.
[141]) See Council of the EU document 2010/0817 (COD), 7654/11, p. 3.
[142]) Briefing on the European Investigation Order (August 2010). JUSTICE, London, para. 32 (p. 14).
[143]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, p. 15.
[144]) Article 14(1) of the Proposal.
[145]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, p. 30.

cation between Member States and third States, the Directive on the EIO shall replace the corresponding provisions of the following conventions applicable in the relationships between the Member States of the EU bound by the Directive:[146])

– the MLA Convention of 1959 as well as its two additional protocols of 1978 and 2001, and the relating bilateral agreements (concluded pursuant to Article 26 of that Convention);
– the Convention implementing the Schengen Agreement of 1990;
– the EU-MLA Convention of 2000 and its Protocol of 2001.

Further, the Directive shall replace the FD on freezing orders and the FD on the EEW.[147]) Maintaining a separate instrument, which is in any case not much used in practice, is a source of unnecessary complexity. However, the FD on freezing orders is applicable not only to freezing of evidence but also to freezing of property with a view to confiscation. Therefore, it should not be entirely repealed.[148])

On the other hand, Member States of the EU may continue to apply the bilateral or multilateral agreements or arrangements insofar as these make it possible to go beyond the aims of the Directive on the EIO and contribute to simplifying or further facilitating the evidence gathering procedures. Moreover, they may conclude bilateral or multilateral agreements and arrangements insofar as these make it possible to go further into or extend the provisions of the Directive on the EIO and contribute to simplifying or further facilitating the evidence gathering procedures.[149])

As explained, replacement of all existing instruments by the EIO with global scope would imply the adoption of a new legal instrument providing a single legal basis for executing all types of investigative measures throughout the EU and replacing all the existing instruments, both of mutual legal assistance and of mutual recognition. It should be noted at positive and negative impact of the EIO.

As far as the positive impact is concerned, the replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition and covering all types of evidence is presented as the most effective solution to simplify the legal framework in the field of obtaining evidence. Starting again from scratch will have some positive impact because Member States will not be bound by pre-existing arrangements or exceptions for that matter.[150])

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[146]) Article 29(1) of the Proposal.
[147]) Article 29(2) of the Proposal.
[148]) Explanatory Memorandum to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 1, p. 30.
[149]) Article 29(3) and (4) of the Proposal.
[150]) Detailed Statement to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 2, p. 34.

As far as the negative impact is concerned, a single legal instrument will only make sense if it supplies an added value in regard to the existing Conventions in the field of mutual legal assistance and framework decisions in the field of the mutual recognition and would actually reach the objective of a single and efficient instrument for obtaining evidence. But one must be realistic: the negotiation process of the FD on the EEW was long and difficult and it is likely that this scenario will be repeated during the adoption procedure of this new instrument. Some Member States will probably request to keep arrangements/exceptions already adopted in previous instruments of mutual recognition and this will reduce the efficiency of the new instrument.[151])

5. CONCLUSION

The concept of the 'free movement of evidence' in criminal matters within the EU is one of the most recent demands coming from Brussels. However, the expression is not used in any official EU document. Even talking about the concept of free movement of evidence may look to some people as a provocation in itself. This concept describes a certain form of mutual recognition of judicial decisions in criminal matters in the EU, during which the competent authorities of one Member State do feed a piece of evidence into the system of 'free movement' and all competent authorities in another Member State can or rather must use it in criminal proceedings.

In Europe has been developed the mutual legal assistance. The 'traditional' mutual legal assistance is provided by the European Convention on Mutual Legal Assistance in Criminal Matters of 1959, which has been supplemented by two additional protocols. The European communities introduced the 'improved' mutual legal assistance within their Member States. Since 1970, there has been a slow movement towards a simplification of the system of mutual assistance. A few instruments have been adopted, namely, the Convention implementing the Schengen Agreement of 1990 and the European Convention on Mutual Assistance in Criminal Matters of 2000, which has been supplemented by a protocol.

The Treaty of Amsterdam introduced a new policy field of the EU – an 'Area of freedom, security and justice'. The EU set itself the objective the establishment of an area of freedom, security and justice, within which European citizens enjoy a high level of safety. This concept has been introduced to reflect the idea that the maintenance of public order, internal peace and security, is shared between the Member States and the EU. Free movement of evidence appears to be one of the goals within the establishment of that area and an essential element to fight efficiently against cross-border and organized crime.

[151]) Detailed Statement to the Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. 2010/0817 (COD), 9288/10, ADD 2, p. 34.

While the mutual legal assistance was being reinforced and updated through international conventions, the European institutions decided to improve the judicial co-operation by replacing the existing international rules on mutual legal assistance with new European instruments based on the principle of mutual recognition of judicial decision in criminal matters in the EU. The European Council held a special meeting in Tampere in 1999 on the creation of an area of freedom, security and justice. It was agreed that the principle of mutual recognition should become the cornerstone of judicial co-operation in both civil and criminal matters, including for pre-trial orders in criminal investigations.

Two instruments based on the mutual recognition principle have been adopted so far: the Council Framework Decision on the execution in the EU of orders freezing property or evidence of 2003 and the Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters of 2008. Although these instruments introduce the principle of mutual recognition in the field of evidence, they are fully criticised because their restricted range of application actually complicates the international co-operation, instead of simplifying it.

The Council Framework Decision on the execution in the EU of orders freezing property or evidence, addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the issuing state in accordance with the rules applicable to mutual legal assistance. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of co-operation and is therefore seldom used in practice by the competent authorities. Furthermore the implementation of this instrument in the national legislation of the Member States of the EU is not satisfactory. It is considered as too complicated by the practitioners and is seldom used in practice.

Also the Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, was adopted to apply the principle of mutual recognition. As far as the European evidence warrant is concerned, it is only applicable to evidence which already exists and covers therefore a limited spectrum of judicial co-operation in criminal matters with respect to evidence. Because of its limited scope, competent authorities are free to use the new regime or to use mutual legal assistance procedures which remain in any case applicable to evidence falling outside of the scope of the European evidence warrant. Furthermore, the European evidence warrant is fully criticized because it complicates the co-operation instead of simplifying it, due to its limited scope of application. It has created a regime which is more complicated than the mutual legal assistance regime and is a subject of critical analysis. It seems that its advantages are of limited significance in practice as in a majority of criminal

cases the European evidence warrant needs to be complemented with additional mutual assistance requests. It is unclear whether the European evidence warrant will in practice contribute significantly to facilitate the gathering of evidence in cross-border criminal cases and its admissibility in the criminal trial. The European evidence warrant is another piece of a fragmented system, and this piecemeal approach does not help simplify the judicial co-operation between Member States. As a consequence of the complexity, it is likely that the European evidence warrant will only be used in practice in a few cases, and where it will be used, the lack of experience will create difficulties.

On top of that, is seems that the free movement approach sketched in the conclusions of the Tampere Council as a 'mutual admissibility concept' will not work as well in regard to the 'transfer of evidence'. Both Order freezing property or evidence and the European evidence warrant may be regarded as unsatisfactory. It has become clear, since the adoption of both instruments, that the existing framework for the gathering of evidence is too fragmented and complicated.

The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension. A new approach is needed, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned. In order to achieve this objective, the Member States introduced a legislative initiative regarding the European investigation order.