

Gathering foreign evidence: Where are we with the European Evidence Warrant and the European Investigation Order?

Summer Course on European Criminal Justice
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Prof. Dr. Gert Vermeulen

t. +32 9 264 69 43

f. +32 9 264 84 94

Gert.Vermeulen@UGent.be

Approach

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not merely: EU initiatives relating to gathering of foreign evidence

- European Evidence Warrant (EEW)
- European Investigation Order (EIO)

but:

- possibilities and preconditions for enhanced freedom
 - in *gathering* (i.e. during the pre-trial investigation stage)
 - respectively *using* (i.e. during the trial stage)
- evidence in criminal matters in the EU
 - generic notion (pre-trial stage)
 - ‘admissibility in court’ focused notion (trial stage)
- properly sketching
 - the cooperation and policy context
 - the (ir)relevance of the EEW & EIO
- research-based (EC research)

questions & discussion

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Prof. Dr. Gert Vermeulen
+32 9 264 69 43
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Introductory classification

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obtaining existing (available) evidence

- house search
- freezing order (with 3rd parties)
- seizure (often requiring house search)
- order to provide/allow access to

obtaining “new” evidence

- hearing, confrontation, covert investigations, analysis, expertise

obtaining evidence “in real time”

- interception telecommunication
- covert investigations
- monitoring bank accounts

Traditional legal instruments

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overview (non-limited)

- CoE 1959 MLA Convention + Protocols 1978 & 2001
- Coe 1990 Laundering Convention
- Schengen 1990 (CISA)
- Naples II Convention 1997
- EU 2000 MLA Convention + 2001 Protocol
- EU 2006 Swedish FD
- Prüm Convention/EU Prüm decisions
- 1988 Vienna Convention, 2000 UN TOC Convention, etc

principal rules of play

- inter-state cooperation
- coercive/intrusive measures/actions: exequatur or transfer procedure, compatibility with law requested state + dual criminality

convention shopping for certain (special) cooperation forms

- hot pursuit, cross-border surveillance, controlled delivery, covert investigations, JITs

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New generation EU instruments

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to be implemented domestically

principal rules of play

- between locally competent judicial authorities
- no more exequatur or transfer procedures
- blind recognition – via order+certificate or warrant
- dual criminality requirement basically abandoned
- refusal for (disguised) fiscal reasons further restricted

which instruments?

- 2003 FD European Freezing Order
- 2008 FD European Evidence Warrant (EEW)
- MR order for all forms of MLA?
 - 2014 European Investigation Order (EIO)
- free movement of evidence?

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2003 FD European Freezing Order

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immediate execution (within 24 hours)

of freezing orders, aimed at preventing transfer, destruction, conversion, disposition or movement etc of objects, documents or data which could be produced as evidence in criminal proceedings in the issuing MS

- (also of alleged proceeds from crime, equivalent goods, instrumentalities + *objectum sceleris*)

if accompanied by standard certificate

no exequatur procedure

no dual criminality check for offences

- punishable in issuing MS with +3 years
- and appearing in the standard list of 32 'list' offences

freezing maintained until transmission

- following a separate request to that end (awaiting the EEW)

2008 FD European Evidence Warrant (1)

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logical post-freezing step (even if freezing is often not useful/needed)

execution within strict time limits of requests

- for transmission of objects, documents and data
- for seizure, transfer, house search

via uniform EEW

no conversion or exequatur procedure

no dual criminality check if

- no house search is required
- offence in 32-list
- Germany allowed opt-out
 - reintroduction dual criminality check for 6/32 offences

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2008 FD European Evidence Warrant (2)

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goal: fast/efficient mechanism for obtaining existing evidence

- including accounts/transactions (Articles 1-2 Protocol 2001)
- not for new evidence gathering
- not for evidence gathering in real time, such as through telecom or bank account tapping

access to info on servers on non-EU territory

- yes, if lawfully accessible from territory executing MS
- = beyond CoE Cybercrime Convention

evaluation

- not a proper MR instrument (no decision to be recognized, FRA)
- quite useless
 - only existing evidence
 - need to rely on traditional MLA in case anything more is needed (which usually is the case)
- 5 y of negotiations | no support any longer

Further policy & research orientations

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clarification relation between MLA and police cooperation

- Principle of Availability (PoA) – Swedish FD – EPRIS (European Police Records Index System)

(future) MR-based MLA

explanatory memorandum EEW (2003)

- additional fd's announced, to be consolidated in a single instrument
 - that can replace mutual assistance altogether
 - including 2000 EU-MA/2001 Protocol
- mutual recognition evidence
 - if lawfully collected in locus MS?

2009 Green Paper – 2010 impact assessments

2009-10 IRCP EC study cross-border gathering & use of evidence (open access)

2010 proposal for a directive on a European Investigation Order (EIO)

2010-12 IRCP EC study future judicial cooperation (open access)

summarized in: Free gathering and movement of evidence (open access)

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IRCP 2009-10 study for EC

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overcomplexity of the environment

- combination of MR and MLA instruments
- partial coverage of investigative measures
- need for benchmarking framework

feasibility of future MR based MLA

- MLA flexibility through “widest possible measure of assistance” => cooperation possible for not explicitly regulated investigative measures
- incompatibility MR and MLA features (e.g. spontaneous information, JIT, ...)

free movement of evidence

- usually not covered by cooperation instruments

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Results: A comprehensive MR-based instrument?

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yes for comprehensive and some MR characteristics

- 32 list + some use beyond traditional use, reduction grounds for non-execution, horizontalisation

no for certain MR characteristics

- EEW marginally useful as example, no prior effective issuing of decision required, FRA support (opposite to MR execution)

no for certain measures

- spontaneous information exchange, JITs, bulk of non-regulated measures
 - either keep flexibility of ‘widest measure possible’
 - or bring non-regulated measures under MR
 - & foresee (capacity) refusal grounds (!?!)

introduction of either one/three procedural rights options

- allow persons concerned to claim
 - specific guarantees of a similar national case
 - the best of both worlds
- introduce EU level minima based on/derived from ECHR

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European Investigation Order

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hardly more than consolidation instrument in terms of measures
regulated

further reduction dual criminality issues

stringency for any measure (problem)

painfully fails to address key challenge since 2003 (admissibility issue)

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Rethinking international cooperation in criminal matters in the EU

Moving beyond
actors, bringing
logic back, footed
in reality

Gert Vermeulen
Wendy De Bondt
Charlotte Ryckman
(eds.)

Principal
European Commission
DG Justice
(JLS/2009/JPEN/PR/0028/E4)

FREE GATHERING AND MOVEMENT OF EVIDENCE IN CRIMINAL MATTERS IN THE EU

Thinking beyond borders,
striving for balance,
in search of coherence

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Free *gathering* of evidence

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By whichever authorities?

With whichever finality?

Irrespective of the offence (definition)?

Any investigative measure?

For free?

Without borders?

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By whichever authorities?

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A matter of judicial cooperation, by judicial authorities only?

- Contemporary landscape blurred (5 additional authorities)
- Member state discretion to appoint 'judicial' authorities
- Often built-in authority-flexibility in CoE and EU instruments
- No 'judicial' authority requirement for data protection

Distinction judicial vs police cooperation: Artificial, often counterproductive or useless

- Notwithstanding the above: often upheld
- Europol/Eurojust, EU-US policy, horizontalisation degree, mutual recognition/availability, ECRIS/EPRIS

Limited necessity for 'judicial' safeguards

- For coercive or intrusive measures only
- Not depending on authority, but on respecting procedural rules

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With whichever finality?

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Decisive marker: Criminal justice finality

- Irrespective of *type* of authorities involved

Part of the EU *acquis*

- Unfortunately in a fragmentary and *ad hoc* fashion

Lack of finality demarcation problematic

- Separation of powers (criminal justice vs administrative finality)
- Procedural guarantees applicable in criminal matters
 - often circumvented/undermined by administrative detours
 - UK (interception), The Netherlands (BIBOP, RIECs, Emergo)
 - to be complied with by administrative/intelligence authorities
- Data protection
 - Stick to criminal justice purpose limitation – avoid purpose deviation

Flexible finality demarcation?

- Administrative offences: Only seemingly a cross-over
 - *Ordnungswidrigkeiten*, Lex Mulder etc
- Prevention of an immediate and serious threat to public security: A
legitimate, one-directional cross-over

Irrespective of the offence (definition)?

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Traditionally limited dual criminality requirement

- For coercive and intrusive investigative measures only (examples)

Further outruling?

- Limited 'breakthrough' based on 32 list
 - in Freezing Order and European Evidence Warrant
 - continued in European Investigation Order (EIO)
- 32 list approach highly discussable
 - Lack of common definitions (EULOCS)
- Not beyond 32 list
 - Except through EULOCS

Any investigative measure?

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Traditionally: consistency test

- For regulated coercive and intrusive measures
- For some non-regulated investigative measures under the ‘widest measure of mutual assistance’ regime
 - EIO ambition to make ‘any’ measure obligatory: illusory

Inconsistencies will prevail

- *Ratione loci*
- *Ratione temporis*
- *Ratione personae*
 - Natural persons: in terms of age, procedural status, definition
 - Legal persons: breakthrough with 2012 IRCP study for EC?
- *Ratione materiae*
 - Limited breakthrough on the basis of 32 list only

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For free?

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Nothing like a free lunch

Example: execution Belgian requests in the Netherlands

EIO lacks credibility

- Any measure obligatory, appealing to self-restraint only

Financial capacity

- Cost-sharing
 - 50/50 for costs above 10.000 EUR (or lower) threshold?
- Costs borne by the requesting or executing Member State
 - Currently: video links, telecom interception, expert fees
 - Extension necessary for: undercover actions etc
- Suggest less costly alternatives
 - Legal basis to be created

Operational capacity

- New *aut exequi aut tolerare* rule?
 - JIT and Naples II acquis – no constitutional hurdles

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Without borders?

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More radical option: *tolerare* principle?

- Physical border-crossing in view of active investigation
- While respecting
 - local legislation and/or
 - agreed EU minimum procedural guarantees

Legal basis available since A'dam Treaty

If still too ambitious on EU-wide scale

- Benelux to embark on creating this possibility
 - ten years have lapsed since Benelux Police Treaty
 - Would solve many issues in Belgo-Dutch relation
 - Catalyst role in an EU of variable speed

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Free *movement* of evidence

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Mutual admissibility of evidence gathered following a cooperation request

- Forum regit actum (FRA)
- Conceptual flaws and weaknesses of FRA
 - No *per se* admissibility
 - Grey zone maintained re lawfulness of evidence
 - ‘1-on-1 only’ solution
- Quick wins: *per se* admissibility
 - Lawful JIT evidence & reports drafted by foreign officials
- Quantum Leap
 - Not by EIO, simply continuing FRA
 - Common minimum standards instead of FRA (examples)

Cross-border admissibility of evidence gathered in a merely domestic context

- Only possible through common minimum standards also
- Treaty competency EU limited to cross-border situations only
 - However often overstepped in recent years

Conclusion

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Thinking beyond borders

- Physically, mentally and policy-wise

In search of coherence

- Integrated judicial and police cooperation
- New criminal justice finality as basis for criminal policy

Striving for balance

- Restore separation of powers
- Focus on criminal procedural protection
- 'Judicial' safeguards where necessary
- Giving and taking
- Cross-border & EU-wide admissibility via common standards

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Contact

Prof. Dr. Gert Vermeulen

t. +32 9 264 69 43

f. +32 9 264 84 94

Gert.Vermeulen@UGent.be

IRCP

Ghent University

Universiteitstraat 4

B – 9000 Ghent