

EU cross-border gathering and use of evidence in criminal matters

Towards mutual recognition of investigative measures
and free movement of evidence?

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Acronyms and abbreviations

Acronym/ abbreviation	Meaning
DG JLS	Directorate General Freedom, Security and Justice
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMA	Council of Europe Convention on mutual assistance
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
EU	European Union
EUMLA	EU Convention on mutual assistance in criminal matters
FD	Framework decision
FRA	Forum regit actum
IRCP	Institute for International Research on Criminal Policy
JHA	Justice and home affairs
LRA	Locus regit actum
MLA	Mutual legal assistance
MR	Mutual recognition
Napels II	Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations
OJ	Official Journal
Prüm	Convention of 25 May 2005 between Belgium, Germany, Spain, France, Luxemburg, The Netherlands and Austria on the stepping up of cross border cooperation particularly in combating terrorism, cross border crime and illegal migration
SIC	Schengen Implementation Convention
TEU	Treaty of the European Union

Executive summary

Introduction

The aim of this follow up study was to obtain up to date information on the national laws of the EU member states on the gathering and handling of evidence and to analyse that information in the light of recent developments in legislation governing cross-border transmission of evidence, in particular the European Evidence Warrant (EEW). In addition to these recent legislative developments, it was the intention of the Commission to initiate preparatory work on a legal instrument, which would expand the scope of application of the EEW in order to further replace the existing regime of mutual legal assistance (MLA) within the EU by the mutual recognition (MR) principle. The end result of the study was to reach a conclusion on whether or not there is a need to take action in order to improve cooperation on the gathering, obtaining and admissibility of evidence in criminal matters and, if so, to identify the preferred way to proceed. The main method for assessing the *status questionis*, needs and wishes of member states in the area of cross-border evidence issues, was a detailed questionnaire sent out to the member states and the Eurojust College.

Considering the complexity of the current environment, the project team created a benchmarking framework to unravel some of the applicable regimes. The benchmarking framework does not only clarify the existing legal provisions, but is intended to support future policy making. Therefore, the project team engaged in an in depth analysis of the existing legal instruments to identify the explicitly regulated investigative measures and cluster them according to the regime applicable to them. Furthermore, considering the vast amount of investigative measures which are currently not explicitly regulated, an additional analysis was performed as to the likeliness member states would attach a sound pre-set and consistent regime to them.

The architecture of the questionnaire reviewed the existing cooperation regimes and clustered the investigative measures according to the regime that is applicable to them. Besides a set of preliminary questions on evidence related issues and a set of questions on the institutional capacity in the member states, the bulk of questions was related to the functioning of MLA and potentially MR. The differences brought about by the different types of cooperation and investigative measures were the starting point for the architecture of the questionnaire. Analysing on the one hand the theoretical and legal framework surrounding cooperation and investigative measures and on the other hand the practical implications and attitudes towards those forms of cooperation and investigative measures, a set of six different clusters of cooperation types were identified. Whereas clusters 1 and 2 are linked to the MR regime in the EEW, clusters 3 and 4 are linked to the MLA regime applicable to a series of explicitly regulated investigative measures.

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Cluster 1 reflects the EEW framework decision, which applies to objects, documents or data obtained under various procedural powers, including seizure, production or search powers. The EEW as such intends to facilitate the obtaining of available and well-identified objects, documents and data. To the extent necessary, (house)search or seizure are possible. However, such a distinction means not all forms of (house)search or seizure fall within the scope of the EEW regime. In the past there has never been a separate regime for the obtaining of existing objects, documents and data through (house)search or seizure on the one hand and documents, objects and data still to be collected via a more scouting (house)search or seizure on the other hand. Considering the implicit step forward made with regard to (house)search or seizure for available and well-identified objects, documents and data, it is only logical for member states to be willing to agree that a more scouting (house)search or seizure be brought under the same regime as the measure(s) falling under the scope of the EEW. Therefore cluster 2 only concerns two investigative measures, being (house)search or seizure (other than the forms included in the scope of the EEW and thus the scope of cluster 1).

Whereas clusters 1 and 2 are linked to the MR regime in the EEW, clusters 3 and 4 are linked to the MLA regime applicable to a series of explicitly regulated investigative measures. A scan of all MLA instruments was made in search of the conditions linked to the execution of investigative measures. As a result of this scan, explicitly regulated investigative measures were grouped according to the possibility for the requested member state to link conditions to the execution of the request. Cluster 3 deals with investigative measures for which the *locus regit actum* rule applies, either in full or to a certain degree. Cluster 4 deals with all investigative measures the execution of which the requested/executing member state may under the current legal framework not make dependent on conditions of double criminality, (double) minimum threshold or consistency with national law, and for which the *forum regit actum* rule applies.

Furthermore, a series of investigative measures currently not explicitly regulated, was listed and divided into two further categories (clusters 5 and 6), according to the likelihood member states would be inclined to either or not attach a *locus* or *forum regit actum* rule to them, and to require or abandon double criminality, double threshold or consistency tests. Cluster 5 consists of measures which are currently not explicitly regulated by any of the MLA legal instruments and for which, because of their intrusive character, it is deemed unlikely that requested member states will execute them unless execution will be in accordance with or in the manner provided for in its national law or under conditions of double criminality, double minimum threshold or consistency with its national law. Cluster 6 consists of measures for which, because of their non-intrusive character, it is likely that requested member states will allow for them under the most lenient MLA regime, i.e. be willing to execute them in

compliance with the formalities and procedures expressly indicated by the requesting member state, provided that these are not contrary to the fundamental principles of its own law.

Four main characteristics of MR were used as the backbone of the study and the backbone of the structure of the report.

The *first* MR characteristic is the use of the 32 MR offences (to abandon the double criminality requirement).

The *second* MR characteristic relates to the enhanced stringency in cooperation. Introducing MR into MLA raises questions as to the feasibility of limiting the grounds for refusal. Linked to those grounds for refusal are the grounds for postponement and the impact such grounds have on the speed with which recognition takes place and execution is commenced.

The *third* MR characteristic relates to the shift from merely requesting to a regime in which orders are issued.

The *fourth* MR characteristic relates to the horizontalisation of cooperation.

Assessing the legal feasibility to base the entirety of mutual assistance on MR characteristics, requires an assessment of the compatibility of the MR characteristics with the philosophy of MLA. However, at the same time it is important to underline that not all forms of MLA can be replaced with an MR regime. The functioning and specific features of a joint investigation team for example are fully incompatible with the ordering and executing principles of MR. Furthermore, replacing the entirety of MLA with an MR regime runs the risk of losing the flexibility offered by the MLA obligation to afford each other *the widest possible measure of assistance*. In today's reality, a significant number of highly intrusive investigative measures is not explicitly regulated. Hence the compilation of clusters 5 and 6. Nevertheless, assistance for those investigative measures remains possible based on the obligation to afford each other *the widest possible measure of assistance*. Therefore, the importance of this article may not be underestimated. Future (MR-based) MLA instruments should either maintain this flexibility or regulate each and every possible investigative measure.

Findings and recommendations

The use of the 32 MR offences

As far as the first MR characteristic, being the use of the 32 MR offences to abandon the double criminality requirement, is concerned, member states were asked to what extent either partial or general abandonment of the double criminality requirement is considered acceptable in MLA. Strikingly, only 10% of the member states indicated to attach great importance to a full fledged double criminality requirement. This means that no less than 90% of the member states are willing to cooperate even if the investigative measure relates to acts which

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do not constitute an offence in their own national law. In current practice 60% of the member states do not even apply the double criminality requirement, even though they are allowed to do so. Abandoning the double criminality requirement most definitely constitutes a significant improvement in terms of efficient cooperation. Considering that an additional 30% accept abandonment as a future policy, double criminality can and should no longer be inserted into the future legal framework.

Furthermore, the questionnaire aimed at assessing the feasibility to use the 32 MR offences beyond the double criminality framework.

First, the requirement to execute in consistency with the national law of the executing member state was put to the test. Because such a requirement might hinder efficient cooperation, it was worth looking into the willingness of member states to waive this right when execution is related to acts included in the 32 MR offences. The enquired situation concerned the execution for acts for which the requested measure cannot be taken/ordered in a national case according to the national law of the executing state. Analysis revealed that only 20% would never allow execution. No less than 80% of member states are either now executing or willing to accept a policy to oblige execution if the acts concerned are included in the 32 MR offences.

Second, the possibility to limit refusal and postponement grounds was put to the test. The MR philosophy requires refusal and postponement grounds to be limited as much as possible. The question again rises whether the introduction of the 32 MR offences would have an added value in this context. Analysis revealed that neither for operational, nor for financial capacity issues the preparedness of member states to limit refusal and postponement grounds is linked to the 32 MR offences.

Third, the questionnaire aimed at assessing the added value of the 32 MR offences in the context of admissibility of evidence. Member states were asked whether they would consider it to be an acceptable future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute per se admissible evidence under the national law of the member states concerned. Only 10% considered this not to be an option. The other 90% do not require that such admissibility is limited to the 32 MR offences.

Fourth and final, member states were asked whether they would consider it to be an acceptable future policy option that competent authorities from other member states who are lawfully present on their territory while executing a request/order/warrant draft official reports having the same probative value as if they had been drafted by their own competent authorities. 80% of the member states consider admissibility of "draft official reports having the same probative value as if they had been drafted by own competent authorities" to be an

acceptable future policy and do not require such admissibility to be limited to the 32 MR offences.

It is safe to say that the introduction of the 32 MR offences in other areas than the abandonment of the double criminality requirement needs to be well considered. Whereas the introduction might seem a step forward, analysis clearly revealed that limiting such a step forward to the 32 MR offences, can actually hinder from taking an even bigger step forward. This view is shared by the Eurojust College. In its replies, it is clarified that in general, the taking of evidence should not be dependent on whether the underlying offence comes under the 32 MR offences set out in previous MR instruments.

Enhanced stringency in cooperation

Grounds for refusal or non-execution

The MR concept must turn traditional judicial cooperation into a more reliable and faster mechanism. This implies more stringency for the requested member state or authority, in that traditional grounds for refusal are reduced and requests must be replied to and effectively executed within strict deadlines.

First, the position of member states *vis-à-vis* the (revised) traditional grounds for refusal or non-execution was tested.

As far as the *ne bis in idem* principle is concerned, the vast majority of member states indicate that execution on the basis of *ne bis in idem* would be refused, or that it should be possible to refuse execution on the basis of it. The overall recommendation therefore must be that the *ne bis in idem* principle should be enshrined throughout future (MR-based) MLA instruments between the member states as (at least an optional) ground for refusal or non-execution.

Even though wholly new and introduced in the questionnaire as a suggested ground for refusal or non-execution, support among member states for refusal or non-execution for the situation where the proceedings in the issuing member state relate to a person who the executing member state has granted immunity from prosecution for the same facts as a benefit for his or her collaboration with justice, is strikingly high. It is therefore recommended to introduce this newly suggested (optional) ground for refusal or non-execution throughout future (MR-based) MLA instruments between the member states.

Refusal or non-execution for reason of lack of double criminality, was also assessed. The granting of traditional MLA generically does not depend on the condition of double criminality, and the possibility of refusal on the basis of lack of double criminality is limited to a series of coercive or potentially intrusive investigative measures only. Therefore this refusal ground was only assessed for measures for which the refusal ground has not (yet) been prohibited. Only a small number of member states would not (insist to have the possibility to)

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invoke lack of double criminality as a ground for non-execution. Hence, complete removal of double criminality as a refusal or non-execution ground is illusory. However, the potential of introducing a prohibition to invoke it for the 32 MR offences in these cases is far more promising.

Subsequently, “impossibility to execute” as a refusal ground was assessed. Art. 13, 1, c EEW stipulates that recognition or execution of an EEW may be refused in the executing member state if it is not possible to execute it by any of the measures available to the executing authority in the specific case in accordance with the provisions of the EEW. This non-execution ground is EEW-specific, and is inexistent under current MLA instruments. Asked whether they would refuse execution of an EEW (or would want to be able to refuse it) if it is not possible to execute it by any of the measures which would be available to them in a similar domestic case the majority of member states answered affirmatively. Both for theoretical reasons and on the basis of the empirical research among member states, it is highly recommended to retain the ground for non-execution for measures related to the EEW (cluster 1), and stressing that it should obviously not be introduced for any other cluster, not even cluster 2.

Thereupon, the refusal ground of immunity or privilege under the law of the executing member state was assessed. The introduction of this ground for refusal or non-execution is a step backwards, compared to traditional MLA. Surprisingly, when tested, there was significant support among member states for keeping or even introducing the ground for non-execution concerned. Notwithstanding this empirical result, the project team strongly suggests redeliberation on the issue, for objectively it would be a step backwards to keep or further introduce the ground for non-execution throughout future (MR based) MLA.

The next refusal ground to be assessed was the extra-territoriality principle; this refusal ground was copied in the EEW from the EAW, which seems a regrettable mistake. The project team therefore opposes introduction of it in future (MR based) MLA instruments, and deletion of it in the EEW. This stance is supported by the assessments made with member states.

As for the exception ground of *ordre public*, and notwithstanding the empirical results, the project team sees no reason for keeping the traditional *ordre public* exception in place. Traditionally, assistance may be refused if the requested party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country. However, in the EEW the exclusion ground has been significantly reduced in that it may only be invoked where, and to the extent that, the objects, documents or data would for those reasons neither be used as evidence in a similar domestic case. Through the latter interpretation, the traditional *ordre public* exception has lost the traditional inter-state dimension it has always had in judicial cooperation in criminal matters. The project team recommends a middle

course, as was introduced in the Wittem Convention of 1979, and allow to impose conditions to execution if this can avoid affecting the interests of the requested state. Furthermore, the possibility to refuse cooperation referring to the political offence exception, was assessed. It has for long held an important position in cooperation instruments. Today this position cannot be maintained any longer for two main reasons. First, for reasons of internal consistency in the legislative framework it is advised to ban the political offence exception altogether. Second it should be noted that calling upon the political offence exception is a clear sign of distrust with regard to the requesting member state, which is odd having explicitly expressed confidence in the structure and operation of the legal systems of the other member states and confidence in the capacity of all the member states to ensure just legal procedures in the preamble to the TEU.

Also, the fiscal offence exception, which has already been drastically reduced in scope in the 2001 EU MLA Protocol has no real future any more. At least, its reduction along the lines of the EEW can be recommended throughout future (MR based) MLA between the member states.

The potential implications in terms of operational or financial capacity for the executing member state in executing under a stringent MR regime investigative measures that currently lack an explicit regulation may be very substantial. The project team has therefore chosen to not only test the position of member states *vis-à-vis* the (revised) traditional grounds for refusal or non-execution but also to check the preparedness of member states to accept semi-mandatory execution of the measures under clusters 5 en 6 irrespective of their potential financial and operational capacity impact. For the interception of telecommunications and the video conference hearing, there is a reverse financial cost regulation in place, which is why the project team has chosen to assess whether member states in the mean time would be willing to step away from the reverse financial cost regulation, or – alternatively – would be in for a new financial regulation for considerable-cost measures.

As for refusal for reasons of lack of financial capacity, none of the current MLA instruments explicitly provides for such a general refusal ground. Member states were asked if they felt that requests for investigative measures were often refused or should be able to be refused when it is felt that the implications of their execution in terms of financial capacity or resources is or would be substantial or extraordinary. Half of the member states did consider this an option. Also, member states were asked if they would be willing to execute the request anyway if a fair share, for example at a 50/50 rate, would be borne by the requesting/issuing member state. The results of the answers provided were spectacularly positive to say the least. The results are significant for the debate on a possible future policy option to introduce a 50/50 sharing of costs made in the execution of (MR based) MLA requests or orders, as an agreed fall-back

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position in case where the financial consequences of executing a request or order would be substantial or extraordinary, in that the cost involved would surpass an amount of e.g. 10.000 EUR (which the project team suggests to copy from the 2006 MR of confiscations framework decision, thus introducing a consistent mirroring regime in the sphere of (MR based) future MLA between the member states).

Concerning refusing execution for reasons of lack operational capacity, the large majority of member states indicated that irrespective of the cluster, lack of operational capacity would and should not count as a refusal or non-execution ground

Strict reply and execution deadlines

Of vital importance for the safeguarding of evidence, be it under traditional MLA or under MR, is that requests or orders are replied to in a timely fashion and swiftly executed.

The project team has chosen not to ask member states what deadlines they thought would be appropriate for replying to a request or order. On the basis of the EEW and other MR based instruments it could easily be set at e.g. 30 days, being the time limit then for agreeing to execution, refusing it or asking for postponement of effective execution of the request or order.

Questioned about deadlines relating to effective execution of requests, irrespective of the clusters, approximately half of the member states require the requested/executing member state to execute the measure concerned within a provided deadline. The project team here inclines to share the standpoint taken by the Eurojust College, i.e that, whilst recognising that it may be difficult to set a general deadline for the execution of requests for the taking of evidence, such requests should be executed as quickly as possible, and preferably within a 60 day term, with a possible extension for another 30 days in case postponement would be requested.

The importance of postponement possibilities was tested separately. Interestingly however, a lot of the member states indicate they would not postpone execution, even if such execution would have a significant impact on routine domestic workload or other domestic priorities and even if such execution entails the risk of hampering the fluent functioning of their own criminal justice system. It is particularly encouraging to see that member states show this kind of willingness to cooperate. Member states that did indicate to use the possibility to postpone execution of a foreign order/request/warrant indicate that they are still willing to start execution within a reasonable deadline provided by the issuing/requesting member state, which is set at 45 to 60 days, which is only slightly longer than the Eurojust position which allows for a possible extension of 30 days in case postponement would be requested.

Based upon this analysis, the project team recommends that the time limit for agreeing to execution, refusing it or asking for postponement of effective execution of the request or order, be set at 30 days. Requests should be executed within a 60 day term, with a possible extension of 45 days in case postponement would be requested.

Accepting and executing orders

This section dealt with the general willingness of member states to step away from the traditional MR *locus regit actum* regime and the position of member states with respect to consistency problems. Furthermore, compliance with expressly indicated formalities was put to the test.

Accepting the validity of domestic judicial decisions taken in the issuing member state

All MR-based instruments that so far have been designed, prevent a decision or measure to be executed abroad unless it has first been taken or ordered domestically or – *mutatis mutandis* – could have been taken or ordered in a similar or comparable domestic case, in due conformity with the national law and procedures of the issuing member state. Given that the very essence of the MR principle lays precisely in the expectation that member states will trust one another sufficiently to mutually recognise each other's judicial decisions in criminal matters, as if it were their own, this is no more than logical. Consequently, the question at hand when considering to base the entirety of MLA between the EU member states as much as possible on a MR-based footing, is not whether that should be via a warrant-like or a domestic order & certificate-like instrument. The only and real question is whether the EEW – which apparently is the only MR instrument under which the actual taking or existence of a domestic decision in the issuing member state must not be evidenced *vis-à-vis* the executing member state as a precondition for its execution by the latter – can or must serve as a model for reorienting MLA towards MR, if that were to be decided. The answer is negative, for the EEW (cluster 1) is extremely atypical in what it envisages, compared to traditional MLA requests (clusters 2-5). Whereas MLA essentially is a vehicle for requesting investigative measures or the transfer of precise objects, documents or data, the issuing of an EEW envisages a result, i.e. obtaining certain objects, documents or data, leaving it to the executing member state to take any investigative measures that it domestically may need to deploy (including, if necessary, search of premises and seizure) to that end. For it is not clear which investigative measures the executing member state will need to deploy in order to obtain the evidence sought, the EEW – even if categorized as a typical MR instrument – actually is no such instrument *stricto*

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sensu. For the bunch of MLA not covered by the EEW (comprised in clusters 2-5) the situation is different, in that it truly relates to the taking of investigative measures or to the transfer of objects, documents or data. It is hardly imaginable that a future EU MR-based system would envisage altering this situation, by allowing the issuing of e.g. 'find the truth' warrants, 'get incriminating testimony' warrants or the like by the issuing member state, instead of the latter spelling out which concrete measures or procedural steps it seeks the execution of in the executing member state. Consequently, only a single question remains: should it be required from the issuing member state to always first order these measures or take these steps in accordance with its domestic law and procedures. The answer is obviously no. For a vast majority of measures or procedural steps, it would not even be possible to have them formally decided or ordered, especially in the phase of preliminary (police) investigations. Even where the measures concerned would require a formal domestic decision if they would need to be taken on the territory of the issuing member state itself, it would largely undo the flexibility that characterizes current MLA if each time the taking of the measures concerned would need to be formally decided domestically – and embedded in a formalised decision eligible for recognition by the executing member state as if it were its own decision. Only to the extent that member states do not have sufficient trust in one another to suffice with self declared *observance potentialis* by the issuing member state of its domestic law and procedures in issuing investigation orders or warrants, it seems acceptable to require the issuing member state to actually deliver proof of the taking of a domestic decision or the issuing of a domestic order or warrant to the envisaged effect. Whether, even for far-reaching coercive or intrusive measures included in cluster 3 and – a fortiori – under cluster 5 – such distrust level is to be maintained when a roll-out of MR is envisaged, seems to be the only real question left. Therefore, member states have been asked for their position on the matter. The empirical results of the questionnaire are inconclusive, in that the position of member states varies greatly. The project team recommends to suffice with requiring the issuing member state to confirm or declare that the measure the execution of which is envisaged could be taken in a similar or comparable national case to promote full trust and hence allow for its execution without prior evidence of any formal domestic decision, order or warrant to the same effect in the issuing member state.

Executing judicial decisions in the executing member state

Member states were asked which position their own national law occupies with respect to the execution of a request/order warrant. For clusters 3 and 5, only 20% of the member states indicated that their own national role plays an essential role and that execution is only possible where fully in accordance

with/in the manner provided for in their national law (and procedures). For cluster 6 none of the member states indicated this strict *locus regit actum* requirement. 10% of the member states give their own national law a complementary role in that execution can only take place under specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc). This 10% does not vary over the different clusters.

Considering the importance of admissibility of the gathered information/evidence in the course of criminal proceedings in the requesting/issuing member state, several instruments foresee the possibility to expressly indicate that the requested/ordered member state in the execution of the measure, should comply with certain formalities and procedures (e.g. compliance with certain formalities and procedures, purpose or use limitations etc). Interestingly, 60% (cluster 3 and 5) upto 70% (cluster 6) of the member states indicate to be willing to accept a *forum regit actum* regime.

Additionally, member states could indicate what the current position of the persons concerned by the execution of the measure is. Three scenarios were put to the test: first, the possibility to grant a person the national guarantees of the executing member state; second, the possibility to grant a person the best of both worlds, being the guarantees of either the executing or the requested member state; third, the possibility to introduce a set of commonly agreed upon minimum standards. The results of the current practice with regard to these three scenarios is contrasted by a larger support of either of them as a future policy. Between 70 and 80% of the member states (depending on the clusters and on the scope of the rights that would be granted to the persons concerned) consider either of these three scenarios to be an acceptable future policy. When going into detail on the elaboration of common minimum rules, 90% of the member states should based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available.

Secondly it was assessed to what extend member states are willing to go beyond the limits of their own legal system. This section of the questionnaire linked in with the possibility to require that the (execution of the) investigative measure is consistent with the law of the requested member state. Analysis revealed that member states are very reluctant to proceed with the execution of an investigative measure if it surpasses the national scope *ratione personae*. 70% indicated that execution would not be possible in such cases. Only 30% is prepared to go ahead with this investigative measure albeit this percentage increases with 10% in cluster 5. Member states are not willing to execute if the order/warrant/request relates to acts which do not constitute offences in the national law of the executing member state. Having anticipated this outcome, the questionnaire made a distinction between a general *ratione materiae* issue and an issue linked to the 32 MR offences featuring in mutual recognition

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instruments. As this list embodies the abandonment of the double criminality test, it is only logical for member states to be willing to cooperate if the acts concerned are included in 32 MR offences, regardless of criminalisation under the own national law. This hypothesis was confirmed by the results of the study in that 50% of the member states currently already applies this rule and an additional 30% considers it a valid future policy option to abandon the possibility to make execution dependant on double criminality. The project team anticipates similar results when the 32 MR offences are attempted to be used to avoid lack of execution for other types of inconsistency with the national law of the execution member state.

Furthermore, requested member states are not only obliged to answer to the request, but equally have to respect additional formal or procedural requirements attached by the requesting state provided that the requirements are not contrary to the requested member states' fundamental principles of law.

Considering the importance for the admissibility of evidence, it is interesting to note that not all member states use the possibility to request additional formal or procedural requirements. The percentage ranges from 50% in cluster 1 to 80% in cluster 6. This might indicate a great deal of trust in the legal systems of the executing member states. The end goal of mutual assistance is the obtaining of information/evidence to be used in the course of criminal proceedings in the issuing/requesting member state. Not complying with the formalities expressly indicated constitutes an important risk. The information/evidence gathered runs the risk of being inadmissible in the requesting/issuing member state. Therefore compliance with expressly indicated formalities is of utmost importance.

Horizontalisation of cooperation

The fourth MR characteristic relates to the horizontalisation of cooperation. MR typically takes place between the authorities of the member states. Derogation from this general rule is possible in special cases, without further clarifying what constitutes a special case. The project team considers it advisable to eliminate such possibility to derogate from the general rule, and only maintain one single exception for the transfer of persons held in custody. The only other exception currently generally used is the exchange of criminal records data, which will be replaced by the ECRIS system and therefore no longer needs to be an exception to the direct communication rule.

Direct communication and thus further horizontalisation of the cooperation environment impacts on the importance of institutional capacity at all authority levels within the member states. Further investment is vital to ensure that MLA becomes a well oiled machine. A reference to this discussion explains why questions related to institutional capacity were included in the questionnaire.

Acceptance of requests issued in a foreign language and technical capacity issues judicial authorities are confronted with, were assessed.

In a Union which counts 27 members and 23 different languages, MLA and MR become empty concepts when member states do not have the institutional capacity to make sure that all requests are understandable for all parties involved. Linguistic and translation facilities and staff are of undeniable importance. Member states were asked to what extent they had translations in English, French or German of their criminal code, their code of criminal procedure or (other) MLA and MR legislation available. The relevance of the previously mentioned question lies in the fact that most request for MLA are accompanied by the corresponding extracts from the relevant legislation, applying to the circumstances of the case. Analysis revealed that as far as complete translated versions of relevant legislation are concerned, the general situation is that they are more available in member states in English than they are in French and German. In future (MR based) MLA it should be an obligation to accept requests/orders in English. Therefore, it is highly recommendable that all member states invest time, effort and resources in having at least partial translations of the most relevant passages of their criminal codes, their codes of criminal procedure or (other) MLA and MR legislation into English available.

Going further when examining language-related issues in relation to MLA, the questionnaire assessed member states' general willingness to accept requests and orders they receive from other member states, written in one of three aforementioned languages. The results of this assessment are clear; most requests and orders in English are accepted while requests and orders in French and German are not accepted by the large majority of the responding member states. This conclusion strengthens the position to make acceptance of incoming requests/orders in English an obligation.

The questionnaire also asked member states if proper translation and interpretation facilities were available to translate and interpret requests and orders from and into English, French, and/or German. English interpretation and translation facilities were most available in the responding member states, followed by German facilities and French facilities were in place the least.

Other non-legislative measures which could facilitate cross-border cooperation and which deserve analysis can be put under the term "technical capacity issues". Just as difficulties arise when member states receive requests or orders for assistance in a language they do not understand, answering to requests or orders without having the technical capacity to do so is problematic. Even though technical issues do not have any sort of legal framework in MLA nor MR-instruments, the project team recognized the importance of the issue and included questions about technical issues in the questionnaire. The importance of all the assessed issues is that member states might refuse to comply with or answer to certain orders or request for measures to be taken,

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because they are technically not capable of doing so. The implicit legal basis for such refusals is the overarching Art. 1 ECMA states that member states are obliged to grant each other the widest measure possible of mutual assistance. If member states do not have the capacity to answer to requests or orders, it is obviously not possible for them to grant assistance and cross-border cooperation fails. The importance of measures for the future in this respect, should not be underestimated.

To investigate the status questionis of technical capacity of member states to effectively process requests for MLA, a number of relevant questions there-to were asked in the questionnaire. More specifically, the extent to which certain technical and other facilitators for the fluent and speedy processing of requests and orders were available in responding member states was assessed.

First, ICT equipment such as telephones, faxes, modem lines, e-mail, fast internet connectivity, etc. are either of high or medium-level availability to the responding member states. None of the member states claimed to have a low availability of such ICT-facilitators. When asked about the availability of technical means for video or telephone conferences including available measures for protection in such a context (such as audio/video distortion), there were as many member states claiming a high availability thereof as member states claiming a low availability of such means. When asked for the level of availability and quality of technical means required for special investigative measures such as interception, audio or video monitoring, etc. the large majority of member states reported only medium-level availability there-of. The importance of having the technical capacity to execute these kinds of measures is however is however not to be underestimated. In the last decade telecommunications technology has undergone considerable development, particularly in the field of mobile telecommunications. These are very widely used by offenders in the context of their criminal activities, especially in the field of cross-border crime. Furthermore, member states were asked about availability of and access to travel budgets for certain authorities to for example participate in joint investigation teams or to assist in the execution of requests abroad. Only a very small number of member states claimed that such budgets were available, most member states responded that such budgets were only available to a low extent. An important recommendation in this respect, especially considering the importance of successful JIT-cooperation and the need for extra impulses to engage in such cooperation, is that more budgets should urgently be made available. As a more general question, member states were asked about the availability and quality of off-line (paper and electronic versions) relevant legal documentation. Most member states claimed a high availability and quality of such documentation and none if the member states reported a low availability and quality. As a very last question, member states were asked if the executions of requests were monitored for quality and speed. Again results were satisfying,

as most member states reported that such a monitoring mechanism was indeed in place.

Free movement of evidence

The project team wanted to assess the possibility of a future implementation of a system of mutual admissibility of evidence across the EU. The entire question of MLA in obtaining evidence becomes completely useless if in the end, the obtained evidence will not serve any purpose in trial due to inadmissibility. It is now 100% unclear what will happen with the evidence, gathered or obtained on the basis of cross-border cooperation.

As a first point of focus, the status of rules on unlawfully obtained evidence in domestic cases was assessed. The exact same set of questions was asked for the scenario in which unlawfully obtained evidence is transferred to a member state, after it was collected there or it was in another way already available in that member state. Thirdly, the set of questions was asked for the scenario in which a member state requests or orders information or evidence to another member state, and where the requested member state obtains this information or evidence in an unlawful or irregular manner. The overall conclusion after the analysis of rules and their consequences and character for unlawfully obtained evidence both domestically and abroad is first that a multitude of scenario's are possible. Secondly, in most member states all of these rules are governed by statutory law, only a small fraction of these rules imbedded are constitutionally embedded. This could mean that the future harmonization of rules for mutual admissibility of evidence would not necessarily pose major legal problems for the large majority of member states. The greatest variety exists in member states when it comes to the value that they attribute to unlawfully obtained evidence in further stages of the criminal justice process. Not only is there a great variety among member states as to the use of unlawfully obtained evidence in a merely national context as steering or supportive evidence or the complete exclusion thereof, some variation also exists as to the value that member states attribute to this evidence in a national context on the one hand, and to this evidence when it is obtained abroad on the other hand. While some member states attribute the exact same value to unlawfully obtained evidence in a national context and when it comes from another member state, others do show some difference in the validation of foreign evidence. Some member states are more strict in the validation of unlawfully obtained evidence in another member state, and surprisingly, sometimes more leniency is shown in this validation of foreign evidence. The fact that a significant amount of member states already does not make any difference in the validation of unlawfully obtained evidence as to where it was obtained, is certainly a sign of the possibility of future complete mutual admissibility of evidence, and attributing the same value to any kind of

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evidence, no matter where in the EU it was obtained. Furthermore, as nearly all member states have existing sets of rules of their own for attributing a certain value to unlawfully obtained evidence, the previously made remark of the law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated, poses no problems. As member states have sufficient rules in place to qualify the value of certain evidence, member states that request the obtainment and transfer of evidence should trust that these rules are of a high enough standard to mutually recognize the value that the requested member state has attributed to evidence that has moved across their borders. The rules governing exclusion can and should be those of the member state in which the evidence was obtained. This is an important recommendation for the future of mutual admissibility of evidence, and more generally for the future of mutual recognition.

Furthermore, four types of techniques and the evidence they bring with them have been assessed in the questionnaire. The reason for the selection of these particular ones, is that they are under heavy discussion and the most differences across member states as to their admissibility can be expected. These large differences can be problematic if one wants to move in the direction of complete mutual admissibility of evidence and mutual recognition in general. The EEW entails some important minimum safeguards to help protect fundamental rights. More specifically, Art. 6 ensures that the EEW will be issued only when the issuing authority is satisfied that the following conditions have been met: that the objects, documents and data are likely to be admissible in the proceedings for which it is sought. This prevents the EEW from being used to circumvent protections in the national law of the issuing state on admissibility of evidence, particularly if further action is taken in the future on the mutual admissibility of evidence obtained pursuant to the EEW. This article is important, especially since a lot of differences exist among member states as to the admissibility of certain investigation techniques. The four techniques analysed are the use of a lie detection test, the use of statements of anonymous witnesses taken in the requested/executing member state not covered in the EU MLA Convention, the technique of provocation/entrapment and the use of hearsay evidence. The questionnaire has addressed just how big the differences in admissibility are across member states, and how willing member states are to accept evidence that these techniques bring forth, when having been conducted abroad. The overall conclusion of this assessment is that most of the time, the same value is attributed to these techniques and the evidence that they bring forth, whether it comes from another member state or is domestically obtained. This is a very positive outcome for the principle of MR. Even more, sometimes more leniency is shown for foreign evidence in comparison with domestically obtained evidence, which is a surprising outcome to say the least. This however does not violate Art. 6 EEW per se, for the reason explained above. When however

comparing the admissibility and value of the techniques on a domestic level, as predicted, large differences exist. This could be problematic for the discussion of harmonization of procedural criminal law in the EU.

Finally, member states' views and current situations of mutual admissibility of lawfully obtained evidence was assessed.

Finally, member states' views and current situations of mutual admissibility of lawfully obtained evidence was assessed. More specifically, experts in member states were asked in the questionnaire to what extent they felt that, according to their experience, information/evidence which has been collected in another member state in accordance with its domestic law and procedures, being eligible for use as evidence under its domestic law, was often considered inadmissible or of a reduced probative value because of the manner in which it has been gathered? Most member states claimed that they did not feel this was often the case, which is a positive outcome for the future of MR. A smaller fraction of member states did however claim that this was often the case. These member states were asked what, in their experience, would often be the underlying reason for this inadmissibility or reduced probative value.

Two very specific questions were asked in this respect. First, member states were asked if they would consider it an acceptable EU future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute per se admissible evidence under the national law of the member states concerned? 90% of the member states would indeed consider this to be a good policy option. Secondly, member states were asked to what extent they currently accepted that competent authorities from other member states who are lawfully present on their territory in while executing a request/order/warrant (e.g. when seconded member of a joint investigation team operating on their territory, when present during a hearing or house search etc) draft official reports having the same probative value under their national law as if they had been drafted by their own competent authorities; Almost all member states currently accept this. Half of the ones that do not, consider this to be a good future policy option. Only one member states would not be willing to accept this.

In globo, as a conclusion of this assessment of the status quo in member states of mutual admissibility of evidence, the outcome is very positive and no significant issues would have to be faced if the system of per se admissibility of evidence were to be installed in the EU. The Eurojust College also comes to this conclusion and considers that in principle, evidence taken abroad in an EU member state in conformity with the law of that state, should be admissible evidence in other member states, unless the way the evidence was obtained is contrary to their fundamental principles.

1 Introduction: Background and vision

1.1 Background to the study

A specific program on 'Criminal Justice' was set out as part of the General Program on Fundamental Rights and Justice, by the European Council Decision of 12 February 2007.¹ The concrete objectives of the program include the promotion of the principle of mutual recognition (MR) and mutual trust, eliminating obstacles created by disparities between member states judicial systems and improving knowledge of member states legal and judicial systems in criminal matters and the exchange and dissemination of good practice. As part of this program, the Commission awarded a contract to the Institute of International Research on Criminal Policy to perform a follow up to a study on the laws of evidence in criminal proceedings throughout the EU, carried out in 2004 by the British Law Society.² This previous study was an analysis of data gathered from the bar associations of each member state by a questionnaire concerning the national laws on gathering and handling of evidence.³

Initially, the aim of this follow up study was to obtain up to date information on the same subject matter from all member states and to analyse that information in the light of recent developments in legislation governing cross-border transmission of evidence. Two recent developments are crucial for this project's subject matter. First, in 2005, the EU Convention on mutual assistance in criminal matters (EU MLA) entered into force⁴. The EU MLA Convention covers MLA in general and supplements the existing conventions in this field. Second, in 2008, the Council agreed on a general approach to the framework decision on the European Evidence Warrant (EEW).⁵ This framework decision applies the MR principle to judicial decisions for the purpose of obtaining evidence for use in criminal proceedings.

In addition to this, it was the intention of the Commission to initiate preparatory work on a legal instrument, which would expand the scope of application of the EEW in order to further replace the existing regime of mutual

¹ Council of the European Union (2007). "Decision of 12 February 2007 establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme 'Criminal Justice'." OJ L 58 of 24.2.2007.

² European Commission (2008). "Call for Tender of 8 December 2008: Study on the laws of evidence in criminal proceedings throughout the European Union." JLS/2008/E4/006.

³ The British Law Society (2004). Study of the laws of evidence in criminal proceedings throughout the European Union. Brussels, European Commission DG Justice and Home Affairs.

⁴ Council of the European Union (2000). "Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union." OJ C 197 of 12.7.2000.

⁵ Council of the European Union (2008). "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" OJ L 350 of 30.12.2008.

legal assistance (MLA) within the EU by the MR principle.⁶ Thereafter, this study will assess whether or not there is a need to take action in order to improve cooperation on gathering, obtaining and admissibility of evidence in criminal matters and, if so, identify the preferred way to proceed. This study deals with the question whether or not an MR-based MLA is desirable and feasible.

In recent years, MR gained more importance. The 1999 Tampere Conclusions⁷ identified MR as the cornerstone of judicial co-operation. The 2001 Program of measures⁸ to implement the MR principle states that the aim in this context is threefold: first to ensure that the evidence is admissible, second to prevent its disappearance and third to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case. Through MR, requests gain a mandatory character as both refusal grounds and the double criminality tests are largely abandoned. Initial but significant steps have been taken by means of adopting the freezing order⁹ and the EEW¹⁰. However, today the bulk of cross-border cooperation on obtaining evidence is still centered around MLA techniques.

A possible next step is the introduction of the MR principle in the remaining MLA field. The European Commission committed itself to assessing the possibility to reform the cross-border cooperation on obtaining evidence in its entirety and to introduce the MR concept for evidence obtained in the context of international judicial cooperation. A perfect exteriorization of this commitment is the publication of the 2009 *Green Paper on obtaining evidence in criminal matters*

⁶ For analyses on the topic of mutual legal assistance in criminal matters see Vermeulen, G. (1999). *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulp ruimte voor de Lid-Staten?* Antwerp-Apeldoorn, Maklu.; VERMEULEN, G. (2002). *New Developments in EU Criminal Policy with regard to Cross-Border Crime*. in VAN DUYN, P., VON LAMPE, K. and PASSAS, N. *Upperworld and Underworld in Cross-Border Crime*. Nijmegen, Wolf Legal Publishers: 115-140.; VERMEULEN, G. (2001). *New trends in international co-operation in criminal matters in the European Union* in BREUR, C., KOMMER, M., NIJBOER, J. and REYNTJES, J. *New Trends in Criminal Investigation and Evidence*. Antwerp-Groningen-Oxford, Intersentia. 2: 683-698.; VERMEULEN, G. (2000). *The European Union Convention on mutual assistance in criminal matters*. in DE KERCKHOVE, G. and WEYEMBERGH, A. *Vers un espace judiciaire pénal européen - Towards a European Judicial Criminal Area*. Brussels, Editions de l'Université de Bruxelles: 181-194

⁷ European Council (15-16 October 1999). "Conclusions of the Presidency." SN 200/1/99 REV 1.

⁸ Council of the European Union (2001). "Programme of Measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters." OJ C 12 of 15.1.2001.

⁹ Council of the European Union (2003). "Framework Decision of 22 July 2003 on the execution in the EU of orders freezing property or evidence." OJ L 196 of 2.8.2003.

¹⁰ Council of the European Union (2008). "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" OJ L 350 of 30.12.2008.

*from one Member state to another and securing its admissibility.*¹¹ The opinions and statements made in this Green Paper were implicitly assessed throughout the study in the form of a questionnaire, serving as the main method for assessing the *status questionis*, needs and wishes of member states in the area of cross-border evidence issues.

1.2 Vision

The visions of the project team with regard to the subject matter can be summarized into three central considerations.

The first consideration acknowledges the overcomplexity of the current environment. The second consideration stresses the challenges and pitfalls that come into play when trying to incorporate the MR philosophy into the MLA environment. The third consideration relates to the feasibility of introducing free movement of evidence.

1.2.1 Overcomplexity of the current environment

As briefly touched upon above, the existing rules on obtaining evidence in criminal matters in the EU are of two different kinds. On the one hand, there are instruments based on the MLA principle. These most notably include the European Convention on mutual assistance in criminal matters (ECMA)¹², supplemented by the Schengen Agreement (SIC)¹³ and the Convention on mutual assistance in criminal matters (EU MLA)¹⁴ and its Protocol (EU MLA Protocol)¹⁵. On the other hand, there are instruments based on the MR principle, of which the EEW is the best known. A series of investigative measures is explicitly regulated in one or more of those MLA/MR instruments, each of them having an individual regime. Besides those explicitly regulated investigative measures, a significant amount of investigative measures is currently not regulated what can make their application complex and cumbersome.

¹¹ European Commission (2009). "Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility." COM(2009) 624 final of 11.11.2009.

¹² Council of Europe (1959). "European Convention on mutual assistance in criminal matters " ETS n°30 of 20.4.1959.

¹³ "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 L 239 of 22.09.2000

¹⁴ Council of the European Union (2000). "Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union." OJ C 197 of 12.7.2000.

¹⁵ Council of the European Union (2001). "Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by the Council in accordance with Article 34 of the Treaty on European Union." OJ C 326 of 21.11.2001.

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Considering the complexity of the current environment, a benchmarking framework to unravel some of the applicable regimes was developed. It does not only clarify the existing legal provisions, but also support future policy making. To create this benchmarking framework, the project team engaged in an in depth analysis of the existing legal instruments to identify the explicitly regulated investigative measures and cluster them according to the regime applicable to them. Furthermore, considering the vast amount of investigative measures which are currently not explicitly regulated, an additional analysis was performed as to the likeliness member states would attach a certain regime to them. This exercise has led to a set of six clusters, as shown on the figure below. These clusters form the backbone of the questionnaire and will be further elaborated on in the methodology section of this report.

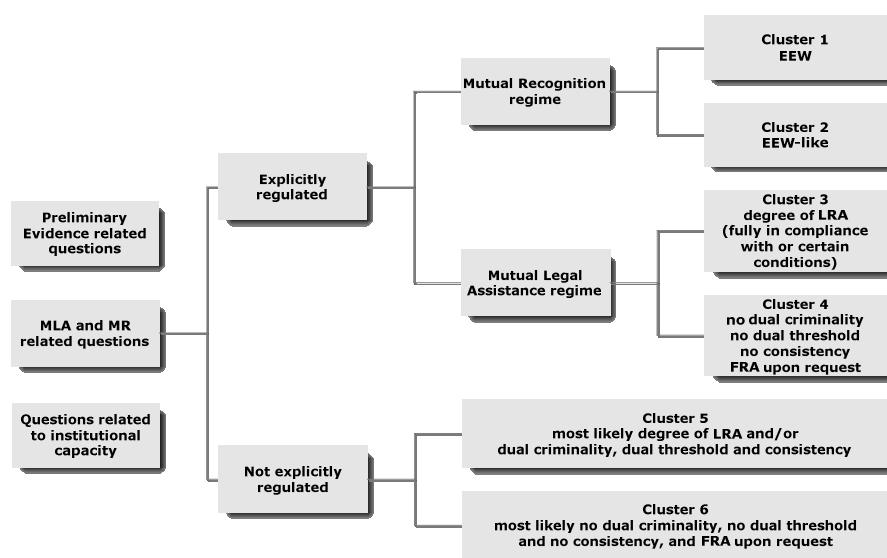


Figure 1. High level overview of the clustered investigative measures

1.2.2 Pitfalls and challenges when combining MR with MLA

In this second consideration the project team stresses the pitfalls and challenges that come into play when trying to incorporate the MR philosophy into the MLA environment. Assessing the legal feasibility to base the entirety of MLA on MR characteristics, requires an assessment of the compatibility of the MR characteristics with the philosophy of MLA.

Two important pitfalls need to be pointed to. First, it is important to underline that not all forms of MLA can be replaced with an MR regime. The functioning and specific features of a joint investigation team for example are fully incompatible with the ordering and executing principles of MR. Second, replacing the entirety of MLA with an MR-based regime runs the risk of losing the flexibility offered by the MLA obligation to afford each other *the widest possible measure of assistance*.¹⁶ In today's reality, a significant number of highly intrusive investigative measures is not explicitly regulated. Hence the compilation of clusters 5 and 6. Nevertheless, assistance for those investigative measures remains possible based on the obligation to afford each other *the widest possible measure of assistance*. Therefore, the importance of this article may not be underestimated. Future (MR-based) MLA instruments should either maintain this flexibility or regulate each and every possible investigative measure.

The main challenge of assessing the legal feasibility to replace the current MLA with a more MR-based MLA, lies in the operationalisation of MR itself. Four main MR characteristics are singled out as the backbone of the study and the backbone of the structure of this report.

The first MR characteristic is the use of the 32 MR offences¹⁷ to abandon the double criminality requirement. Underneath this heading, the importance and erosion of the double criminality requirement will be pointed to, before engaging in an analysis of the possible alternative uses of the 32 MR offences, which lie at the basis of the erosion of the double criminality requirement.

The second MR characteristic relates to the enhanced stringency in cooperation. Introducing MR into MLA raises questions as to the feasibility of limiting the grounds for refusal. Linked to those grounds for refusal are the grounds for postponement and the impact such grounds have on the speed with which recognition takes place and execution is commenced.

The third MR characteristic relates to the shift from merely *requesting* to a regime in which *orders* are issued. Such a shift raises questions not only as to the compatibility of the precondition of having a domestic decision, order or warrant before its execution is possible, but also as to the position of the national law of the executing member state in MR. In traditional MR cases, the basic principles are the accepting of the foreign decision and executing it *as if it was their own decision*. That latter philosophy links in with the *locus regit actum* (LRA)

¹⁶ Art 1, Council of Europe (1959). "European Convention on mutual assistance in criminal matters " ETS n°30 of 20.4.1959.

¹⁷ See also, DE BONDT, W. and VERMEULEN, G. (2009). "Justitiële samenwerking en harmonisatie. Over het hoe en het waarom van een optimalisering in het gebruik van verwezenlijkingen op vlak van harmonisatie bij de uitbouw van justitiële samenwerking." *Panopticon* 6: 47, DE BONDT, W. and VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. in COOLS, M. *Readings On Criminal Justice, Criminal Law & Policing*. Antwerp-Apeldoorn-Portland, Maklu. 4: 15-40.

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theory, in which execution takes place in compliance with the provisions of the national law of the executing member state. However, this philosophy significantly differs from MLA practice, where the actions of the executing member state are meant to have an effect in the requesting/issuing member state. Because MLA aims at obtaining information/evidence that can be used in the course of criminal proceedings in the requesting/issuing member state, it becomes vital that information/evidence is obtained in such a way that it is admissible there. This is the rationale underlying the *forum regit actum* (FRA) theory. Because of the tension between these two regimes, the compliance with explicitly mentioned formalities, will be discussed together with the general position of the national law of the executing member state and the possibility to require execution in compliance with the national law of the executing member state.

The fourth and final MR characteristic relates to the horizontalisation of cooperation. MR typically takes place between the authorities of the member states. This characteristic can also be found in MLA ever since the introduction of Art. 6,1 EU MLA Convention. In general communication via central authorities will only take place for transfer of persons held in custody and for the exchange of criminal records information. Besides these explicit exceptions, the option to derogate from the rule *to communicate amongst decentralized authorities* is foreseen in Art. 6, 2 EU MLA Convention. This article allows for a derogation of the general rule in special cases, without further clarifying what constitutes a special case. The project team considers it advisable to eliminate the possibility to derogate from the general rule, and only maintain the exception for the transfer of persons held in custody.¹⁸ However, direct communication and thus further horizontalisation of the cooperation environment impacts on the importance of institutional capacity at all authority levels within the member states. Regardless of the investments in EU support mechanisms in the past (EJN, Eurojust, fiches belges, judicial atlas, etc), further investment is vital to ensure that MLA continues to be and becomes an even better oiled machine. A reference to this discussion explains why questions related to institutional capacity were included in the questionnaire.

¹⁸ It should be noted that the exchange of criminal records information is now regulated via the ECRIS system – which will replace the exchange of criminal records information via central authorities

1.2.3 *Free movement of evidence*

The third consideration with regard to cross-border use of evidence relates to the feasibility to introduce the concept of free movement of evidence. This topic is often neglected in cooperation instruments because admissibility of information/evidence *as such* is not a cooperation issue. Even though mutual admissibility was addressed in the European Commission's Green Paper on the European Public Prosecutor¹⁹, it is safe to say that the topic has been largely neglected. The EEW does not explicitly address the issue of mutual admissibility of evidence, nor do other MR or MLA instruments. Nevertheless, considering that the purpose of MLA is to conduct investigative measures to obtain information/evidence for use in the requesting member state, the importance of free movement of evidence may not be underestimated. A reference to this issue clarifies why general evidence related questions were included in the questionnaire

1.3 Structure of the report

The vision with regard to the subject matter has been thoroughly discussed with the European Commission at the onset of the study, and is also reflected in the structure of the report. However, before reporting on the comprehensive analysis conducted, key components of the project methodology are explained.

Besides the use of an online questionnaire, attention is drawn to the clustering of the investigative measures and how these clusters relate to the recurring patterns of the questions in the online questionnaire.

Thereafter the report consists of two main chapters, being the mutual recognition of investigative measures and the free movement of evidence.

The structure of the chapter on mutual recognition of investigative measures reflects the main characteristics of MR, being the 32 MR offences, the enhanced stringency of cooperation, accepting and executing orders and the horizontalisation of cooperation.

The structure of the chapter on free movement of evidence is centered around three topics. First it is assessed how unlawfully obtained evidence is dealt with and what the influence is of being unlawfully obtained in a mere domestic situation, in a more abroad situation or in a situation where evidence has been unlawfully obtained abroad upon a domestic request. Second, four investigative measures are analysed, being the lie detection test, provocation/entrapment, anonymous witnesses and hear say evidence. Finally

¹⁹ European Commission (2001). "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor." COM (2001) 715 final of 11.12.2001.

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this chapter deals with the admissibility and value of lawfully obtained foreign evidence.

The project team concludes with an overview of the findings and recommendations.

2 Methodology: Online questionnaire

2.1 Distribution via Single Point of Contact

Following the Eurojust College Decision of 17 July 2009, the Eurojust national members were appointed the single points of contact for the questionnaire. It is important to note that the national members were not to fill out the questionnaire on an individual basis. Being the project team's single point of contact, meant they were responsible for bringing together an expert group with the necessary qualifications and diverse backgrounds encompassing representatives from all competent centralized authorities relevant for this study, to ensure the answers are representative for the concerned member state as a whole.

An instruction letter clarified that ideally the expert group would consist of both legal experts and practitioners (prosecution, investigating judges, judges,...). Considering the nature of some of the questions, it was advised to also involve policy makers representing for example the views of the Ministry of Justice or the Ministry of Interior. Finally, it was strongly recommended to also bring EJNI contact persons to the expert group.

The project team challenged the national expert groups with a very complex questionnaire which required extensive reflection on the entirety of cross-border investigative measures and the international status of evidence. The questionnaire is annexed to this report. Considering the complexity of the subject matter and the limited time span in which replies had to be provided²⁰, the project team highly appreciates the feedback received from 10 member states (Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, Latvia, Malta, Poland and the United Kingdom) and Eurojust. Because of the sensitive nature of some of the questions and the ongoing political debate on this matter, the project team will not disclose which answers were given by whom.

Furthermore, the Eurojust College's expertise in these matters was used to the advantage of the study, as a separate but similar questionnaire was sent to the College. The questionnaire was answered in an analytical and detailed manner, especially in the light of EU future policy-assessments.

Not having the opinion of each of the 27 member states does not negatively impact on the representative value of the study. The main idea was to map the existing legal framework and assess possible support for the introduction of MR characteristics in the current MLA regime. In this respect, it is important to recall the changes to the voting regime agreed in and introduced by the Lisbon Treaty. Whereas before decisions in the area police and judicial cooperation required unanimous support, the new qualified majority voting regime allows member

²⁰ Some member states provided us with the feedback that it was impossible for them to compose an expert group that could reply to such complex questions in the given time span.

states to move ahead even where a minority of member states is not prepared to take that next step. Furthermore, the findings of the study were validated on 9 February 2010 at an Commission meeting of experts on evidence, at which a discussion was held with representatives of the member states.

2.2 Terminology and phrasing of the questions

The questions and propositions in the questionnaire are all linked to the main MR characteristics as opposed to MLA. In order to formulate the questions in a system-neutral fashion, the project team paid significant attention to the phrasing of the questions and the terminology used. Whereas MLA uses 'requesting' and 'requested' member states, MR uses 'issuing' and 'executing' member state. Similarly, whereas MLA refers to 'requests', MR refers to 'warrants' or 'orders'.

In order to combine both regimes into one set of questions, both terminology sets were combined. This explains why questions are phrased as follows: *"Can a request/order/warrant to take/execute/allow for this/these measure(s) in another member state be made?"*

Furthermore, the project team opted to rely on the authentic phrasing in the various legal instruments. In doing so, it is more clear where the regime for the investigative measures has its origin. Even though this approach obviously makes the phrasing of the questions complex and sometimes hard to read, it was preferred over trying to simplify the terminology which would inevitably have led to a loss of subtlety.

2.3 Clustering investigation measures

As explained above when elaborating on the project team's vision with regard to the complexity of the current environment, there are various regimes in place for a variety of investigative measures. The elaboration of the applicable regime is done in an *ad hoc* fashion, without a general reference framework. The architecture of the questionnaire reviews the existing cooperation regimes and clusters the investigative measures according to the regime that is applicable to them. In doing so, the project team intends to assess the feasibility to create an overarching reference framework.

Therefore, besides a set of preliminary questions on evidence related issues and a set of questions on the institutional capacity in the member states, the bulk of questions were related to the functioning of MLA and MR.

It is clear that the functioning of MLA and MR are dependent on the cooperation type and the kind of investigative measure. The more invasive the requested investigative measure is, the more likely it becomes that member

states will attach requirements and conditions to cooperation. The differences brought about by the different types of cooperation and investigative measures were the starting point for the architecture of the questionnaire. Analysing on the one hand the theoretical and legal framework surrounding cooperation and investigative measures and on the other hand the practical implications and attitudes towards those forms of cooperation and investigative measures, a set of six different clusters of cooperation types were identified. The underlying goal of the questionnaire was to first assess the feasibility to graft further elaboration on investigative measures onto the six-cluster reference framework and second, whether currently there is sufficient support to introduce more MR characteristics for certain investigative measures.

The first goal was already touched upon when elaborating the vision and is deemed of utmost importance because the introduction of a reference framework and consistently working with a number of identified clusters has the potential to clarify the current cooperation regimes and significantly improve coherence and understanding. The second goal is deemed important because the hypothesis developed by the project team hints that for certain investigative measures it would only be logical for member states to agree on a more MR like regime considering what has already been unanimously agreed upon before.

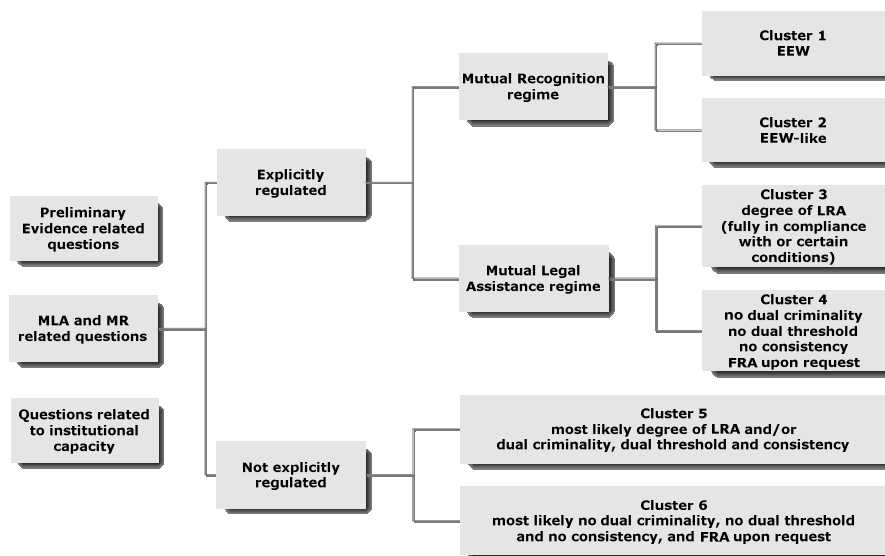


Figure 2. High level overview of the clustered investigative measures

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To make this approach more tangible, the following paragraphs will elaborate on the architecture (and its rationale) of the six clusters.

2.3.1 Influence of the European Evidence Warrant

Both clusters 1 and 2 are linked to the European Evidence Warrant (EEW).²¹ Therefore it is useful to briefly recall the history underlying the adoption and the EEW and its main features.

The background to the EEW proposal and subsequent Framework Decision constitutes of a complex set of treaties at Council of Europe level (comprising all 47 member states of the Council of Europe), supplemented by pre-existing EU measures.

The core background text is the 1959 Council of Europe Convention on mutual assistance (ECMA)²², which has been ratified by all of the EU member states. It sets out the basic rules for the gathering and transfer of evidence in criminal proceedings where more than one state is involved. It has been supplemented by a First Protocol of 1978²³, which has also been ratified by all member states.

It was felt that at EU level, member states needed to move ahead in the sphere of MLA, to shape an area of freedom security and justice, in which police and judicial cooperation are facilitated as much as possible. After long negotiations, the EU member states then signed the EU Mutual Assistance Convention (EU MLA Convention) in 2000 in order to supplement the existing Council of Europe and Schengen rules.

However, few years later things started to move again because MR – introduced as the cornerstone of judicial cooperation – obtained a more prominent position. In 2008 the EEW was adopted. A EEW is an order issued by a competent authority in one member state, which under the principle of mutual recognition must be executed in another member state. According to the framework decision it may be deployed for the purpose of obtaining objects, documents and data for use in criminal proceedings.

As of its entry into force, the EEW will co-exist with all Council of Europe and EU measures now in force with regards to the gathering of the types of evidence, that fall under its scope. These types of evidence have been clustered for the purpose of this report as belonging to the first cluster of measures.

²¹ Council of the European Union (2008). "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 " OJ L 350 of 30.12.2008.

²² Council of Europe (1959). "European Convention on mutual assistance in criminal matters " ETS n°30 of 20.4.1959.

²³ Council of Europe (1978). "Additional Protocol to the European Convention in Mutual Assistance in Criminal Matters." ETS n°99 of 17.3.1978.

The EEW supplements the freezing order²⁴ by applying the MR principle to orders with the specific objective of obtaining objects, documents and data for use in proceedings in criminal matters. Under the freezing order, MR is required for orders issued for the purpose of freezing evidence with a view to its eventual transfer to the requesting state, or for the purpose of freezing property with a view to its eventual confiscation. The EEW will provide a single, fast and effective mechanism for obtaining evidence and transferring it to the requesting state. It will not be necessary for a prior freezing order to have been issued.

Although the EEW does not cover obtaining all types of evidence, the European Commission has expressed to consider this to be the first step towards replacing the existing regime of MLA within the European Union by a single EU body of law based on MR and subject to minimum safeguards.

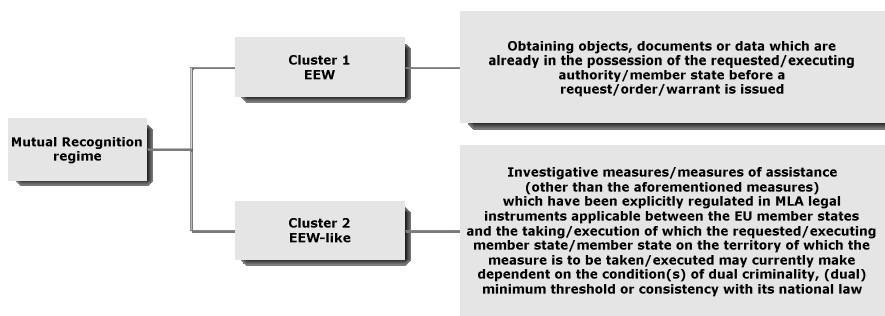


Figure 3. Clarifying clusters 1 and 2

Cluster 1

Cluster 1 encompasses the investigative measures included in the EEW. The EEW applies to objects, documents or data obtained under various procedural powers, including seizure, production or search powers. However, the EEW is not intended to be used to initiate the interviewing of suspects, taking statements, or hearing of witnesses and victims. Taking bodily evidence from a person, in particular DNA samples, is also excluded from the scope of the EEW. Furthermore, the EEW is not intended to be used to initiate procedural investigative measures which involve obtaining evidence in real-time such as interception of communications and monitoring of bank accounts. A specific regime for cooperation on interception of communications has been established

²⁴ Council of the European Union (2003). "Framework Decision of 22 July 2003 on the execution in the EU of orders freezing property or evidence." OJ L 196 of 2.8.2003.

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in the EU MLA Convention, and a regime for cooperation with respect to monitoring bank accounts has been established by Art. 3 EU MLA Protocol.

The EEW is equally not intended to be used to obtain evidence that can only result from further investigation or analysis. Therefore, it can for example not be used to require the commissioning of an expert's report. It should be noted that EEW's should conversely be used where the evidence is directly available in the executing state for example by extracting the relevant information from a register. It should also be used for requesting data on the existence of bank accounts where such data is available in the requested state. The EEW may equally be used for the purpose of obtaining objects, documents or data falling within the excluded categories provided that they had already been gathered prior to the requesting of the warrant. In these circumstances, it will be possible to obtain existing records of intercepted communications, surveillance, interviews with suspects, statements from witnesses and the results of DNA tests.

Cluster 2

Cluster 2 encompasses measures linked to the EEW. The EEW as such intends to facilitate the obtaining of available and well-identified objects, documents and data. To the extent necessary, (house)search or seizure are possible. It should be noted that, such a distinction means not all forms of (house)search or seizure fall within the scope of the EEW regime.

However, there is no valid reason to distinguish between and thus categorise forms of (house)search or seizure. In the past there has never been a separate regime for the obtaining of existing objects, documents and data through (house)search or seizure on the one hand and documents, objects and data still to be collected via a more scouting (house)search or seizure on the other hand. Considering the implicit step forward made with regard to (house)search or seizure for available and well-identified objects, documents and data, it is only logical for member states to be willing to agree that a more scouting (house)search or seizure be brought under the same regime as the measure(s) falling under the scope of the EEW. Therefore this cluster only concerns two investigative measures, being (house)search or seizure (other than the forms included in the scope of the EEW and thus the scope of cluster 1).

The legal framework for the choice for these two investigative measures can be found in the ECMA, read together with the Schengen Implementation Convention (SIC). Reading the provisions in those instruments further explains why the project team added that those (house)search and seizure may not be made dependent on the condition(s) of dual criminality, (dual) minimum threshold or consistency with its national law.

Notwithstanding the fact that Art. 5 ECMA stipulates that the execution of letters rogatory for search or seizure may be made dependant on three conditions (i.e.:

- that the offence is punishable under both the law of the requesting as of the requested party;
- that the offence is an extraditable offence in the requested party;
- that the execution is consistent with the law of the requested party;)

Art. 51 SIC limits the possibility to impose conditions in that it stipulates that the Contracting parties may not make the admissibility of letters rogatory for search and seizure dependent on conditions other than dual criminality, dual minimum threshold or consistency with its national law.

Those two articles combined with the argumentation above, clarifies why in the questionnaire, these two investigative measures were technically characterised as *“Investigative measures/measures of assistance (other than the aforementioned measures in cluster 1) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and the taking/execution of which the requested/executing member state/member state on the territory of which the measure is to be taken/executed may currently make dependent on the condition(s) of dual criminality, (dual) minimum threshold or consistency with its national law.”*

2.3.2 Measures explicitly regulated in MLA instruments

Whereas clusters 1 and 2 are linked to the *MR regime* in the EEW, clusters 3 and 4 are linked to the *MLA regime* applicable to a series of explicitly regulated investigative measures.

Even though briefly touched upon when clarifying the background documents to the EEW, it remains interesting to recall the basic principles of MLA. In international judicial cooperation in criminal matters, MLA is a well-established principle. It is relied on when a state is unable to continue with an investigation or procedure on its own and requires another state's help, such as to hear witnesses or carry out surveillance on persons located on the other state's territory.

A number of agreements have been adopted by international organisations such as the ECMA and its 1978 ECMA Protocol, the Benelux Treaty of 1962 and the 1990 SIC.

The next step in the area of MLA in criminal matters was the EU MLA Convention between the Member states of the European Union, which should complete the other agreements by facilitating the proceedings and by fitting it on technological changes.

The purpose of the EU MLA Convention is to encourage and modernise cooperation between judicial, police and customs authorities by supplementing

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the provisions and facilitating the application of the 1959 ECMA, and its 1978 ECMA Protocol, the 1990 SIC and the Benelux Treaty of 1962. As a result to differences between national procedures, sometimes information gathered in one country could not be used in the other country because the way the information was obtained did not fit with the national procedural requirements. Therefore the EU MLA Convention provides that the requesting state can ask the receiving state to comply with some formalities or procedural requirements which are essential under its national legislation. The state receiving a request for mutual assistance must in principle comply with the formalities and procedures indicated by the requesting state.

A scan of all MLA instruments was made in search of the conditions linked to the execution of investigative measures. As a result of this scan, explicitly regulated investigative measures were grouped according to the possibility for the requested member state to link conditions to the execution of the request.

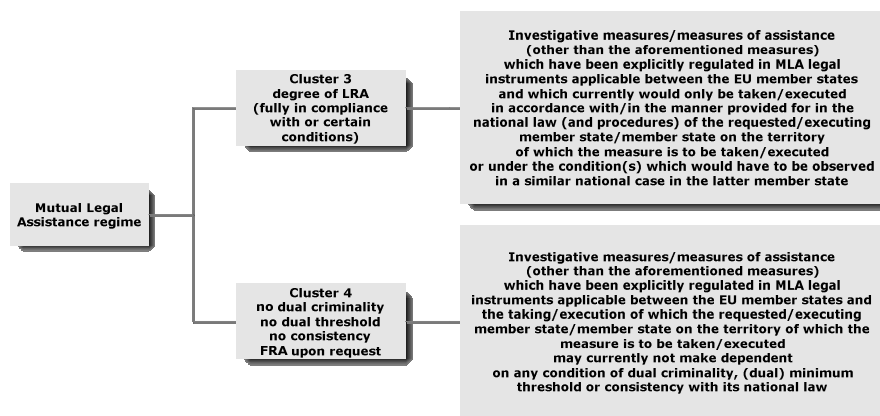


Figure 4. Clarifying clusters 3 and 4

Cluster 3

Cluster 3 deals with investigative measures for which the *locus regit actum* rule applies, either in full or to a certain degree. It brings together all the explicitly regulated investigative measures for which the requested/executing member state has the possibility to make authorization or execution dependent on execution:

- in accordance with or in the manner provided for in its national law or
- under (certain of) the condition(s) which would have to be observed in a similar national case.

The investigative measures have been listed in an exhaustive fashion:

- ***cross-border observation*** – this investigative measure is regulated in Art. 40, 1 SIC and 21, 1 Napels II²⁵, equally clarifying that ‘conditions may be attached to the authorisation’;
- ***observation on the territory of the requested/executing member state by its own authorities*** – this investigative measure is covered in Art. 40, 1, 2nd paragraph SIC and 21, 1, 2nd paragraph Naples II; *mutatis mutandis* paragraph 1 of the same articles, outlining that ‘conditions may be attached’, applies;
- ***cross-border hot pursuit*** – this investigative measure is regulated in Art. 41, 5, a) SIC and 20, 4, a) Naples II, equally clarifying that pursuing officers ‘must comply with the law of the member state in whose territory they are operating [and] obey the instructions of the competent authorities of the said member state’;
- ***covert investigations (by officials)*** – this investigative measure is regulated in Art. 23, 3 Naples II and 14, 2-3 EU MLA Convention, stipulating respectively that both the conditions under which a covert investigation is allowed and under which it is carried out ‘shall be determined by the requested authority in accordance with its national law’, and that the decision on a request for assistance in the conduct of covert investigations is taken by the competent authorities of the requested member state ‘with due regard to its national law and procedures’, the covert investigations themselves having to ‘take place in accordance with the national law and procedures’ of the member state on the territory of which they take place;
- ***controlled delivery in the territory of the requested/executing member state (i.e. being the territory of destination of the delivery or where intervention is envisaged)*** – this investigative measure is regulated in Art. 22, 2-3 Naples II and 12, 2-3 EU MLA Convention, equally stipulating that the decision to carry out controlled deliveries shall be taken by the competent authorities of the requested member state ‘with due regard for the national law of that member state’ and that controlled deliveries ‘shall take place in accordance with the procedures of the requested member state’, ‘the [right or competence] to act and to direct [and control] operations [lying] with the competent authorities of that member state’;
- ***interception of telecommunications if the subject of the interception is present in the requested/executing member state and his or her communications can be intercepted in that member state, with immediate transmission*** – this investigative measure is regulated in Art. 18, 1, a) in conjunction with 18, 2, b) and 18, 5, b) EU MLA Convention, the latter

²⁵ "Convention of 18 December 1997 on Mutual Assistance and Co-operation between customs administrations (Naples II-Convention)." OJ C 24 of 23.01.1998.

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paragraph stipulating that the requested member state shall undertake to comply with an interception request 'where the requested measure would be taken by it in a similar national case', being allowed moreover to 'make its consent subject to any conditions which would have to be observed in a similar national case';

- *interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and without transcription of the recordings* – this investigative measure is regulated in Art. 18, 1, b) in conjunction with 18, 2, a), b) or c) and 18, 6 EU MLA Convention, the latter paragraph stipulating that the requested member state shall undertake to comply with an interception request 'where the requested measure would be taken by it in a similar national case', being allowed moreover to 'make its consent subject to any conditions which would have to be observed in a similar national case'; *interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and with transcription of the recordings* – this investigative measure is regulated in Art. 18, 1, b) in conjunction with 18, 2, a), b) or c), 18, 6 and 18, 7 EU MLA Convention, the latter two paragraphs stipulating that the requested member state shall undertake to comply with an interception request 'where the requested measure would be taken by it in a similar national case', being allowed moreover to 'make its consent subject to any conditions which would have to be observed in a similar national case', and that it will consider the request for a transcription of the recording 'in accordance with its national law and procedures';
- *allowing an interception of telecommunications to be carried out or continued if the telecommunication address of the subject of the interception is being used on the territory of the requested/executing member state ('notified' member state) in case where no technical assistance from the latter is needed to carry out the interception* – this investigative measure is regulated in Art. 20, 2 in conjunction with 20, 4, a) EU MLA Convention, the latter paragraph stipulating under i)-iv) that the notified member state 'may make its consent subject to any conditions which would have to be observed in a similar national case', may require the interception not to be carried out or to be terminated 'where [it] would not be permissible pursuant to [its] national law', may in such cases require that any material already intercepted may not be used, or 'may only be used under conditions which it shall specify', or may require a short extension 'in order to carry out internal procedures under its national law';

- *monitoring of banking transactions* – this investigative measure is regulated in Art. 3 EU MLA Protocol, clarifying that the decision to monitor ‘shall be taken [...] by the competent authorities of the requested member state, with due regard for the national law of that member state’;
- *collecting and examining cellular material and supplying the DNA profile obtained* – this form of legal assistance is regulated in Art. 7 Prüm, stipulating under (3) that it can only be provided if, inter alia, ‘under the requested contracting party’s law, the requirements for collecting and examining cellular material and for supplying the DNA profile obtained are fulfilled’;

This reading of the articles clarifies why the investigative measures in this cluster were technically characterised as *“Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and which currently would only be taken/executed in accordance with/in the manner provided for in the national law (and procedures) of the requested/executing member state/member state on the territory of which the measure is to be taken/executed or under the condition(s) which would have to be observed in a similar national case in the latter member state”*.

Cluster 4

Cluster 4 deals with all investigative measures of which the requested/executing member state may under the current legal framework not make execution dependent on conditions of dual criminality, (dual) minimum threshold or consistency with national law, and for which the *forum regit actum* (FRA) rule applies.

Again, the investigative measures have been listed in an exhaustive fashion.

- *interception of telecommunications where the technical assistance of the requested/executing member state is needed to intercept the telecommunications of the subject of the interception (irrespective of whether the latter is present in the territory of the requesting/issuing member state or of a third member state) with immediate transmission* – this investigative measure is regulated in Art. 18, 1, a) in conjunction with 18, 2, a) or c) and 18, 5, a) EU MLA Convention, the latter paragraph stipulating that ‘the requested member state may allow the interception to proceed without further formality’;
- *transfer of detainees from the requested/executing to the requesting/issuing member state (provided the requested/executing member state may make*

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such transfer dependent on the consent of the person concerned) – this investigative measure is regulated in Article 11 ECMA, which does not allow for refusal of transfer referring to national law;

- *transfer of detainees from the requesting/issuing to the requested/executing member state (provided the requested/executing member state may make such transfer dependent on the consent of the person concerned)* – this investigative measure is regulated in Art. 9 EU MLA Convention, which neither foresees possible refusal of transfer referring to national law nor allows for entering reservations, to be read in conjunction with Article 25 of the same Convention, according to which member states may not enter reservations in respect of the Convention, other than those for which it makes express provision;
- *hearing under oath (of witnesses and experts)* – this investigative measure is regulated in Art. 12 ECMA, prescribing mandatory compliance by the requested party with such request unless its law prohibits it;
- *hearing by videoconference* – this investigative measure is regulated in Art. 10, 2 EU MLA Convention, pointing out that the requested member state shall agree to the hearing where this is not contrary to the fundamental principles of its law and on the condition that it has the technical means to carry out the hearing;
- *hearing by telephone conference (of witnesses or experts, only if these agree that the hearing takes place by that method)* – this investigative measure is regulated in Art. 11, 3 EU MLA Convention, pointing out that the requested member state shall agree to the hearing where this is not contrary to fundamental principles of its law.

This reading of the articles clarifies why the investigative measures in this cluster have been technically characterised as *“Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and the taking/execution of which the requested/executing member state/member state on the territory of which the measure is to be taken/executed may currently not make dependent on any condition of dual criminality, (dual) minimum threshold or consistency with its national law.”*

2.3.3 Analogy for measures currently not explicitly regulated

Besides the investigative measures that are explicitly regulated in any of the MLA legal instruments, there are a series of other measures which have currently not been explicitly regulated. Nevertheless, MLA requests for those measures are still possible, because member states have agreed in Art. 1 ECMA to afford each other *the widest possible measure of mutual assistance*. In today's

reality, a significant number of highly intrusive investigative measures is not explicitly regulated. Therefore, the importance of this article may not be underestimated.

Hence, it is important to once more highlight the consequences of replacing the MLA legal framework with a system of MR for explicitly regulated investigative measures only. The current practice of creating MR instruments is essentially one of repealing and thus replacing other instruments. Art. 31 EAW for instance, stipulates that without prejudice to their application in relations between member states and third states, the EAW shall replace the corresponding provisions of the listed conventions applicable in the field of extradition in relations between the member states. Amongst others, the Convention of 27 September 1996 relating to extradition between the member states of the EU²⁶ is listed. When the same approach would be applied to the domain of MLA, the flexibility of the "*widest possible measure*" referred to in Art. 1 ECMA would be lost.

Considering the amount of investigative measures that are currently not regulated it is clear that replacing the entirety of the current MLA regime with MR instruments must take into account the current practice of requesting investigative measures currently not regulated in any of the instruments. Losing the flexibility offered by Art. 1 ECMA would constitute an undesirable effect.

Because member states use the possibility enshrined in Art. 1 ECMA and request MLA for investigative measures not explicitly regulated and considering the risk of losing the flexibility of the MA system, it becomes very important to test whether these investigative measures could also be clustered and placed under a similar regime. Therefore, a series of investigative measures currently not explicitly regulated, was listed and divided into two categories, according to the likelihood member states would be inclined to attach a *locus* or *forum regit actum* rule to them, require or abandon the dual criminality, (dual) minimum threshold and consistency test.

²⁶ "Convention drawn up on the basis of Article K.3 of the Treaty on European Union, of 27 September 1996 relating to Extradition between the Member States of the European Union." OJ C 313 of 23.10.1996.

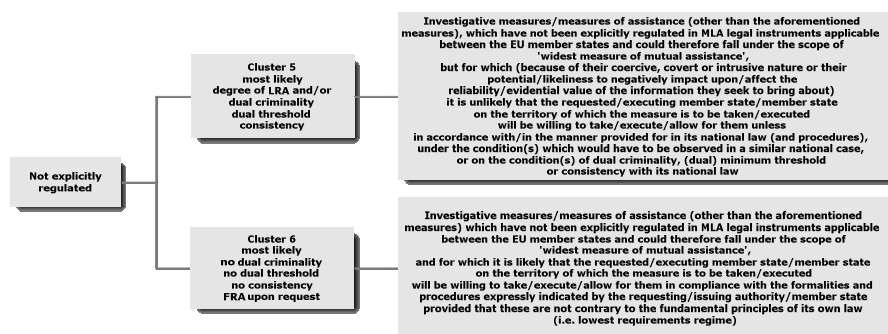


Figure 5. Clarifying clusters 5 and 6

Cluster 5

Cluster 5 encompasses a (non-limitative) series of intrusive investigative measures which are currently not explicitly regulated by any of the MLA legal instruments. Because of their intrusive character, it is deemed unlikely that requested member states will execute them unless execution will be in accordance with or in the manner provided for in its national law or under conditions of double criminality, double minimum threshold or consistency with its national law.

In the questionnaire a non-limitative list of potential measures falling in the scope of this cluster were listed:

- registration of incoming and outgoing telecommunication numbers
- interception of so-called direct communications
- obtaining communications data retained by providers of a publicly available electronic communications service or a public communications network
- withholding/intercepting of mail (and reading it)
- cooperation with regard to electronic communications (other than telecommunications) (registration of incoming and outgoing communications, interception etc)
- controlled delivery through the territory of the requested/executing member state (i.e. across its territory, the territory of destination of the delivery or where intervention is envisaged being another member state or a third state)
 - The inclusion of this investigative measure in this cluster might not be self-explanatory, as it may seem that it is regulated in the EU MLA Convention. Unlike in the corresponding provision of the 1997 Naples II Convention, however, the provision relating to controlled deliveries in the EU MLA Convention does not relate to transit controlled deliveries also, and is limited to controlled deliveries ‘on’ the territory of the requested member state.

- (cross-border) use of (police) informers and civilian infiltrators
- (cross-border) use of technical devices (camera, electronic/GPS tracking) for the purposes of observation
- entry of premises without consent in view of discrete visual control or search
- confidence buy (either or not including flash-roll)
- establishing front business
- (discrete) photo and video registration
- assistance in non-procedural protection of protected witnesses and their family members (direct and physical protection; placement of a detainee in a specialised and protected section of the prison; relocation for a short period; relocation for a longer or indefinite period; change of identity, including the concealment of certain personal data by the administrative authorities; lesser measures, techno-preventative in nature)
- carrying out bodily examinations or obtaining bodily material or biometric data directly from the body of any person, including the taking of fingerprints (other than collecting and examining cellular material and supplying the DNA profile obtained: *supra*)
- exhumation and transfer of the corpse
- (exhumation and) forensic anatomist investigation
- lie detection test (of a non-consenting witness or suspect)
- line-up (including of a suspect, not consenting to appear)

Cluster 6

Cluster 6 encompasses a (non-limitative) series of intrusive investigative measures which are currently not explicitly regulated by any of the MLA legal instruments. Because of their non-intrusive character, it is likely that requested member states will allow for them under the most lenient MLA regime, i.e. be willing to execute them in compliance with the formalities and procedures expressly indicated by the requesting member state, provided that these are not contrary to the fundamental principles of its own law.

In the questionnaire a non-limitative list of potential measures falling in the scope of this cluster were listed:

- conducting analysis of existing objects, documents or data
- conducting interviews or taking statements (other than from persons present during the execution of a European Evidence Warrant (EEW) and directly related to the subject thereof, in which case the relevant rules of the executing state applicable to national cases shall also be applicable in respect of the taking of such statements) or initiating other types of hearings involving

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suspects, witnesses, experts or any other party, other than under oath or by video or telephone conference (supra)

- reconstruction
- making of video or audio recordings of statements delivered in the requested/executing member state
- video conference hearing of accused persons
- video conference hearing of suspects

2.4 Recurring patterns

Having clustered the investigative measures into six clusters, the questions were linked to them.

The questions are all related either the MR of investigative measures or the free movement of evidence. Because the answers are likely to differ for each of the clusters, a recurring pattern was attached to the questions, as a result of which questions appear more than once in the questionnaire, be it for different clusters.

However, not all questions appear in each cluster. Considering that the aim of the study is to assess the feasibility to introduce MR characteristics in MLA to improve efficiency, the overall intention is not to make MLA more strict. This explains why not all questions appear in all clusters as they are meaningless or even fully counterproductive in some situations. The analysis in this report clarifies, where necessary, why certain questions were not asked for one or more cluster(s).

3 Mutual recognition of investigative measures

The first pillar of the study relates to the desirability and feasibility to introduce more MR characteristics into the current MLA environment and thus create a more MR-based MLA. To assess the political and practical support for a such future policy option, a general preliminary question was asked. It served as an introduction to the questionnaire but should also be seen as the justification for the entire study. More specifically, member states were asked to what extent they considered it to be the better future policy option for the EU to base the entirety of MLA as much as possible on a MR-based footing, as in the EEW Framework Decision. Such an option would replace the current dual-track system, which is likely to cause confusion among practitioners.

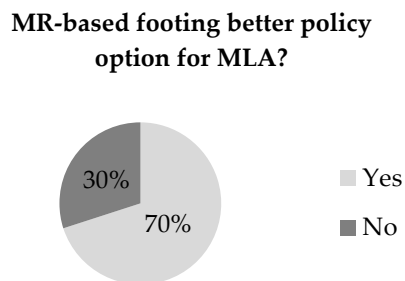


Figure 6. MR-based footing better policy option for MLA?

70% of the member states accept this “broadening” as future policy option, which shows the will of member states to go further than what the EEW provides for.

Subsequently, the hypothesis of cluster 2 was tested. Member states were asked whether they consider it to be an acceptable future policy option to broaden the application EEW to all forms of (house)search and seizure. Considering the responses to the introductory question and the general willingness to broaden the MR-basis in MLA it was only logical that 60% of the member states confirm the project hypothesis with regard to cluster 2.

**EEW regime for all
(house)search or seizure?**

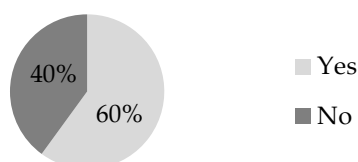


Figure 7. EEW regime for all (house)search or seizure?

Notwithstanding this acceptance to broaden the MR influence, it should be noted that it is impossible to replace the entirety of MLA with MR. Two pitfalls support this position. First, it is important to underline that not all forms of MLA can be replaced with an MR regime. The functioning and specific features of a joint investigation team for example are fully incompatible with the ordering and executing principles of MR. Second, replacing the entirety of MLA with an MR-based regime runs the risk of losing the flexibility offered by the MLA obligation to afford each other *the widest possible measure of assistance*. In today's reality, a significant number of highly intrusive investigative measures is not explicitly regulated. Hence the compilation of clusters 5 and 6.

Nevertheless, MLA for those investigative measures remains possible based on the obligation to afford each other *the widest possible measure of assistance*. Therefore, the importance of this article may not be underestimated. Future (MR-based) MLA instruments should either maintain this flexibility or regulate each and every possible investigative measure.

The biggest challenge to assess the extent to which an MR based MLA is desirable and feasible is the operationalisation of MR itself. Four main MR characteristics are singled out as the backbone of the study and the backbone of the structure of this report.

The first MR characteristic is the use of the 32 MR offences (to abandon the double criminality requirement).

The second MR characteristic relates to the enhanced stringency in cooperation. Introducing MR into MLA raises questions as to the feasibility of limiting the grounds for refusal. Linked to those grounds for refusal are the grounds for postponement and the impact such grounds have on the speed with which recognition takes place and execution is commenced.

The third MR characteristic relates to the shift from merely requesting to a regime in which orders are issued.

The fourth MR characteristic relates to the horizontalisation of cooperation.

The following sections reflect the analysis of these characteristics.

3.1 The 32 MR offences

The first MR characteristic singled out for this analysis is the list of 32 MR offences linked to the abandonment of the double criminality requirement.

Traditionally, MR is made dependent on *double criminality*.²⁷ It is safe to say that the more far-reaching MR is, the more far-reaching the double criminality requirement is likely to be.²⁸ This is of course closely linked to the rationale behind the introduction of the double criminality requirement: it is a protection mechanism which aims at preventing member states from being obliged to cooperate in the enforcement of a decision contrary to their own legal (and criminal policy) views.

However, recent evolutions reveal a tendency to abandon, either in full or partially, such double criminality requirement. The title of this section refers to the list of 32 offences for which some MR instruments abandon double criminality.

This study does not only assess these 32 MR offences in relation to the double criminality requirement. The study also looks into the future of those 32 MR offences in other domains. It is analysed whether there are other possible aspects to judicial cooperation for which the introduction of the 32 MR offences might have an added value.

²⁷ In the Framework decision on the European Arrest Warrant, it is required that the act constitutes an offence under the law of the executing member state, whatever the constituent elements or however it is described; In the Framework decision on the mutual recognition of confiscation orders, it is required that the act constitutes an offence which permits confiscation under the law of the executing state, whatever the constituent elements or however it is described under the law of the issuing state;

²⁸ DE BONDT, W. and VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. in COOLS, M. *Readings On Criminal Justice, Criminal Law & Policing*. Antwerp-Apeldoorn-Portland, Maklu. 4: 15-40.

3.1.1 *Erosion of the double criminality requirement*

Traditionally, the 32 MR offences are linked to the abandonment of the double criminality requirement. Notwithstanding the importance of the double criminality requirement, it is considered an obstacle for smooth cooperation. Member states looked into alternatives and the possibility to limit the use of the double criminality requirement.²⁹

The erosion of the double criminality requirement only became truly apparent with the adoption of the new MR instruments. Today, two tracks appear. The first consists of a partial abandonment of the double criminality requirement through incorporation of a list of offence types. The second consists of a general abandonment of the double criminality requirement, regardless of the offence types involved.

Partial abandonment: no double criminality for the listed offence (types)

A first appearance of the abandonment of the double criminality requirement can be found in the *offence lists* introduced in most mutual recognition instruments. A list of offence types is compiled for which double criminality will no longer be tested. In this report the list is referred to as *the 32 MR offences*.

The listed offences vary slightly across instruments. The list featuring in the 2005 FD on the MR of financial penalties³⁰ is unusually broad as it lists more specific offences³¹ and ends with the inclusion of “*all offences established by the issuing state and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty*”.³²

General abandonment: no double criminality what so ever

The second appearance of the abandonment of the double criminality requirement is not linked to offence types. The 2008 FD on the taking into account of prior convictions, does not feature a list at all.³³ Art. 3 stipulates that *a conviction* handed down in another member state shall be taken into account in

²⁹ Thomas, F. (1980). *De Europese rechtshulpverdragen in strafzaken*. Gent, Rijksuniversiteit te Gent.

³⁰ Council of the European Union (2008). "Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings." OJ L 220 of 15.08.2008.

³¹ That list includes all the offences on the equivalent EAW list, and makes a meaningful supplement considering the context of financial penalties by introducing *infringement of road traffic regulations, smuggling, intellectual property offences, threats and acts of violence against persons, criminal damage and theft*.

³² OJ L 78 of 22.3.2005.

³³ OJ L 220 of 15.8.2008

the course of new criminal proceedings. Legal effects equivalent to previous national convictions must be attached in accordance with national law. It is amazing that unanimity was found to demand MR of any conviction, which in practice includes the recognition of a conviction for behaviour not criminalised in own national criminal law provisions.

3.1.2 Future of 32 MR offences in MLA

In light of the abovementioned two tracks showing the erosion of the double criminality requirement identified in MR instruments, the member states were asked to what extent either partial or general abandonment of the double criminality requirement is considered an acceptable future policy option for the entire MLA environment.

However, this question does not appear for all six clusters. Considering the architecture of the questionnaire and the clustering of the investigative measures, these questions are not relevant for each of the six clusters. Clusters 1 and 2 are related to the EEW, which has a clear regime related to the double criminality requirement and the use of the 32 MR offences. Similarly the questions were not asked for clusters 4 and 6 because introducing a double criminality requirement for them would constitute a step back. Generally, the granting of traditional MLA does not depend on the condition of dual criminality. These two clusters were specifically designed to be composed of investigative measures for which it is either explicitly regulated or highly plausible that member states cannot make execution dependent on conditions of dual criminality, (dual) minimum threshold or consistency with national law. Therefore this set of questions only featured in clusters 3 and 5.

The future of the 32 MR offences was not only tested with regard to double criminality. The 32 MR offences proved to have significant potential to increase efficient cooperation in providing a framework for the abandonment of the double criminality requirement. Because of its potential, the question has already been raised whether there are alternative uses for the list. Today, one example can already be found. In its Art. 11, 3 the EEW requires member states to ensure that measures which would be available in a similar domestic case in the executing state are also available for the purpose of the execution of the EEW. Regardless of availability of measures for domestic cases, the EEW additionally requires measures, including (house)search or seizure, to be available for the purpose of executing an EEW which relates to acts included in the 32 MR offences.

Following the attempts to look into alternative uses for the 32 MR offences, the questionnaire looked into its added value with regard to three applications: limiting the possibility to require execution in consistency with the national law

of the executing member state, limiting refusal and postponement grounds and finally, ensuring admissibility of information/evidence.

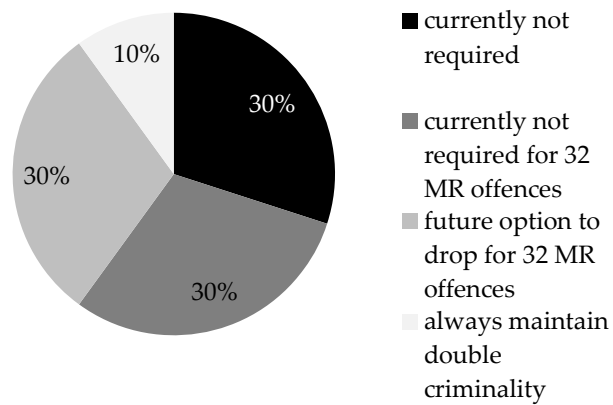
The following paragraphs present the empirical results of the study, starting off with the traditional link between the 32 MR offences and the double criminality requirement, before going into alternatives.

Abandoning the double criminality requirement

Considering the historic ties between the two concepts, the project team started off with an analysis of the link between the 32 MR offences and the abandonment of the double criminality requirement. Strikingly, only 10% of the member states indicated to attach great importance to a full fledged double criminality requirement for cluster 3 measures. This means that no less than 90% of the member states are willing to cooperate even if the investigative measure relates to acts which do not constitute an offence in their own national law. In current practice 60% of the member states do not even apply the double criminality requirement, even though they are allowed to do so. Considering that abandoning the double criminality requirement constitutes a significant improvement in terms of efficient cooperation, and considering that an additional 30% accept abandonment as a future policy, the future legal framework can no longer maintain the double criminality requirement.

With regard to the investigative measures included in cluster 5, member states are slightly more conservative which is of course linked to the more intrusive character of the measures concerned. Nevertheless, 70% of the member states accept the abandonment of the double criminality requirement as a future policy.

Double criminality in cluster 3



Double criminality in cluster 5

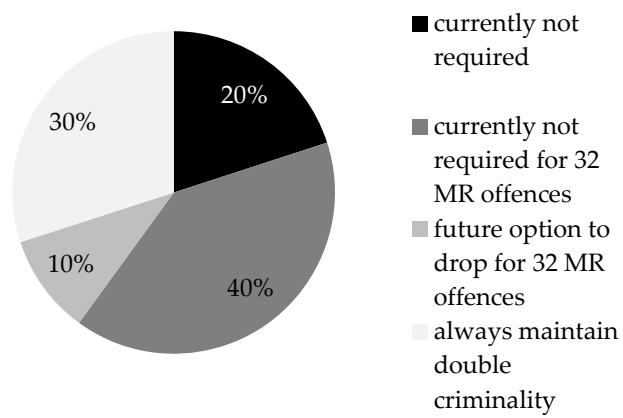


Figure 8. Future of 32 MR offences: Double criminality in clusters 3 and 5

Consistency issues

Secondly, the (future) link between the 32 MR offences and the execution in consistency with the national law of the executing member states was assessed. Several instruments allow the executing member state to require execution *in consistency with its national law*. Because such a requirement might hinder efficient cooperation, it is worth looking into the willingness of member states to waive this right when execution is related to acts included in the 32 MR offences. Member states were asked how they deal with a request for a measure which cannot be taken/ordered in a national case according to the national law of the executing state. Member states could indicate whether or not execution is possible and whether or not a link with any of the 32 MR offences makes a difference.

Analysis revealed that only 20% would never allow execution of a measure which cannot be taken/ordered in a national case according to their national law. No less than 80% of member states are either now executing or willing to accept a policy to oblige execution *if the acts concerned are included in the 32 MR offences*. Making reference to the 32 MR offences clearly results in a significant step forward to facilitate cooperation and execute foreign requests. This result undeniable proves that it is worth while looking into the added value an introduction of the 32 MR offences can have for the execution of requests of which execution is inconsistent with the law of the executing member state.

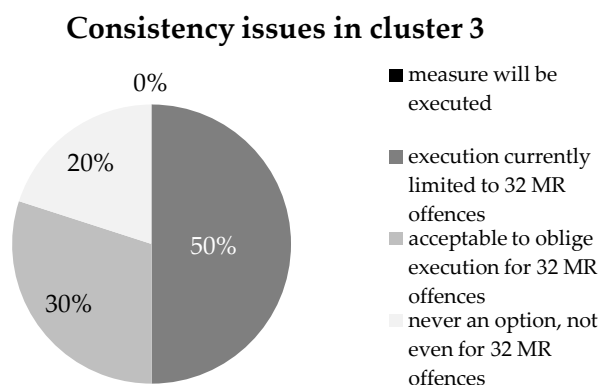


Figure 9. Future of 32 MR offences: Consistency issues in clusters 3

Consistency issues in cluster 5

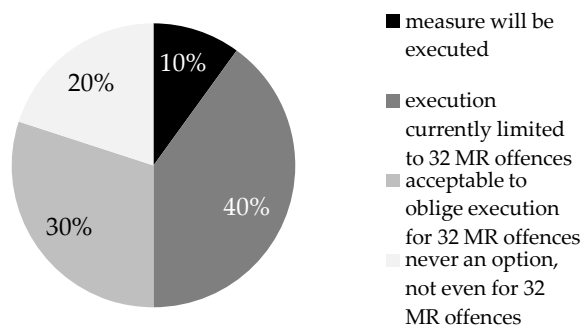


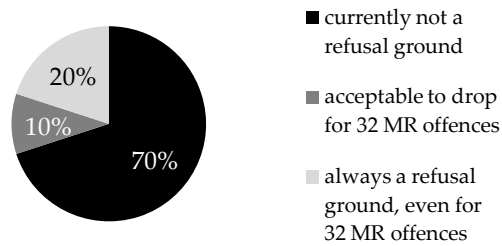
Figure 10. Future of 32 MR offences: Consistency issues in clusters 5

Grounds for refusal and ground for postponement

Thirdly, the (future) link between the 32 MR offences and the grounds for refusal and postponement was assessed. The questionnaire aimed at assessing the feasibility of limiting refusal and postponement grounds. The MR philosophy requires refusal and postponement grounds to be limited as much as possible. The question again rises whether the introduction of the 32 MR offences would have an added value. Analysis revealed that neither for operational, nor for financial capacity issues, the introduction of the 32 MR offences has added value, be it for different reasons.

Operational capacity is both used as a ground for refusal and as a ground for postponement. Considering that 70% of the member states indicated not to use operational capacity as a refusal ground, added value via introduction of the 32 MR offences can only be generated for the remaining 30%. Even though one third (for cluster 3) up to half (for cluster 5) of the remaining member states accepts removing the possibility to refuse when acts are included in the 32 MR offences list, the result would be rather marginal as only a small number of member states refuse to begin with.

Operational capacity as a refusal ground in cluster 3



Operational capacity as a refusal ground in cluster 5

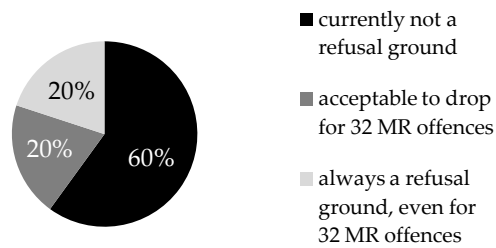


Figure 11. Future of 32 MR Offences: Operational capacity as a ground for refusal

In parallel, even though 50 to 60% of the member states do postpone execution, none or only 20% of the remaining member states are willing to accept the removing the possibility to postpone when acts are included in the 32 MR offences. In both cases the *netto* effect of an introduction would be marginal.

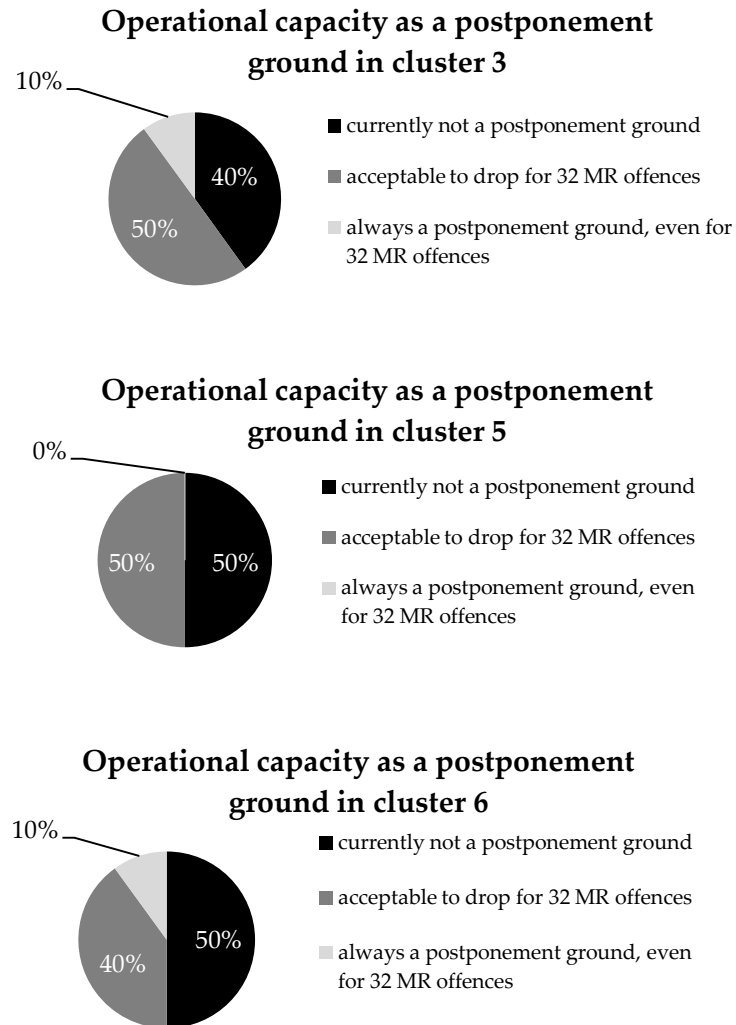
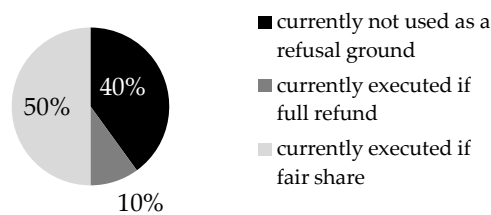


Figure 12. Future of 32 MR Offences: Operational capacity as a ground for postponement

Similarly, financial capacity as a refusal ground would not benefit from the introduction of the 32 MR offences. Analysis reveals that member states favour a system in which a fair share of the costs/expences would be borne/refunded by the requesting/issuing authority/member state over a regime in which execution would be obliged regardless of any form of sharing the financial burden.

**Financial capacity currently used
as a refusal ground in cluster 3**



**Financial capacity linked to 32
MR offences as a refusal ground
in cluster 3**

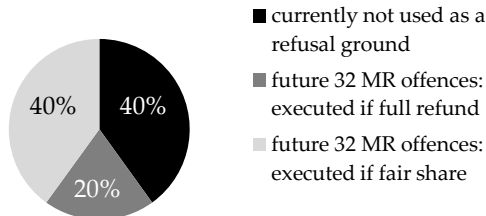
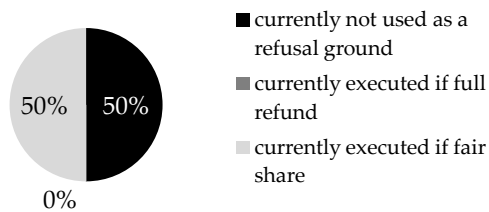


Figure 13. Future of 32 MR Offences: Financial capacity as a ground for refusal in cluster 3

**Financial capacity currently used
as a refusal ground in cluster 5**



**Financial capacity linked to 32 MR
offences as a refusal ground in
cluster 5**

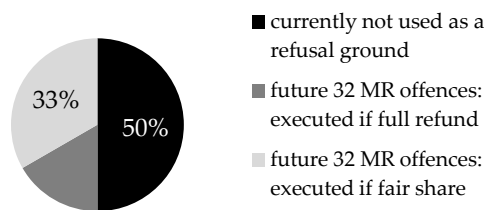
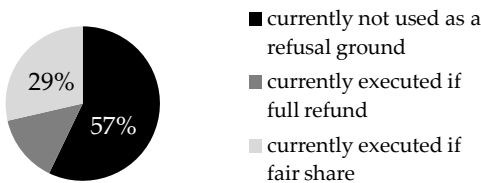


Figure 14. Future of 32 MR Offences: Financial capacity as a ground for refusal in cluster 5

**Financial capacity currently used
as a refusal ground in cluster 6**



**Financial capacity linked to 32 MR
offences as a refusal ground in
cluster 6**

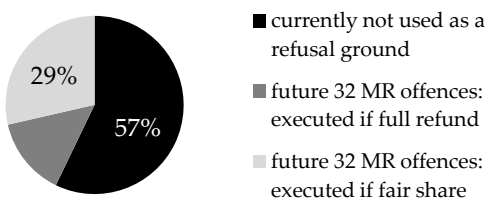


Figure 15. Future of 32 MR Offences: Financial capacity as a ground for refusal in cluster 6

Admissibility of evidence

Fourthly, the (future) link between the 32 MR offences and the admissibility of evidence was put to the test. The questionnaire aimed at assessing the added value of the 32 MR offences in the context of admissibility of evidence. Member states were asked whether they would consider it to be an acceptable future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute per se admissible evidence under the national law of the member states concerned. Only 10% considered this not to be an option. The other 90% do not require that such admissibility is limited to the 32 MR offences.

Similarly, member states were asked whether they would consider it to be an acceptable future policy option that competent authorities from other member states who are lawfully present on their territory in while executing a request/order/warrant (e.g. when seconded member of a joint investigation team operating on your territory, when present during a hearing or house search etc) draft official reports having the same probative value under your national law as if they had been drafted by your own competent authorities. 80% of the member states consider this to be an acceptable future policy and do not require this to be limited to the 32 MR offences.

Conclusion

It is safe to say that the introduction of the 32 MR offences in other areas than the abandonment of the double criminality requirement needs to be well considered. Whereas the introduction might seem a step forward, analysis clearly revealed that limiting such a step forward to the 32 MR offences, can actually hinder from taking an even bigger step forward. This view is shared by the Eurojust College. In their replies, it is clarified that in general, the taking of evidence should not be dependent on whether the underlying offence is one of the 32 MR offences set out in previous instruments of mutual recognition.

3.2 Enhanced stringency in cooperation

The second MR characteristic singled out for this analysis is the enhanced stringency in cooperation MR brings about. The well-known shift from *requesting* member state to *issuing* member state and from *requested* member state to *executing* member state is not merely symbolic in nature: the MR concept must turn traditional judicial cooperation – *in casu* MLA – into a more reliable and faster mechanism. This implies more stringency for the requested (now: *executing*) member state or authority, in that traditional grounds for refusal (now: *non-execution*) are reduced and requests (now: *orders to execute decisions*) must be replied to and effectively executed within strict deadlines.

Both the 2003 Freezing Order³⁴ and the 2008 EEW³⁵ reflect these characteristics, especially where it comes to enhanced speediness. A potential further roll-out of MR for the entirety of MLA requires a scrupulous and systematic assessment of traditional grounds for refusal (non-execution) in MLA (including the testing of new or amended non-execution grounds as they appear in the EEW in particular, of a new MR based non-execution ground in case of immunity from prosecution for the same facts in the executing member state and of the need for additional capacity-related refusal or non-execution grounds) as well as the feasibility of introducing strict reply and execution deadlines for the requested (executing) member state.

3.2.1 Grounds for refusal or non-execution

First, grounds for refusal and non-execution are assessed. In MR instruments designed until date, there has only been a reassessment of traditional substantive refusal grounds (even if, as will be explained hereafter, the systematic taking over of certain grounds of non-execution that had been inserted in the EAW, serving as the archetypical MR instrument, in other MR instruments, including the EEW, has prompted counterproductive effects).

Transposing MR to MLA altogether would however mean rendering the entirety of MLA more stringent, i.e. including when it comes to a variety of investigative measures that currently lack explicit regulation in MLA instruments but the taking of which could be asked for under the notion '*widest*

³⁴ Council of the European Union (2003). "Framework Decision of 22 July 2003 on the execution in the EU of orders freezing property or evidence." OJ L 196 of 2.8.2003.

³⁵ Council of the European Union (2008). "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" OJ L 350 of 30.12.2008.

measure of mutual assistance’ in Art. 1 ECMA, granting of the requested assistance then however being left to the full discretion of the requested member state. Introducing MR for these investigative measures (in our study comprised in clusters 5 and 6) would logically imply putting a stop to such discretion, and allowing for refusal or non-execution of the cluster 5 and 6 investigative measures for a limited set of reasons only – most likely mirroring the (revised) traditional grounds for refusal or non-execution. However, given the potential impact for the executing member state in executing the measures concerned (including e.g. special investigative measures as comprised in cluster 5), in that the implications thereof in terms of operational or financial capacity may be very substantial, the project team has chosen to not only test the position of member states vis-à-vis the (revised) traditional grounds for refusal or non-execution, but also to check the preparedness of member states to accept semi-mandatory execution of the measures under clusters 5 and 6 irrespective of their potential financial and operational capacity impact. Given that currently (in the EU MLA Convention) for two measures comprised in cluster 3, i.e. the interception of telecommunications and the video conference hearing, there is a reverse financial cost regulation in place (shifting the financial burden towards the requesting member state), the project team has chosen to revisit cluster 3 measures from the same perspective, in order to see whether member states in the mean time would be willing to step away from the reverse financial cost regulation, or – alternatively – would be in for a new financial regulation for considerable-cost measures. For the above reasons, a distinction is implemented below between *substantive* and *capacity* refusal or non-execution grounds.

Worth mentioning, finally, is that the project team has chosen to also test support among member states for an additional substantive ground for refusal or non-execution, which it believes logically should be introduced from an MR-perspective. It relates to the situation where the proceedings in the issuing member state relate to a person who the executing member state has granted immunity from prosecution for the same facts as a benefit for his or her collaboration with justice.

Substantive grounds for refusal or non-execution

Ne bis in idem

The first substantive ground for refusal or non-execution is the *ne bis in idem* principle. *Ne bis in idem* is a fundamental legal principle which is enshrined in most legal systems, according to which a person cannot be prosecuted more than once for the same act (or facts). It is also found in regional and international instruments, particularly in Art. 4 of the 7th Protocol to the ECHR of 22 November 1984 and in Art. 14(7) of the International Covenant on Civil and

Political Rights of 19 December 1966. However, under these international provisions the principle only applies on the national level, i.e. prohibits a new prosecution under the jurisdiction of a single state. These instruments make the principle binding in the state where a final judgment has been passed, but do not prevent other states from launching further proceedings for the same facts/offence.

In the past (too) little significance has been assigned to the *ne bis in idem* principle in the field of MLA in terms of treaty law. The ECMA itself does not recognise the principle. Therefore it does not come as a surprise that quite some contracting parties have taken the initiative themselves, and have reserved the right, in a reservation to Art. 2 ECMA, not to meet a request for legal assistance with regard to a prosecution or proceedings which is irreconcilable with the *ne bis in idem* principle. Still, notwithstanding the international connotation these reservations attach to the *ne bis in idem* principle, this approach does not anticipate problems caused by the fact that the interpretation of the principle differs significantly from country to country. In a strict sense, the *ne bis in idem* principle should prevent legal assistance from being granted for the prosecution or conviction of a person who has already been the subject of a final judgement in his own country (or in a third state). Traditionally, there is the additional condition that the person concerned was acquitted in the judgement that was passed, or that, in the case of a conviction, no sanction was imposed, the sanction had been executed, is still being executed, or can no longer be executed, according to the law of the convicting state (because it has lapsed, a pardon has been granted, or there has been an amnesty). In a wider sense, the principle can also be invoked as an obstacle to granting legal assistance with regard to acts for which the proceedings have already been instituted in the country of the person concerned (or in a third state). Finally, the *ne bis in idem* effect can also be assigned to decisions of the requested (or a third) state, to stop the proceedings or even decide not to institute proceedings with regard to the acts for which the legal assistance has been requested (no grounds for proceedings or dismissal).

Despite the non-recognition of the *ne bis in idem* principle in the ECMA – which should still be seen as the international common law for European MLA in criminal matters – it must be recalled that also the member states which did not formulate any reservation regarding the *ne bis in idem* principle to Art. 2 ECMA, have all joined the Schengen group, and are as such all obliged to observe the *ne bis in idem* principle in assessing the desirability of instituting or continuing proceedings. Chapter 3 of the SIC (Art. 54 to 58, the text of which was taken from a the Convention between the Member states of the European Communities on Double Jeopardy signed in Brussels on 25 May 1987) – which in the mean time has been formally integrated into the EU *acquis* as part of the Schengen *acquis* – deals with the application of an EU wide *ne bis in idem* principle. In contrast to other international instruments, which only provide for

the applicability of the *ne bis in idem* at national level (application of the rule in the legal order of a state for convictions/acquittals delivered in the legal order of that state), the SIC applies the principle of *ne bis in idem* between EU member states on a trans-national level. In other words, the SIC incorporates to the national legal order of the member states a *ne bis in idem* principle which can result from convictions and acquittals, (or for other “final decisions” in general) which have been handed down in other EU member states. In its path breaking judgment of 11 February 2003 (Gözütok/Brügge, Joined Cases C-187/01 and C-385/01), the ECJ developed important guidelines for the interpretation of the SIC, which must be the guiding principles to any further steps by the EU legislator as regards enhancing the principle of *ne bis in idem* among the EU member states from a MR perspective. Even though the Schengen provisions do not formally prevent the granting of legal assistance, it is obviously difficult from a logical point of view to (have to) take into account the *ne bis in idem* principle for the instituting the criminal proceedings in one’s own member state, on the one hand, while not (having to) do so with regard to taking a decision about whether or not to cooperate in implementing proceedings in another member state, on the other hand. It must be seen as a missed opportunity that this imbalance has not been removed with the introduction of an imperative *ne bis in idem* exception in establishing the EU MLA Convention in 2000 and the EU MLA Protocol thereto in 2001.

It should be applauded that the *ne bis in idem* principle as a ground for refusal found its way from formerly applicable extradition instruments between the member states into the EAW as a ground for non-execution and later – due to the archetypical character attributed to the EAW when it comes to shaping new MR instruments – has been copied into further MR instruments, including in the EEW. From the perspective that MR must reduce traditional grounds for refusal, that was a step backwards compared to traditional MLA, where, as was explained above, the principle does not appear as a ground for refusal in the ECMA, the EU MLA Convention or the Protocol thereto. However, from an emancipatory perspective, and in line with the MR Strategy of November 2000, which had pointed out the importance of a further roll-out of the *ne bis in idem* principle between the member states, the ‘accidental’ copying of the corresponding ground for non-execution from EU surrender law to the sphere of MLA must be welcomed. It is only logical therefore that a further introduction of MR throughout the sphere of MLA, irrespective of the cluster concerned, must follow the line of the EEW, turning the *ne bis in idem* principle into (at least an optional) ground for non-execution.

This hypothesis has been tested both for the application sphere of the EEW (cluster 1), where the EU has already chosen to introduce a *ne bis in idem* ground for non-execution, and for all other cooperation clusters, for which the current cooperation instruments do not foresee such refusal ground (except cluster 2,

which should logically follow the cluster 1 regime, and cluster 4, where the project team assessed that it could definitely be introduced in case introduction of it in the clusters 3, 5 and 6 would not be opposed by member states). The results are clear: the vast majority of member states indicates that execution on the basis of *ne bis in idem* would be refused, or that it should be possible to refuse execution on the basis of it. The overall recommendation therefore must be that the *ne bis in idem* principle should be enshrined throughout future (MR-based) MLA instruments between the member states as (at least an optional) ground for refusal or non-execution.

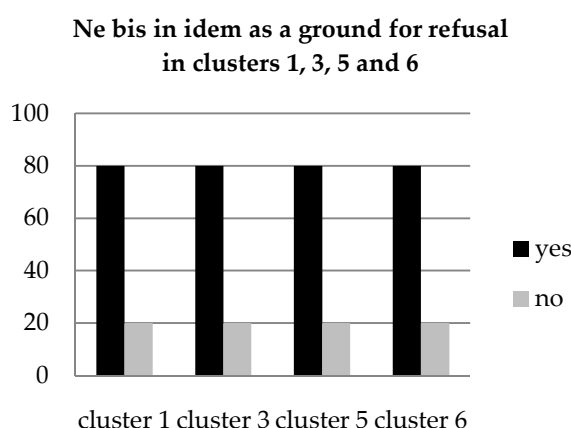


Figure 16. Ne bis in idem as a ground for refusal in clusters 1, 3, 5 and 6

Immunity from prosecution for the same facts

The second substantive ground for refusal or non-execution is *immunity from prosecution for the same facts*. Linked to the *ne bis in idem* principle – and as already mentioned above – the project team has chosen to also test support among member states for the introduction of an additional substantive ground for refusal or non-execution, i.e. the situation where the proceedings in the issuing member state relate to a person who the executing member state has granted immunity from prosecution for the same facts as a benefit for his or her collaboration with justice, which it believes logically should be introduced from an MR-perspective.

The importance of taking EU legislative initiative in the sphere of (international cooperation relating to) protection of witnesses and collaborators with justice was underlined in Recommendation 25 of the 2000 Millennium

Strategy³⁶. The importance of MR of immunities granted to collaborators with justice was already argued in the final report of the 2004 study on EU standards in witness protection and collaboration with justice, conducted by IRCP,³⁷ as a logical complement or extension of the *ne bis in idem* philosophy underlying the Gözütok/Brügge ECJ jurisprudence referred to above. In line with the transposition of the Schengen *ne bis in idem* *acquis* into a ground for refusal or non-execution in the sphere of MLA, the project team therefore believes an analogue approach should be followed with regard to immunity from prosecution for the same facts.

Even though wholly new as a suggested ground for refusal or non-execution, support among member states for its introduction is strikingly high. Being at 70% for the EEW cluster (and logically therefore also for cluster 2), support among member states even amounts to 80% for all other clusters. It is therefore recommended to introduce the newly suggested (optional) ground for refusal or non-execution throughout future (MR-based) MLA instruments between the member states.

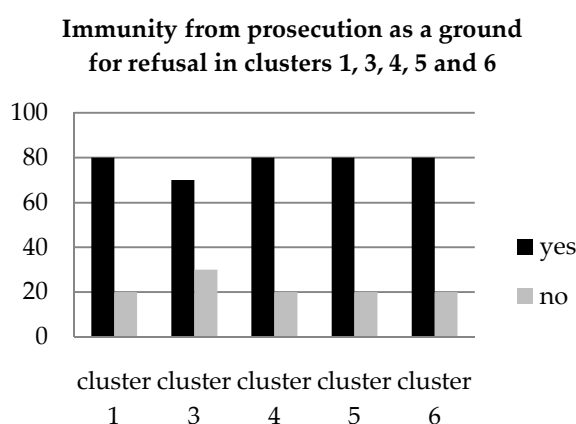


Figure 17. Immunity from presecution as a ground for refusal for clusters 1, 3, 4, 5 and 6

³⁶ European Council (2000). "The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium." OJ C 124 of 3.5.2000.

³⁷ G. Vermeulen (ed.), *EU standards in witness protection and collaboration with justice*, 2005, Antwerp-Apeldoorn, Maklu, 256, where – in the context of a draft framework decision on collaborators with justice the adoption is suggested of – the following text of a provision on 'Mutual recognition' (Article 11) is proposed: 'A collaborator with justice who has been granted immunity from prosecution in accordance with Article [...] in one member state, may not be prosecuted by another member state for the offences for which he has been granted immunity from prosecution [...]'.

Lack of double criminality

The third substantive ground for refusal or non-execution is *lack of double criminality*. It has already been pointed out above that the granting of traditional MLA generically does not depend on the condition of double criminality, and that the possibility of refusal on the basis of lack of double criminality is limited to a series of coercive or potentially intrusive investigative measures only. Currently that is the case for (house)search or seizure (cluster 2 and, the case being, cluster 1) and for the investigative measures comprised in cluster 3. As for cluster 1 measures, within the sphere of the EEW, Art 13, 1, b EEW has already introduced a prohibition to raise lack of double criminality as a ground for non-execution for the 32 MR offences and, where execution of an EEW would not require search or seizure, also for other offences. The project team has logically taken the position that the same approach can be introduced for (house)search or seizure measures under cluster 2, with the effect that double criminality should no longer be a ground for non-execution for any of the 32 MR offences. The results of testing that hypothesis have been described above, not only for cluster 1-2 measures, but in general. For cluster 4 measures a double criminality test is currently prohibited in MLA (so that testing its reduction to other offences than the 32 MR offences is pointless). By analogy, the project team believes it should be altogether prohibited for cluster 6 measures too (for which, logically, the 32 MR offences scenario has not been tested either). For cluster 5 one obviously does not know, even though – by analogy – it seems logical that member states would definitely require double criminality for cluster 5 measures if they choose to retain the principle for cluster 3 measures.

The project team has therefore tested whether member states would refuse execution of cluster 3 and 5 measures in case of lack of double criminality, or would want to be able to refuse execution on that basis. As shown below, only 30% respectively 20% of the member states would not (insist to have the possibility to) invoke lack of double criminality as a ground for non-execution. Hence, complete removal of double criminality as a refusal or non-execution ground for cluster 3 and 5 measures is illusionary. The Eurojust College, in its reply, has taken firm position along the same lines: ‘Member states should have the possibility to make the *taking of evidence which would involve the use of coercive measures [...] subject to the condition of dual criminality*’. As was shown above, however, the potential of introducing a prohibition to invoke it for the 32 MR offences in these cases is far more promising.

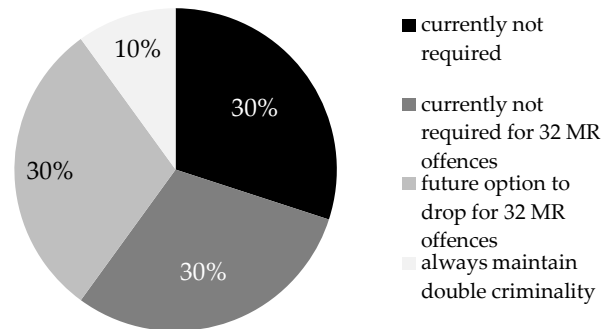
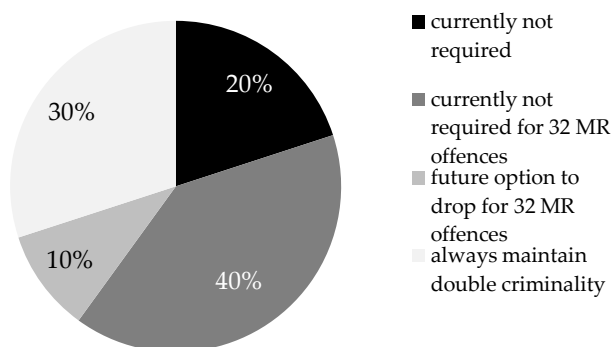
Double criminality in cluster 3**Double criminality in cluster 5**

Figure 18. Double criminality in clusters 3 and 5

Impossibility to execute

The fourth substantive ground for refusal or non-execution is the *impossibility to execute* the investigative measure. Art. 13, 1, c EEW stipulates that recognition or execution of an EEW may be refused in the executing member state if it is not possible to execute it by any of the measures available to the executing authority in the specific case in accordance with Art. 11(3). This article in turn states that each member state shall ensure: (i) that any measures which would be available in a similar domestic case in the executing state are also available for the purpose

of the execution of the EEW; and (ii) that measures, including search or seizure, are available for the purpose of the execution of the EEW where it is related to any of the offences as set out in Art. 14(2) – which are the 32 MR offences excluded from verification of double criminality.

This non-execution ground is EEW-specific, and is inexistent under current MLA instruments. The reason it has been introduced for the EEW is that issuing the latter is intrinsically result-oriented (obtaining objects, documents or data), leaving the executing member state discretion in choosing the investigative measures or steps necessary to that end and available to it within the limits of its national law. Consequently, if no measures are available to it under its national law, execution is impossible, so that execution of an EEW should obviously be refusable. Introducing such ground for refusal or non-execution for other forms of MLA than in the sphere of the EEW (cluster 1) would be a step backwards, and moreover pointless, as all other clusters comprise investigative measures as such (i.e. means that could lead to results instead of result-oriented orders). Hence, the extent to which the project team has tested the continued relevance for the future of the ‘impossibility to execute’ ground for non-execution was therefore necessarily limited to cluster 1, whereby it should also be firmly stated that, unlike for other aspects, the cluster 1 regime should not be copied to cluster 2 measures when it comes to retaining or introducing the ground for non-execution at stake.

Asked whether they would refuse execution of an EEW (or would want to be able to refuse it) if it is not possible to execute it by any of the measures which would be available to them in a similar domestic case (provided that for the 32 MR offences it must be ensured that there are measures, including search and seizure, available for the purpose of its execution, the majority of member states answered affirmatively. Both for theoretical reasons and on the basis of the empirical research among member states, it is therefore recommended to retain the ground for non-execution for cluster 1 (EEW), recalling that it should obviously not be introduced for any other cluster, not even cluster 2.

**Impossibility to execute as a
ground for refusal in cluster 1**

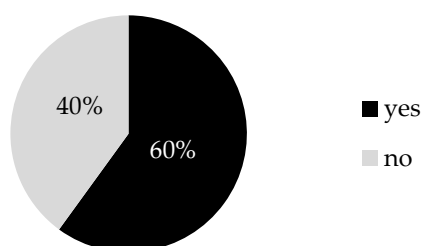


Figure 19. Impossibility to execute as a ground for refusal in cluster 1

Immunity or privilege under national law

The fifth substantive ground for refusal or non-execution is the presence of *immunity or privilege under national law*. Art.13, 1, d EEW, as Art. 7, 1, (b) of the 2003 Freezing Order, has explicitly introduced as a non-execution ground the circumstance where there is an immunity or privilege under the law of the executing member state which makes it impossible to execute the EEW or respectively freezing order. Even if there is no common definition of what constitutes an immunity or privilege in the EU and the precise definition of these terms is therefore left to national law, it is important to remember that the introduction of this ground for refusal or non-execution is a step backwards, compared to traditional MLA, and should therefore, from an MR perspective, definitely not be rolled out over the entirety of MLA. On the contrary, the project team proposes its deletion even for the sphere of the EEW (cluster 1) and the freezing of evidence. The reason is simple: progress in MLA is incompatible with the introduction of new non-MR-based grounds for refusal or non-execution. Moreover, it should be recalled that the insertion in the EEW and the 2003 Freezing Order of 'immunity or privilege under national law' as a ground for non-execution is the mere result of mainstream copying through of non-execution grounds from the EAW, erroneously considered to be the archetypical standard to which all later MR instruments must be modelled. It is relevant here to also recall that the ground for non-execution concerned has been inserted in the EAW (it was inexistent in former extradition law) during the December 2001 negotiations on the instrument for the sole reason of convincing Italy (which did not want to run the risk that Italians under a national (political) immunity or

privilege would become surrenderable under the EAW, Italy not having ratified the 1996 EU Extradition Convention³⁸, which, in the relationship between the other then member states had already introduced the principle of extradition of own nationals) and thus reaching unanimous support for adoption of the EAW. Whilst it should already be pitied that this was the price to be paid for reaching consensus at the level of the JHA Council on the EAW, there was clearly no good reason to simply copy the ground for non-execution into the sphere of MLA by introducing it in the EEW or the Freezing Order, for the effect of execution would not come close to surrender, as in the case of the EAW.

Surprisingly, when tested for the clusters 1, 3 and 5, as shown below, there is significant support among member states for keeping (cluster 1) or even introducing (clusters 3 and 5) the ground for non-execution concerned. Notwithstanding this empirical result, the project team strongly suggests redeliberation on the issue, for objectively it would be a step backwards to keep or further introduce the ground for non-execution throughout future (MR based) MLA.

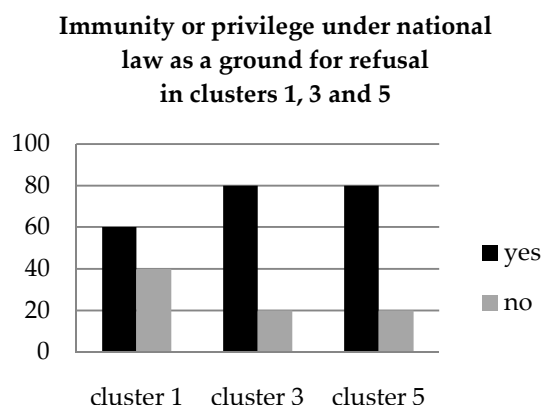


Figure 20. Immunity or privilege under national law as a ground for refusal in clusters 1, 3 and 5

³⁸ "Convention drawn up on the basis of Article K.3 of the Treaty on European Union, of 27 September 1996 relating to Extradition between the Member States of the European Union." OJ C 313 of 23.10.1996.

(Extra)territoriality principle

The sixth substantive ground for refusal or non-execution is the *(extra)territoriality principle*. Art 13, 1, f EEW states that recognition or execution of an EEW may be refused in the executing state if the EEW relates to criminal offences which: (i) 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 (ii) were committed outside the territory of the requesting 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.

This ground for non-execution ground has equally been copied from the EAW. In extradition law, this refusal ground has always taken a prominent place. However, copying it into an MLA instrument seems a mistake, and is regrettable. Extradition and surrender law cannot be simply assimilated with MLA. The project team therefore opposes introduction of it in future (MR based) MLA instruments, and deletion of it even for cluster 1 (EEW). When asked to what extent they used or felt should be able to use the (extra)territoriality rule as a refusal or non-execution ground for the coercive or intrusive measures of clusters 1, 3 and 5, only a small fraction of member states answered affirmatively. This strengthens the call for non-introduction of this non-execution ground in the sphere of MLA and for disposing of it for the EEW.

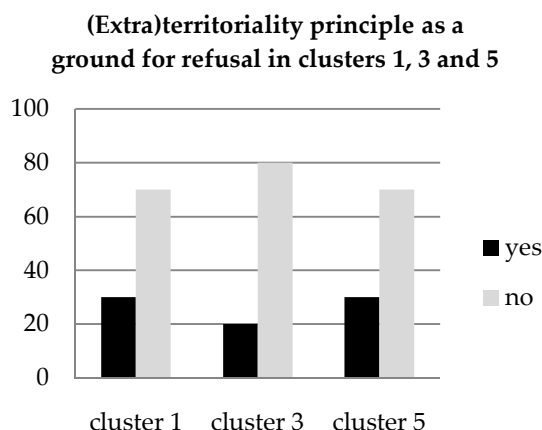


Figure 21. (Extra)territoriality principle as a ground for refusal in clusters 1, 3 and 5

Essential national security, classified information and *ordre public*

The seventh substantive ground for refusal or non-execution is the *essential national security, classified information and ordre public*. As a general provision, the ECMA states in Art. 2, (b) that assistance may be refused if the requested party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country. Neither in the EU MLA Convention, in the 2001 Protocol to it or in the 2003 Freezing Order, this traditional *ordre public* refusal ground has been reduced in scope.

In the EEW, it has been successfully reduced in scope, and moreover finetuned in relevance to documents and data in particular. Art. 13, 1, g EEW stipulates that if, in a specific case, the execution of an 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, recognition or execution of the EEW may be refused in the executing state. According to the preamble to the EEW, however, it is accepted that such ground for non-execution may be invoked only where, and to the extent that, the objects, documents or data would for those reasons neither be used as evidence in a similar domestic case. Through the latter interpretation, the traditional *ordre public* exception has lost the traditional inter-state dimension it has always had in judicial cooperation in criminal matters. The new rationale seems to lay in the protection of national security interests and (classified) (state) intelligence against interference or unwanted disclosure through criminal investigations (irrespective whether these are domestic or foreign investigations), and no longer against other member states as such. The project team considers this as genuine progress, and theoretically supports extending such reduction throughout future (MR based) MLA between the member states, i.e. for all clusters.

That is why, alongside with assessing continued support for the traditional *ordre public* exception in clusters 3-6 (not for cluster 1, the reduced formula having been introduced there, nor for cluster 2, which will likely follow the EEW regime), the relevance of the reduced national interest formula as embedded in the EEW has been tested for all clusters (i.e. 1, 3, 4, 5 and 6).

As shown immediately hereafter, member state support for keeping the traditional *ordre public* exception in place for clusters 3-6, is total.

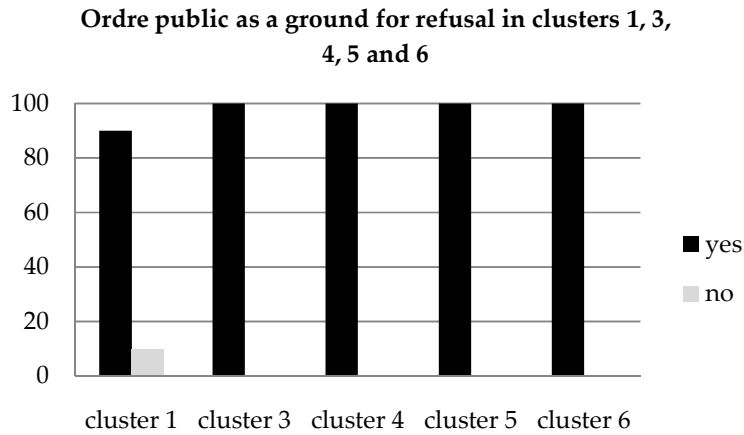


Figure 22. Ordre public as a ground for refusal in clusters 1, 3, 4, 5 and 6

As explained before, and notwithstanding the empirical results shown above, the project team sees no reason for keeping the traditional *ordre public* exception in place, as apparently the member states have already generically agreed to a more limited approach along the lines of the EEW formulation of it. Support for the new formula, as shown below, varies from 80% (clusters 3-6) to 90%, the potential of which to replace the traditional *ordre public* exception is thereby convincingly proven.

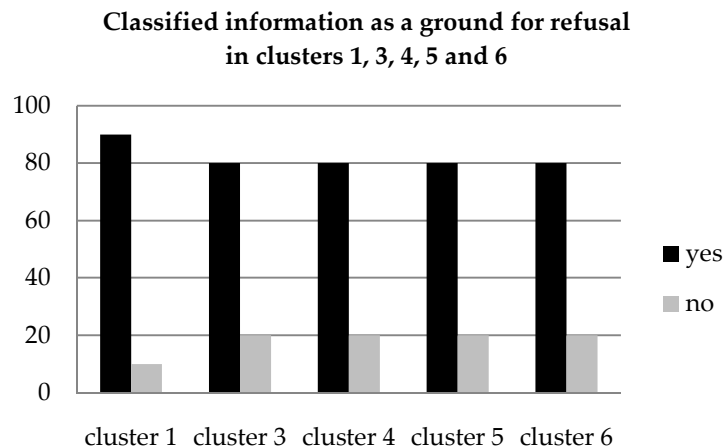


Figure 23. Classified information as a ground for refusal in clusters 1, 3, 4, 5 and 6

If it would be felt that the latter suggestion, i.e. to generically reduce the *ordre public* exception to a national interest exception (EEW style) that could be invoked only where it would also be invoked in a mere domestic context, would not be feasible after all (which the project team would find illogical), its is suggested to at least consider reducing it in the sense of the Dutch-German 'Wittem' Convention of 30 August 1979, concluded to supplement the ECMA.³⁹ According to Art. III. 2 of this Convention, MLA in the cases of Art. 2, (b) of the ECMA, is granted 'if possible, imposing conditions, if this can avoid affecting the interests of the requested state'. Such provision entails an obligation to make this effort with regard to the requested/executing member state, to try and find a solution, which also complies with the wishes of the requesting/issuing member state, even in those cases in which guaranteeing its essential interests is at stake. It would definitely render MLA between the member states more effective.

Political offences

The eighth substantive ground for refusal or non-execution are the *political offences*. The possibility to refuse cooperation referring to the political offence exception has for long held an important position in cooperation instruments. Today this position cannot be maintained any longer for two main reasons. First, for reasons of internal consistency in the legislative framework it is advised to ban the political offence exception altogether. Second it should be noted that calling upon the political offence exception is a clear sign of distrust with regard to the requesting member state, which is odd having explicitly expressed confidence in the structure and operation of the legal systems of the other member states and confidence in the capacity of all the member states to ensure just legal procedures in the preamble to the TEU. The following paragraphs will clarify the rationale underlying this twofold argumentation.

First, the political offence exception can no longer be maintained for reasons of internal consistency. Traditionally, extradition provisions were more strict than less invasive MLA provisions. Therefore, traditionally, the political offence exception was a mandatory ground for refusal in extradition treaties, where it was only an optional ground for refusal in MLA. Therefore it is no surprise that Art. 2 (a) ECMA stipulates that legal assistance can be refused if the request relates to criminal acts which are considered by the requested party to be a political offence, or an act related to such an offence.

The strict application of the political offence exception in extradition law was left in 1996. In light of the common commitment to prevent and combat terrorism, the EU Extradition Convention prescribed as a general principle that

³⁹ "Overeenkomst tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland betreffende de aanvulling en het vergemakkelijken van de toepassing van het Europees Verdrag betreffende uitlevering van 13 december 1957." Wittem 30.8.1979.

for the purposes of applying the EU Extradition Convention, no offence may be regarded by the requested member state as a political offence, as an offence connected with a political offence or an offence inspired by political motives. However, the provision concerned continued and in doing so eroded that general principle, by allowing member states to declare only to apply the general rule with regard to terrorist offences. In practice extradition could no longer be refused for terrorist offences, which constituted a significant simplification of the regime. Considering that MLA is traditionally more lenient and less strict in the application of refusal grounds, it would only have been logical that in the EU MLA Convention the possibility to use the political offence exception as a refusal ground in MLA would have been reduced to the same extent. It was not until the adoption of the 2001 Protocol thereto, that the restriction inscribed in the 1996 EU Extradition Convention found its way into MLA.

Meanwhile, the provisions with regard to extradition have been replaced by the regime installed by the EAW. Interestingly, in the EAW, the political offence exception has been banned altogether, without any form of clarification. Again referring to the traditionally more lenient cooperation for MLA, it is only logical that such general abolition is copied into the MLA regime.

Second, calling upon the political offence exception is a sign of distrust with regard to the requesting/issuing member state, so that it seems virtually out of the question that the possibility of refusal will be used in the EU.

Even though logically the chances for the ground for refusal for political offences to be called upon in (MR based) MLA between the member states are expected to be minimal, still a surprising 70-80% of the member states have indicated continued support for the exception (clusters 3-6; for clusters 1-2, the question was not raised, as the member states have already accepted abolition of the exception in the EEW sphere (cluster 1), and should logically be willing to also do so for cluster 2). It seems to the project team that member states' positions lack behind reality itself, for they have accepted abolition of the exception altogether for extradition/surrender law and the EEW sphere already.

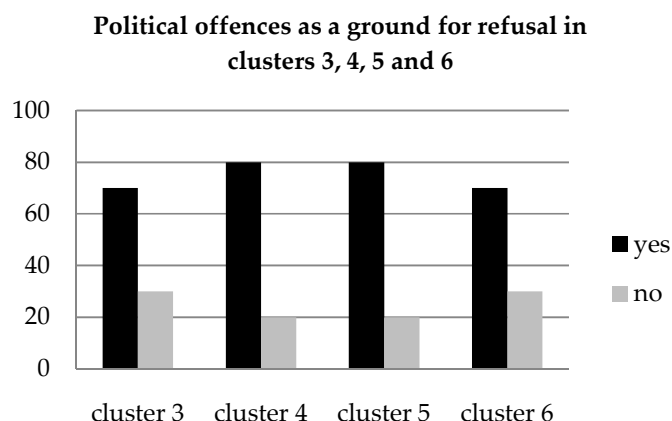


Figure 24. Political offences as a ground for refusal in clusters 3, 4, 5 and 6

Fiscal offences

The ninth and final substantive ground for refusal or non-execution is the *fiscal offence exception*. Given that support for a continued double criminality rule in the clusters 1, 2, 3 and 5 is low, and that at least it can be recommended to reduce the relevance of that rule to other than the 32 MR offences, it seems clear that the fiscal offence exception, which has already been drastically reduced in scope in the 2001 EU MLA Protocol, (*acquis* that has been copied into Art. 14, 3, 2 EEW, combined with a restriction to (house)search and seizure for other offences than the 32 MR offences), has no real future any more. At least, its reduction along the lines of the EEW can be recommended throughout future (MR based) MLA between the member states. As shown below, however, 60% (clusters 4-6) to 70% (cluster 3) of the member states do no longer insist that there be a fiscal offence exception altogether.

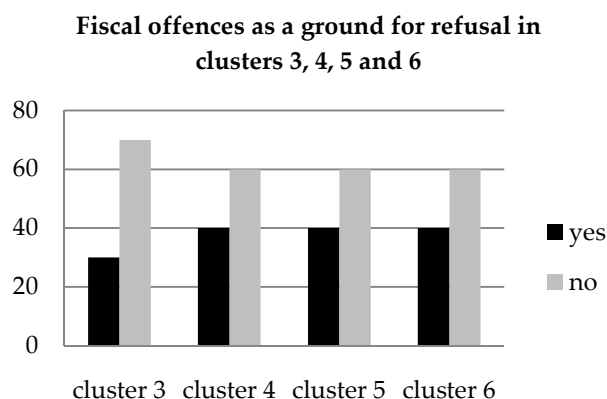


Figure 25. Fiscal offences as a ground for refusal in clusters 3, 4, 5 and 6

Capacity refusal or non-execution grounds

As already explained above, the potential implications in terms of operational or financial capacity for the executing member state in executing under a stringent MR regime investigative measures that currently lack an explicit regulation (clusters 6 and 5, comprising a.o. special investigative measures) may be very substantial. The project team has therefore chosen to not only test the position of member states *vis-à-vis* the (revised) traditional grounds for refusal or non-execution (*supra*), but also to check the preparedness of member states to accept semi-mandatory execution of the measures under clusters 5 and 6 irrespective of their potential financial and operational capacity impact. Given that currently (in the EU MLA Convention) for two measures comprised in cluster 3, i.e. the interception of telecommunications and the video conference hearing, there is a reverse financial cost regulation in place (shifting the financial burden towards the requesting member state), the project team has chosen to revisit cluster 3 measures from the same perspective, in order to see whether member states in the mean time would be willing to step away from the reverse financial cost regulation, or – alternatively – would be in for a new financial regulation for considerable-cost measures.

Financial respectively *operational* capacity refusal or non-recognition grounds pass in review hereafter.

Financial capacity as a ground for refusal or non-execution

Firstly, financial capacity as a ground for refusal or non-execution is analysed. None of the current MLA instruments explicitly provide for a general refusal ground for reasons of financial capacity. Still, reference to the 2001 ECMA Protocol and to EU MLA Convention is relevant. Art. 5 ECMA Second Protocol states that parties shall not claim from each other the refund of any costs resulting from the application of the ECMA or its Protocols. The article further provides for some specific exceptions to the general rule of 'the executing member state pays'. Particularly noteworthy as an exception to the general rule is that costs of substantial or extraordinary nature in the execution of requests for MLA may be claimed back. In the EU MLA Convention reference is made to financial capacity and financial implications of MLA in two specific articles, relating respectively to refunding (which may be waived) of certain costs that the execution of requests for hearings by video conference can entail (Article 10, 7) and the mandatory payment by the requesting member state of telecommunication interception costs (Article 21).

Another relevant example of an EU judicial cooperation instrument – be it from the non-MLA sphere – that pays attention to the financial implications of executing requests is the 2006 framework decision on the application of the principle of MR to confiscation orders.⁴⁰ Its purpose is to establish the rules under which a member state shall recognize and execute confiscation orders, issued by a criminal court of another member state, in its territory. The most interesting article for the analysis of monetary consequences of the execution of MLA requests or orders, is Article 16 of the MR instrument. It has introduced the splitting of revenues from the execution of confiscation orders surpassing the amount of 10.000 EUR on a 50/50 basis between executing and requesting member state. Only if the revenues are not very significant, i.e. below or equivalent to 10.000 EUR, they will accrue to the executing member state, as in traditional scenario's of transfer of execution of confiscation. This article may not seem directly relevant for the analysis of financial issues that executing requests or orders for investigative measures can entail. However, the possibility of broadening the new approach embedded in the confiscation framework decision as to the 50/50 division of profits to a possible future 50/50 division of substantial costs in executing MLA requests or orders, deserves further reflection and has therefore been implicitly integrated in the questionnaire by the project team.

As a preliminary question, member states were asked if they felt that requests for investigative measures under clusters 3, 5 and 6 are refused or should be able to be refused when it is felt that the implications of their

⁴⁰ Council of the European Union (2006). "Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders." OJ L 328 of 24.11.2006.

execution in terms of financial capacity or resources is or would be substantial or extraordinary. Half of the member states did not consider this an option. The other half did. Member state reality clearly contrasts here with the standpoint taken by the Eurojust College, i.e. that MLA should not be refused solely on the basis that the execution of a request would have substantial implications as to financial resources. Member states were further asked if, provided they would refuse execution of requests for financial reasons, they would execute the request anyway if the costs would be fully refunded by the requesting/issuing member state. Almost none of the member states claimed that this would make any difference to them. However, as a follow-up question and relating to the analysis made above relating to the 2006 MR of confiscation framework decision, member states were asked if they would be willing to execute the request anyway if a fair share, for example at a 50/50 rate, would be borne by the requesting/issuing member state. The results of the answers provided are spectacular to say the least. For cluster 3 measures, 50% out of 60% of member states that claimed that they would refuse execution of requests for financial reasons, would accept executing it anyway if a fair share (e.g. 50%) was paid or refunded by the requesting/issuing member state. For cluster 5 measures, all member states would accept this. A slightly lower but still very significant number of member states would be willing to accept this for cluster 6 measures. These results are significant for the debate on a possible future policy option to introduce a 50/50 sharing of costs made in the execution of (MR based) MLA requests or orders, as an agreed fall-back position in case where the financial consequences of executing a request or order would be substantial or extraordinary, in that the cost involved would surpass an amount of e.g. 10.000 EUR (which the project team suggests to copy from the 2006 MR of confiscations framework decision, thus introducing a consistent mirroring regime in the sphere of (MR based) future MLA between the member states). Wholly in line with the recommendation of the Eurojust College, i.e. that the principle that the execution of requests for MLA will not entail refunding of expenses, must be maintained, the traditional system could remain in place for all MLA the execution cost of which would be unsubstantial or non-extraordinary (e.g. not higher than 10.000 EUR).

Asked for both of the above questions whether it would make an additional positive difference for them in increasing their willingness to execute requests or orders anyway if it would relate to any of the 32 MR offences, the member states' positions only marginally changed in a positive fashion.

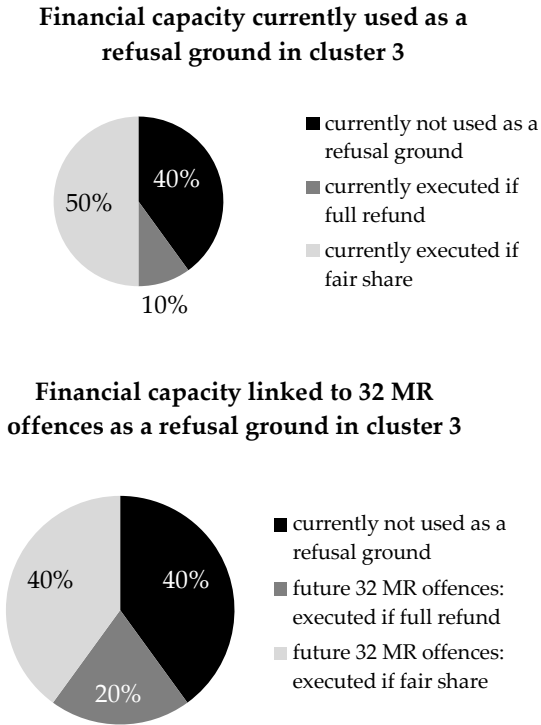
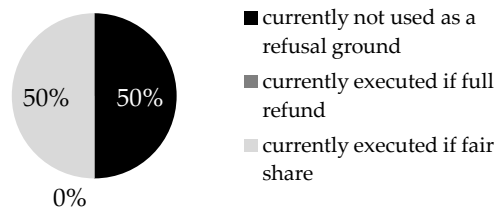


Figure 26. Financial capacity as a ground for refusal in cluster 3

Financial capacity currently used as a refusal ground in cluster 5



Financial capacity linked to 32 MR offences as a refusal ground in cluster 5

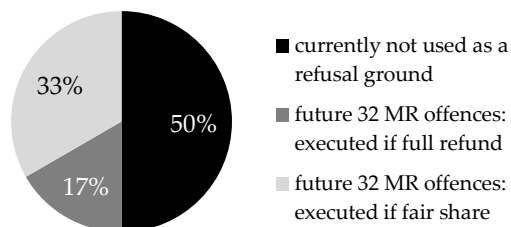
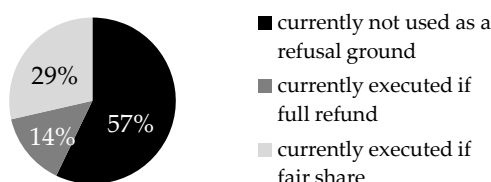


Figure 27. Financial capacity as a ground for refusal in cluster 5

Financial capacity currently used as a refusal ground in cluster 6



Financial capacity linked to 32 MR offences as a refusal ground in cluster 6

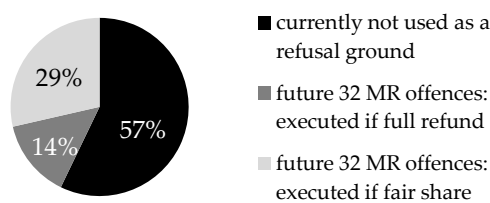


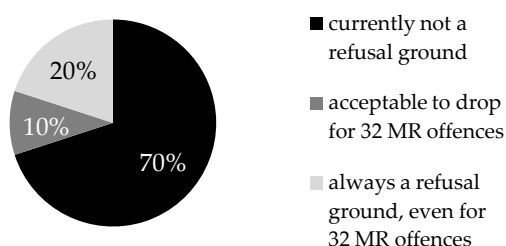
Figure 28. Financial capacity as a ground for refusal in cluster 6

Operational capacity as a ground for refusal or non-execution

Secondly, operational capacity as a ground for refusal or non-execution is analysed. The executing member state might feel that the implications of the execution of a request or order in terms of operational capacity or resources would be too heavy and thus hamper the proper functioning of the executing member state's own criminal justice system. For example, it is very likely that extensive requests may require a lot of working hours from authorities in the requested/executing member state and that the latter considers that the impact on the domestic workload is disproportionately heavy or that other priority domestic cases would be jeopardised. The project team therefore assessed to what extent member states were likely to refuse the execution of requests for operational reasons, or if they felt that refusal for these reasons should be

possible. Also, it was tested to what extent member states would consider it a good future EU policy option to require the measures to be taken anyway if the measures related in any way to any of the 32 MR offences. As the EEW does not offer the possibility to refuse an order for operational reasons (member states are likely to have the technical capacity to execute EEW's for the measures under its scope), and in order to maintain the logic with questions raised concerning financial capacity issues, the questions were only asked in relation to measures under clusters 3 and 5. The large majority of member states indicated that irrespective of the cluster, lack of operational capacity would and should not count as a refusal or non-execution ground. Whilst this may come as a surprising outcome at first sight, especially given the capacity-intensive nature of certain measures under clusters 3 and 5, member states are apparently willing to execute such requests notwithstanding their potentially significant operational capacity impact because of the likely serious nature of the offences for which they would logically be most required.

Operational capacity as a refusal ground in cluster 3



Operational capacity as a refusal ground in cluster 5

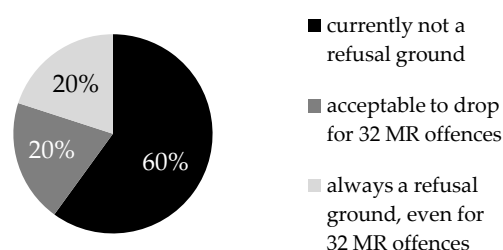


Figure 29. Operational capacity as a refusal ground in clusters 3 and 5

3.2.2 *Strict reply and execution deadlines*

Besides the reduction of grounds for refusal and non-execution, the enhanced stringency in cooperation also implies respecting strict reply and execution deadlines. Of vital importance for the safeguarding of evidence, be it under traditional MLA or under MR, is that requests or orders are replied to in a timely fashion and swiftly executed. Time limits are necessary to ensure quick, effective and consistent cooperation on obtaining objects, documents or data and other types of evidence for use in proceedings in criminal matters throughout the EU.

The EU MLA Convention requires in Art. 4, 2 that the requested member state has to execute a request for assistance as soon as possible, taking as full account as possible of the procedural deadlines and other deadlines indicated by the requesting member state. In doing so the member states recognize that in certain cases it is crucial for an MLA request to be dealt with within a specific and strict time frame. Furthermore, if the requesting member state authority considers it necessary to have the request executed before a certain date, it may state so in the request, provided it states relevant reasons for it. It is in the interests of all member states that the possibility of setting deadlines is not to be abused. Hence, when setting a time limit to the execution of a request, member states should only specify a deadline which is reasonable or necessary under the particular circumstances of the case. Art. 4, 4 EU MLA Convention further refers to the arrangements to be adopted if a deadline cannot be complied with by the requested/executing member state. The latter must indicate as quickly as possible the estimated time that will be required to execute the request. The requesting member state must respond without delay indicating whether the request should continue to be processed. In addition, the text allows the authorities of both member states to agree as to how the matter should be taken forward. Mention should also be made of the Joint Action on Good Practice in MLA⁴¹, basically promoting analogue practice.

As a possible introduction of the MR concept must turn traditional MLA into a more reliable mechanism, including from a speediness perspective, it would be mandatory for requests and orders to be replied to and effectively executed within strict deadlines. Such timing principles have been laid down – as in all MR based instruments – in both the 2003 Freezing Order and the EEW, Art. 15 of the latter requiring orders to be answered to within 30 days, and the objects, documents or data concerned to be effectively obtained within 60 days. If the deadline for execution cannot be complied with, the requested/executing member state must inform the issuing member state thereof and also indicate what the timeframe for effective execution will be.

⁴¹ Council of the European Union (1998). "Joint Action of 29 June 1998 on Good Practice in Mutual Legal Assistance in Criminal Matters." OJ L 191 of 7.7.1998.

The project team has chosen not to ask member states what deadlines they thought would be appropriate for *replying* to a request or order. On the basis of the EEW and other MR based instruments it could easily be set at e.g. 30 days, being the time limit then for either agreeing to execution, refusing it or asking for postponement of effective execution of the request or order.

Questioned about deadlines relating to effective *execution* of requests, irrespective of the clusters, approximately half of the member states require the requested/executing member state to execute the measure concerned within a provided deadline.

**Requirement of execution
within a provided deadline**

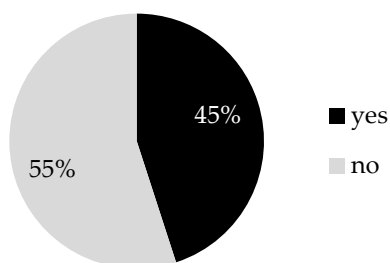


Figure 30. Requirement of execution within a provided deadline

For clusters 3, 4 and 5, most responding member states feel that when they do not provide a deadline for execution, the requested/executing member state satisfactorily rapidly executes the the request. For cluster 6 measures, member states are relatively less content with the speed in executing measures for which no execution deadline has been provided. When deadlines are provided by the member states for cluster 3, 4 and 5 measures, approximately half of them claim that these are often not respected by the requested/executing member state. For cluster 6 measures, the satisfaction rate is slightly higher.

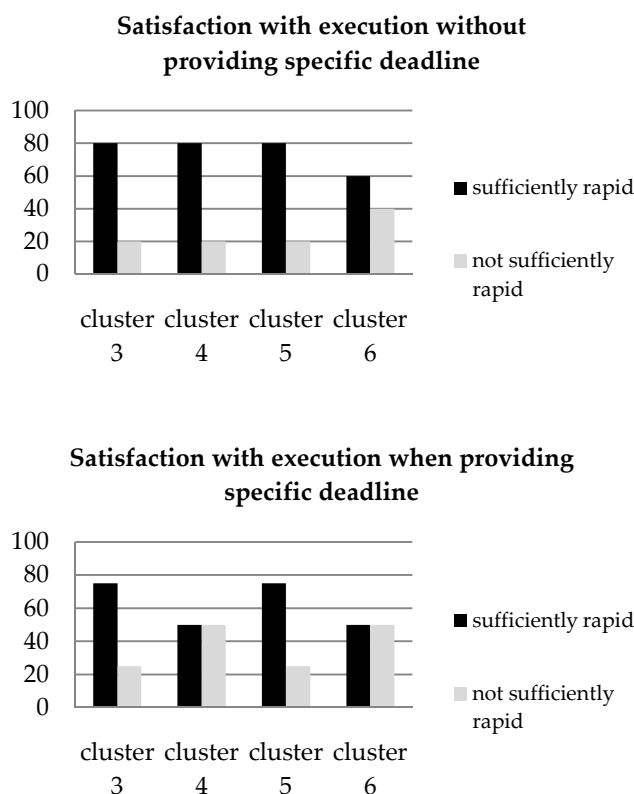


Figure 31. Satisfaction with execution with and without the provision of a specific deadline

Here, the project team inclines to share the standpoint taken by the Eurojust College, i.e that, whilst recognising that it may be difficult to set a general deadline for the execution of requests for the taking of evidence, such requests should be executed as quickly as possible, and preferably within a 60 day term, with a possible extension for another 30 days in case postponement would be requested.

The importance of postponement possibilities was tested separately. As described when elaborating on operational capacity as a refusal or non-execution ground, execution of a foreign order/request/warrant may have significant implications for the executing member state. Interestingly however, 40% (up to 50% for clusters 5 and 6) of the member states indicate they would not postpone execution, even if such execution would have a significant impact on routine domestic workload or other domestic priorities and even if such execution entails the risk of hampering the fluent functioning of their own

MUTUAL RECOGNITION OF INVESTIGATIVE MEASURES

criminal justice system. It is particularly encouraging to see that member states show this kind of willingness to cooperate, and that this willingness increases with an additional 10% for investigative measures currently not explicitly regulated. This increase might seem surprising considering the intrusive character of those not explicitly regulated measures (especially those of cluster 5), but can be explained referring to the type of cases these measures are likely to be asked for. In high profile cases involving serious crime, member states are even more willing to cooperate.

Member states that did indicate to use the possibility to postpone execution of a foreign order/request/warrant indicate that they are still willing to start execution within a reasonable deadline provided by the issuing/requesting member state. Irrespective of the nature of the investigative measure, 60% of the member states indicate it is reasonable to execute within 45 days. The remaining 40% indicate it is reasonable to execute within 60 days.

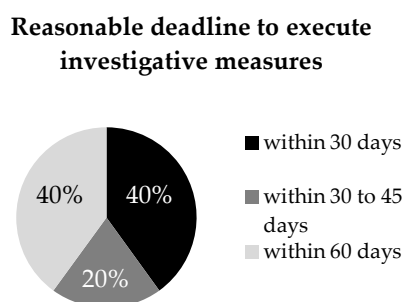
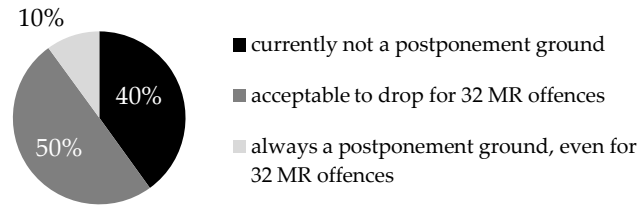


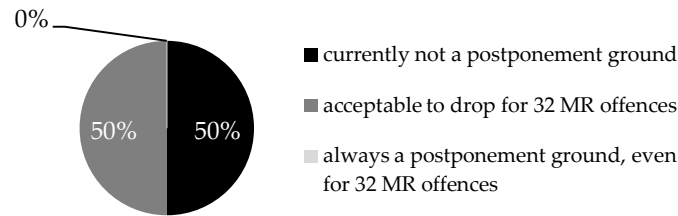
Figure 32. Reasonable deadline to execute investigative measures

Finally, the questionnaire also tested whether it would be an acceptable future policy option to require execution within the deadline provided for by the requesting/issuing authority/member state if the request/order/warrant relates to acts/offences included in the 32 MR offences. The use of the list in this context does not provide significant added value. Only 10% of the member states who want to be able to postpone execution where it is felt that implications of immediate execution would impact too heavily on operational capacity, are willing to waive the postponement possibility if the order/request/warrant relates to any of the 32 MR offences.

Operational capacity as a postponement ground in cluster 3



Operational capacity as a postponement ground in cluster 5



Operational capacity as a postponement ground in cluster 6

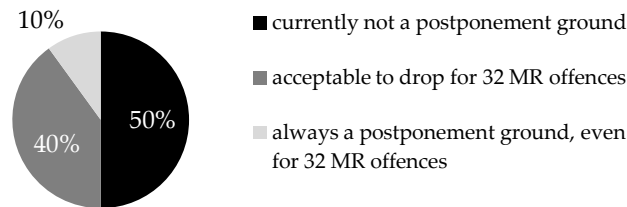


Figure 33. Operational capacity as a ground for postponement

3.3 Accepting and executing orders

As indicated when clarifying the structure of this section, introducing MR characteristics in MLA applications will cause tension with regard to the law applicable to the execution of investigative measures. Traditional MR foresees execution in the manner provided for by the national law of the executing member state (*locus regit actum*), whereas MLA application require at least the taking into account of expressly indicated procedural requirements and formalities by the requesting/issuing authority/member state to ensure admissibility in future criminal proceedings (*forum regit actum*).

This distinction is of course closely linked to the functions and finality of MR and MLA. In MLA, the central and overall most important member state is the requesting member state. The requesting member state is the lead state in that the criminal proceedings and prosecution are intended to be held in that member state. Other member states are only involved to the extent the lead member state is in need of assistance. An MLA request aims at gathering information/evidence to be used in the course of the criminal proceedings in that lead member state. Because the results of the MLA-request return to the requesting/lead member state, it is important to take expressly indicated procedural requirements and formalities into account.

By contrast, MR does not have such a clear lead member state, because a *caesura* is made between the issuing and the executing member state. The executing member state accepts the judicial decision *as if* it was handed down by its own authorities. Execution therefore takes place in conformity with the law of the executing member state, which is only logically considering it is to execute the foreign decision *as if* it was its own.

Because of this tension between execution in an MLA or MR philosophy, it is crucial to test to what extent a future more MR-based MLA is acceptable.

This section deals with the general willingness of member states to accept the validity of judicial decisions taken in the issuing member state and step away from the traditional MR *locus regit actum* regime. Furthermore the position of member states with respect to consistency problems is analysed. Finally, compliance with expressly indicated formalities is put to the test.

3.3.1 *Accepting the validity of judicial decisions taken in the issuing member state*

Traditional MLA between the member states does not require the requesting member state to domestically take either an internal decision or issue an order/warrant for the investigative measure in the MLA request. Neither is the granting of traditional MLA by the requested member state dependent on proof

that the measure requested could be taken by the requested member state in a similar case on the territory and under the law and procedures of the latter. The only formal condition incumbent upon the requesting member state for being allowed to request the '*widest possible measure of mutual assistance*', is to have jurisdiction at the time the MLA request is made for the offences the proceedings to which request relates (Art. 1, 1 ECMA), irrespective whether the offences concerned are administrative offences (in either one of the states concerned) or constitute offences or infringements for which a legal person may be held liable in the requesting member state (as extended by Art. 3 EU MLA Convention).

The sole exceptions to this traditional stand have only been recently introduced, i.e. by the EU MLA Convention for interception of telecommunications and by the Prüm Convention for collecting and examining cellular material and supplying the DNA profile obtained. According to Art. 18, 3, b) and 20, 3, b) EU MLA Convention, the requesting respectively intercepting member state must provide the requested respectively notified member state a confirmation 'that a lawful interception order has been issued' in connection with a criminal investigation. According to Art. 7, (3) Prüm⁴², the requesting contracting party must 'produce an investigation warrant or statement issued by the competent authority, as required under that contracting party's law, showing that the requirements for collecting and examining cellular material would be fulfilled if the individuals concerned were present within the requesting contracting party's territory'.

When considering to base the entirety of MLA between the EU member states as much as possible on a MR-based footing, as in the EEW framework decision, instead of keeping a dual-track system in place, the question of course arises as to whether this implies that the investigative measures the execution of which is sought by the issuing member state, must first have been domestically decided or ordered, as currently in case of requests for interception of telecommunications or DNA collection, examination and supply, or not, as currently for any other MLA request. In this respect, one could be tempted to believe that the choice between both scenario's basically comes down to the choice between a warrant-like MR system (based on execution of standardized European warrants directly issued internationally by domestic authorities in the issuing member state, like in the case of the EAW or the EEW) and a MR system based on international execution of domestic decisions or orders of the issuing member state, provided they are sent to the executing member state together with a standardised certificate (like in the case of all other MR-based

⁴² "Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross border cooperation, particularly in combating terrorism, cross border crime and illegal migration (Prüm Convention)." 25.8.2005.

instruments, including the 2003 Freezing Order). The fragmentary introduction of MR in the domain of MLA – through the warrant-like EEW on the one hand and the domestic order and certificate-like Freezing Order on the other hand – would then not consistently show the way to go. However, the above classification of the EEW as a warrant-like instrument, and therefore at first sight not requiring a *locus* test in the issuing member state, is wholly misleading. Firstly, the issuing of an EAW, upon which the EEW has been archetypically modeled, does also require the issuing member state to deliver domestic ‘evidence of an enforceable judgement, an arrest warrant or any other enforceable judicial decision having the same effect’ (Art. 8, 1, (c) EAW), and hence has in common with all domestic order & certificate-like MR instruments that the measure the execution of which is sought, must first have been domestically decided or ordered in the issuing member state. Secondly, even where the EEW does not require the latter, Art. 7, b) EEW imposes comparable self-restraint on the issuing member state, in that an EEW should not be issued unless the objects, documents or data could be obtained under its (domestic) law in a comparable case if they were available on its territory, even though different procedural measures might be used. The lesson learned seems to be that all MR-based instruments that so far have been designed, prevent a decision or measure to be excuted abroad unless it has first been taken or ordered domestically or – *mutatis mutandis* – could have been taken or ordered in a similar or comparable domestic case, in due conformity with the national law and procedures of the issuing member state. Given that the very essence of the MR principle lays precisely in the expectation that member states will trust one another sufficiently to mutually recognise each others judicial decisions in criminal matters, as if it were their own, this is no more than logical. Consequently, the question at hand when considering to base the entirety of MLA between the EU member states as much as possible on a MR-based footing, is not whether that should be *via* a warrant-like or a domestic order and certificate-like instrument. The only and real question is whether the EEW – which apparently is the only MR instrument under which the actual taking or existence of a domestic decision in the issuing member state must not be evidenced vis-à-vis the executing member state as a precondition for its execution by the latter – can or must serve as a model for reorienting MLA towards MR, if that were to be decided.

The answer is negative, for the EEW (cluster 1) is extremely atypical in what it envisages, compared to traditional MLA requests (clusters 2-5). Whereas MLA essentially is a vehicle for requesting investigative measures or the transfer of precise objects, documents or data, the issuing of an EEW envisages a result, i.e. obtaining certain objects, documents or data, leaving it to the executing member state to take any investigative measures that it domestically may need to deploy (including, if necessary, search of premises and seizure) to that end. For it is not clear which investigative measures the executing member state will need to

deploy in order to obtain the evidence sought, the EEW – even if categorized as a typical MR instrument – actually is no such instrument *stricto sensu*. For the bunch of MLA not covered by the EEW (comprised in clusters 2-5) the situation is different, in that it truly relates to the taking of investigative measures or to the transfer of objects, documents or data. It is hardly imagineable that a future EU MR-based system would envisage altering this situation, by allowing the issuing of e.g. ‘find the truth’ warrants, ‘get incriminating testimony’ warrants or the like by the issuing member state, instead of the latter spelling out which concrete measures or procedural steps it seeks the execution of in the executing member state. Consequently, only a single question remains: should it be required from the issuing member state to always first order these measures or take these steps in accordance with its domestic law and procedures. The answer is obviously no. For a vast majority of measures or procedural steps, it would not even be possible to have them formally decided or ordered, especially in the phase of preliminary (police) investigations. Even where the measures concerned would require a formal domestic decision if they would need to be taken on the territory of the issuing member state itself, it would largely undo the flexibility that characterizes current MLA if each time the taking of the measures concerned would need to be formally decided domestically – and embedded in a formalised decision eligible for recognition by the executing member state as if it were its own decision. Consequently, the *philosophy underlying* Art. 7, b) EEW, i.e. that the issuing member state should not seek the MR-based execution of investigative measures that it would not be able to take in a similar or comparable domestic case with due respect for its national law and procedures, must be the generic point of departure for any reorganisation of the remaining part of MLA between the member states. Only to the extent that member states do not have sufficient trust in one another to suffice with self-declared *observance potentialis* by the issuing member state of its domestic law and procedures in issuing investigation orders or warrants, it seems acceptable to require the issuing member state to actually deliver proof of the taking of a domestic decision or the issuing of a domestic order or warrant to the envisaged effect, as under current MLA for interception of telecommunications or DNA collection, examination and supply. Whether, even for far-reaching coercive or intrusive measures included in cluster 3 and – *a fortiori* – under cluster 5 – such distrust level is to be maintained when a roll-out of MR is envisaged, seems to be the only real question left.

Therefore, member states have been asked for their position on the matter. The results – as shown below – are inconclusive. For measures under cluster 3, positions are divided on a 50/50 basis.

**Domestic decision, order or
warrant as a precondition for
execution in cluster 3**

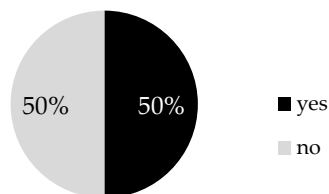


Figure 34. Domestic decision, order or warrant of the requesting/issuing member state as a precondition for its execution in cluster 3

For measures under cluster 5, unregulated in current MLA and potentially even more coercive or intrusive in nature, the current distrust level mounts up to 60%. It may suffice though to require the issuing member state to confirm or declare that the measure the execution of which is envisaged, could be taken in a similar or comparable national case to promote full trust and hence allow for its execution without prior evidence of any formal domestic decision/order/warrant to the same effect in the issuing member state.

**Domestic decision, order or
warrant as a precondition for
execution in cluster 5**

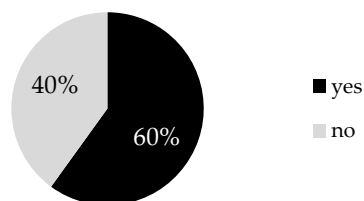


Figure 35. Domestic decision, order or warrant of the requesting/issuing member state as a precondition for its execution in clusters 3 and 5

3.3.2 *Executing judicial decisions by the execution member state*

As clarified above, the execution of a traditional MLA request is considerably different from the execution of a traditional MR request. Whereas the result of an MLA request is intended to be used in criminal proceedings in the requested member state, execution of an MR order/warrant is not in such a way linked to the law of the issuing member state. Introducing MR features in MLA means as much as introducing a link with the law of the issuing member state in the execution of an MR order/warrant.

Therefore, it needs to be tested whether member states remain willing to recognise foreign decisions *as if they were their own* and at the same time execute *taking into account that they are foreign* and thus taking into account expressly indicated procedural requirements and formalities by the issuing member state. The project team tested this willingness on three levels. First, compatibility issues were analysed. Member states were asked which position their own national law occupies, and whether execution needs to be fully in accordance with their national law. Second, consistency issues were analysed. Member states were asked how they deal with requests that require them to go beyond the limits of their own national law in that the request surpasses those limits e.g. *ratione materiae*. Third, member states were asked whether they stipulate conditions in terms of procedural requirements and formalities and whether those conditions are complied with.

Compatibility issues

Because of the importance of admissibility of the gathered evidence in the requesting/issuing member state, acceptance of *forum regit actum* linked to the willingness to step away from strict *locus regit actum* plays an essential role.

Member states were asked which position their own national law occupies with respect to the execution of a request/order warrant (essential, complementary or subordinate). Additionally, member states could indicate what the current position of the persons concerned by the execution of the measures is. Finally it was tested whether there is support for the alternative of introducing minimum procedural standards for gathering information/evidence commonly agreed at EU level.

Position of the national law

For clusters 3 and 5, only 20% of the member states indicated that their own national law plays an *essential* role and that execution is only possible where fully in accordance with/in the manner provided for in their national law (and procedures). For cluster 6 none of the member states indicated this strict *locus*

regit actum requirement. 10% of the member states give their own national law a complementary role in that execution can only take place under specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc). This 10% does not vary over the different clusters.

Interestingly, 60% (cluster 3 and 5) upto 70% (cluster 6) of the member states indicate to be willing to accept *forum regit actum*. In doing so, national law of the executing member states is granted a *subordinate* position in that execution will be in compliance with the formalities and procedures expressly indicated by the requesting/issuing authority/member state provided that these are not contrary to the fundamental principles of their national law. These percentages are encouraging considering the importance of *forum regit actum* in MLA. The high score for cluster 6 confirms the hypothesis for this cluster that it is likely that member states would accept *forum regit actum*.

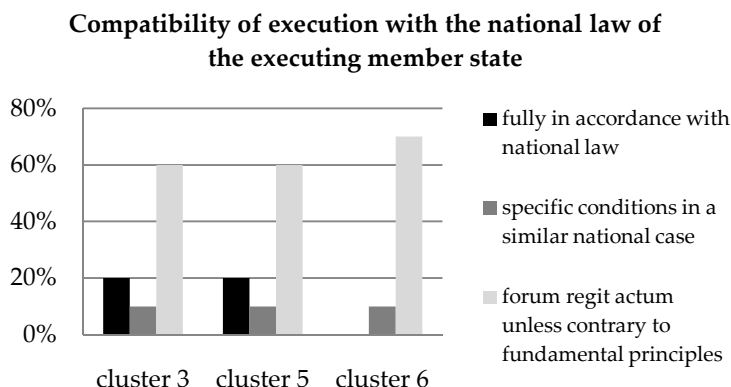


Figure 36. Compatibility of execution with the national law of the executing state

Position of the persons concerned

Additionally, member states could indicate what the current position of the persons concerned by the execution of the measure is. It was asked whether it is possible for the persons concerned to claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under their national law. Furthermore, the possibility of granting the best of both worlds regime was enlisted, asking member states whether execution would be possible only where the persons concerned can claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under either their national law or that of the requesting/issuing member state. The rationale for the inclusion of these options is the occurrence of this possibility in Art. 10, 5, e EU MLA

Convention in the context of hearing by videoconference. For clusters 3 and 5 none of the member states indicated the position of the persons concerned currently plays a role. For cluster 6, 10% of the member states indicated that the position of the persons concerned is currently taken into account.

The current practice is contrasted by the support the inclusion of the position of the persons concerned as a future policy. Between 70 and 80% of the member states (depending on the clusters and on the scope of the rights that would be granted to the persons concerned) consider it to be an acceptable future policy.

It should be clarified that the slight decrease in support for this future option for the measures included in cluster 6 does not necessarily mean member states are opposed to such a policy. This decrease might also be an indication that the member states feel less need for regulation and EU intervention for the measures included in this cluster.

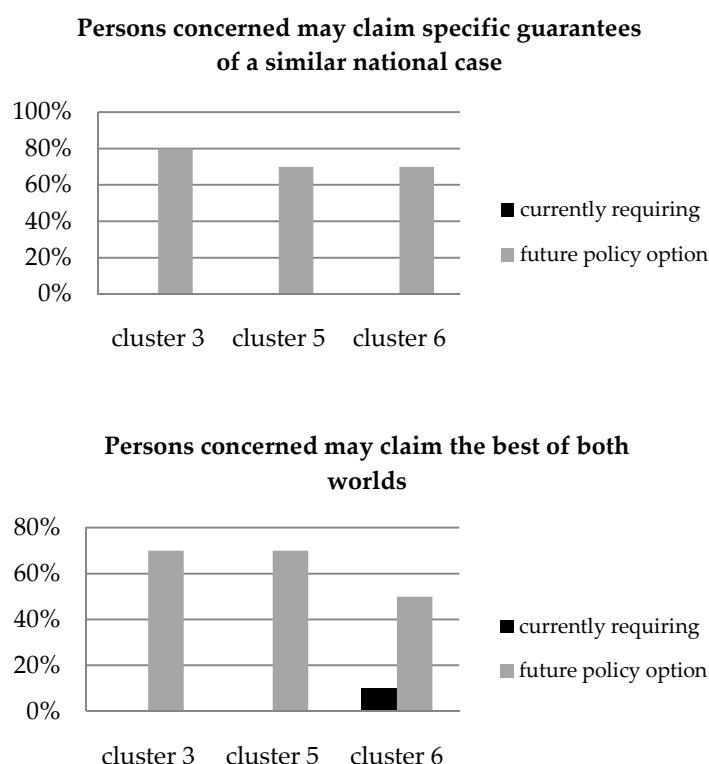


Figure 37. position of the persons concerned by the execution of the measure

EU level minimum procedural standards

Finally, it was tested whether there is support for the alternative of introducing minimum procedural standards for gathering information/evidence commonly agreed to at EU level. Linked to this question, member states were asked to indicate whether these minimum standards should be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available, or be of a higher or lower level. Whereas only 10% of the member states indicated to currently already apply this kind of regime, up to 70% consider the elaboration of such common minimum rules an acceptable future option, which for 90% of the member states should be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available. Eurojust too considers that observance of minimum procedural standards is essential in the context of taking evidence, although non-observance of these standards will not necessarily render the evidence obtained inadmissible.

Consistency issues

Secondly it was assessed to what extent member states are willing to go beyond the limits of their own legal system. This section of the questionnaire links in with the possibility to require that the (execution of the) investigative measure is consistent with the law of the requested member state. It is regrettable that none of the legal instruments that include this possibility (e.g. Art. 51 SIC) clarify what this consistency test should look like. There are several possible issues that could fall within the scope of a consistency problem.

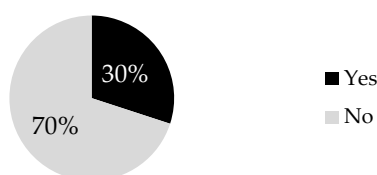
Execution can be inconsistent with the law of the executing member state in that it surpasses the scope *ratione auctoritatis* because the requesting/issuing authority (or the authority having validated the request/order/warrant) is not a judge, a court, an investigating magistrate or a public prosecutor, whereas in a similar national case the measure(s) would need to be ordered or supervised by such an authority. This situation is explicitly described in Art. 11 EEW. The possibility is foreseen to refuse execution if the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing state. However, under the current regime member states can make a declaration that it is their general policy to require such validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the EEW would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing state in a similar domestic case.

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Execution can also be inconsistent with the law of the executing member state in that it surpasses the scope *ratione loci*, *ratione temporis* or *ratione personae* (because the measure(s) can only be taken to a more limited category of persons). For the latter scope, the link with corporate criminal liability and the possibility to execute investigative measures is obvious. Furthermore, the possibility to execute an investigative measure can also be limited to a more narrow category of natural persons in terms of for example their age, procedural status and definition.

This last aspect of the consistency issues was presented to the member states in the questionnaire. Analysis revealed that member states are very reluctant to proceed with the execution of an investigative measure if it surpasses the national scope *ratione personae*. 70% indicated that execution would not be possible in such cases. Only 30% is prepared to go ahead with this investigative measure albeit this percentage increases with 10% in cluster 5. Again a similar conclusion can be drawn: because of the typology of the cases in which the more intrusive investigative measures included cluster 5, member states are more likely to proceed.

Execution of an investigative measure surpassing the national scope *ratione personae* in cluster 3



Execution of an investigative measure surpassing the national scope *ratione personae* in cluster 5

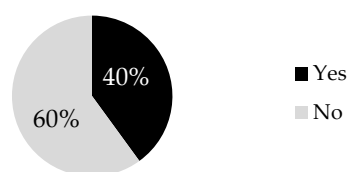
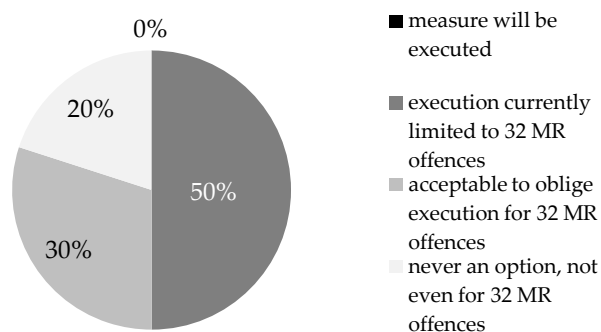


Figure 38. Execution of an investigative measure surpassing the national scope *ratione personae* in clusters 3 and 5

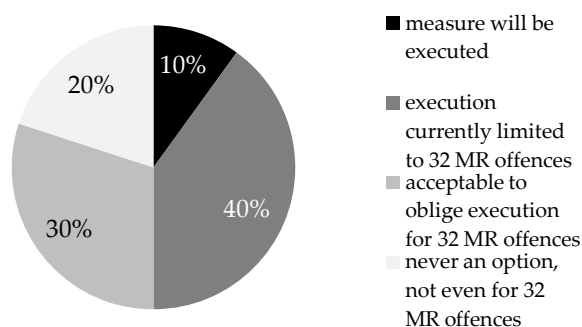
The final hypothesis developed by the project team in terms of issues related to inconsistency with national law, is linked to surpassing the scope *ratione materiae*, which is linked to the double criminality requirement. Initially, member states are not willing to execute if the order/warrant/request relates to acts which do not constitute offences in their national law. Having anticipated this outcome, the questionnaire made a distinction between a general *ratione materiae* issue and a *ratione materiae* issue linked to the 32 MR offences. As this list embodies the abandonment of the double criminality test, it is only logical for member states to be willing to cooperate if the acts concerned are included in 32 MR offences, regardless of criminalisation under the own national law. This hypothesis was confirmed by the results of the study in that 50% of the member states currently already applies this rule for cluster 3 and an additional 30% considers it a valid future policy option to abandon the possibility to make execution dependant on double criminality for cluster 3. With only few exceptions, the member states did not make a distinction in their responses according to the different clusters.

The fact that 10% of the member states indicated to be more willing to cooperate for investigative measures in cluster 5 and thus indicated that the lack of double criminality would not constitute a hurdle for execution for investigative measures included in cluster 5 only confirms the hypothesis that even though not explicitly regulated, member states are largely willing to provide MLA even for these intrusive investigative measures in cluster 5, because of the high profile cases they are linked to.

Consistency issues in cluster 3



Consistency issues in cluster 5



Consistency issues in clusters 3 and 5

These results undeniably proof that it is worth while looking into the added value an introduction of the 32 MR offences can have in the context of requests for which the execution is inconsistent with the law of the executing member state.

Compliance with requested formalities

Considering the importance of admissibility of the gathered information/evidence in the course of criminal proceedings in the requesting/issuing member state, several instruments foresee the possibility to expressly indicate that the requested/ordered member state in the execution of the measure, should comply with certain formalities and procedures (e.g. compliance with certain formalities and procedures, purpose or use limitations etc).

Art. 12 EEW proscribes that the executing authority shall comply with the formalities and procedures expressly indicated by the requesting authority unless otherwise provided, and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing state. Differently put and obvious in the light of the compulsory character of EEWs, executing member states are not only obliged to answer to the order/warrant, but equally have to respect additional formal or procedural requirements attached by the issuing state provided that the requirements are not contrary to the executing member states' fundamental principles of law.

Considering the importance for the admissibility of evidence, it is interesting to note that not all member states use this possibility. The percentage ranges from 50% in cluster 1 to 80% in cluster 6. This might indicate a great deal of trust in the legal systems of the executing member states.

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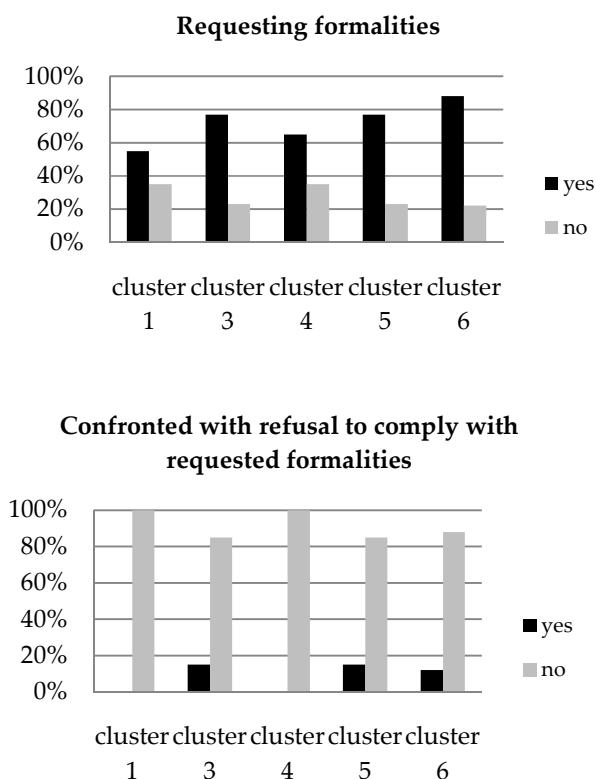


Figure 39. Requesting formalities and the compliance thereto

Furthermore it is equally encouraging that for clusters 1 and 4, member states indicated that their requests are rarely not complied with. In this respect, the Eurojust College indicated to be of the opinion that member states should not be obliged to comply with requests for the taking of evidence which go beyond the limits of their own law when coercive measures are necessary to execute the request. Even though for the other clusters only 10% to 15% of the member states indicated that their requests are often not complied with, it is important to again underline the consequences thereof. Different from other MR applications, the end goal of mutual assistance is the obtaining of information/evidence to be used in the course of criminal proceedings in the issuing/requesting member state. Not complying with the formalities expressly indicated constitutes an important risk of gathering information/evidence, that will be inadmissible in the requesting/issuing member state. Efforts by the executing authority are totally useless. Therefore the importance of compliance with expressly indicated formalities cannot be underlined enough.

3.4 Horizontalisation of cooperation

The fourth MR characteristic relates to the horizontalisation of cooperation. MR typically takes place between the authorities of the member states. This characteristic can also be found in MLA ever since the introduction of Art. 6,1 EU MLA Convention.

Direct communication between the authorities involved, has a significant influence on the speediness and ease of cooperation. In contrast, communication via central authorities can be complex and cumbersome. Currently, communication via central authorities only takes place for two kinds of cooperation: first, for the transfer of persons held in custody and second for the exchange of criminal records information. Besides these two explicit exceptions, an additional option to derogate from the rule to communicate amongst authorities is foreseen in Art. 6, 2 EU MLA Convention. This article allows for a derogation of the general rule *in special cases*, without further clarifying what constitutes a special case.

The project team has a twofold recommendation in this respect. First, it considers it advisable to eliminate the possibility to derogate from the general rule. Second, only one exception should be maintained namely for the transfer of persons held in custody. The current exception for the exchange of criminal records is no longer required. It should be noted that the exchange of criminal records information is now regulated via the ECRIS system⁴³ – which will replace the current practice of exchanging criminal records information via central authorities.

Consequently, direct communication and thus further horizontalisation of the cooperation environment impacts on the importance of institutional capacity at all authority levels within the member states. Regardless of the investments in EU support mechanisms in the past (EJN, Eurojust, fiches belges, judicial atlas, etc), further investment is vital to ensure that MLA becomes a well oiled machine. A reference to this discussion explains why questions related to institutional capacity were included in the questionnaire. This section deals with accepting requests issued in a foreign language and technical capacity issues judicial authorities are confronted with.

3.4.1 *Accepting requests issued in a foreign language*

In a Union which counts 27 members and 23 different languages, MLA and MR become empty concepts when member states do not have the institutional

⁴³ Council of the European Union (2009). "Council Framework Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA." OJ L 93 of 7.4.2009.

capacity to make sure that all requests are understandable for all parties involved. Linguistic and translation facilities and staff are of undeniable importance.

When member states send out requests in their very own language to other member states that do not have this language in common with the requesting member states, obvious problems arise. Member states cannot reasonably be expected to have the capacity to have interpretation and translation facilities available for the 23 languages of the European Union.

The 2009 *Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility*⁴⁴, aimed at identifying current difficulties with cross-border cooperation in criminal matters and at formulating future prospects and solutions for identified difficulties. The Green Paper stressed that it is important to examine whether it would be appropriate to supplement any existing or future instrument with non-legislative measures. These non-legislative measures, according to the Green Paper, could include initiatives aimed at raising awareness of the instrument(s) among practitioners, such as drafting guidelines or providing training to practitioners on their application. Possible future measures addressing language-issues certainly may be seen as falling under this scope of “non-legislative measures”. The following analysis will clarify why it is certainly useful to consider this aspect in the future.

Art. 16 ECMA states that principally, translations of requests and annexed documents are not required. However, Art. 16.2 allows for member states to reserve the possibility of declaring to require that requests made to them be accompanied by a translation into their own language or in one of the official languages of the Council of Europe.

Art. 6.2 EEW however requires EEW's to be written in, or translated by the requesting state into, the official language or one of the official languages of the executing state. This is a significantly heavy obligation and it requires member states to have extensive linguistic institutional capacity such as for example qualified linguistic staff. Furthermore, the EEW instrument which is supposed to facilitate cross-border cooperation, in this respect is more demanding than previous MLA instruments, which is not desirable and certainly is incompatible with the principles and goals of MR. The executing state may also accept translations into other official EU languages by submitting a declaration to the General Secretariat of the Council.

Member states were asked to what extent they had translations in English, French or German of their criminal code, their code of criminal procedure or (other) MLA and MR legislation available. The fact that German was included in this and in following questions, is that with the expansion of the EU, more

⁴⁴ European Commission (2009). "Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility." COM(2009) 624 final of 11.11.2009.

countries acceded that do not at all have any Francophone or Anglo-Saxon tradition but do have certain links with the Germanic tradition. When developing the questionnaire, both the project team and the EU Commission recognized the importance of including German next to French and English in the analyses of language issues.

The relevance of the previously mentioned question lies in the fact that most request for MLA are accompanied by the corresponding extracts from the relevant legislation, applying to the circumstances of the case. Analysis revealed that as far as complete translated versions of relevant legislation are concerned, the general situation is that they are more available in member states in English than they are in French and German. A small fraction of member states does not have any kind of translations in English (20%) or French (10%) available. However, all of them have either full or partial German versions available. It is important to note in this respect that a possible explanation for this high availability of German translations may be that most member states to the questionnaire have strong links with Germany and the German language, be it historical, political or for other reasons.

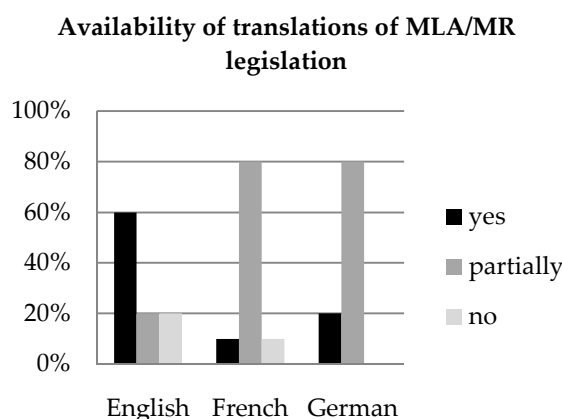


Figure 40. Availability of translations of MLA/MR legislation

In future (MR based) MLA it should be an obligation to accept requests/orders in English. Therefore, it is worrying that 20% of the member states indicate not to have any translation into English. It is highly recommendable that all member states invest time, effort and resources in having at least partial translations of the most relevant passages of their criminal codes, their codes of criminal procedure or (other) MLA and MR legislation into English available.

Furthermore, member states were asked to what extent they had technically and linguistically qualified staff available to deal with the translation and processing of incoming and outgoing requests for MLA. Additionally, the questionnaire wanted to assess the extent to which technical and legal basic and specialized foreign language training for staff was available. The general situation in the responding member states is that a sufficient number of qualified staff is indeed available. However, more member states responded that not enough basic and specialized language training opportunities are in place. The obvious but important recommendation in this respect is to invest more resources in much needed language training of staff.



Figure 41. Availability of staff and training

Going further when examining language-related issues in relation to MLA, the questionnaire assessed member states' general willingness to accept requests and orders they receive from other member states, written in one of three aforementioned languages. The results of this assessment are clear; Up to 90% of the member states accept requests and orders in English, while requests and orders in French and German are not accepted by 70% of the member states. This conclusion strengthens the position to make acceptance of incoming requests/orders in English an obligation.

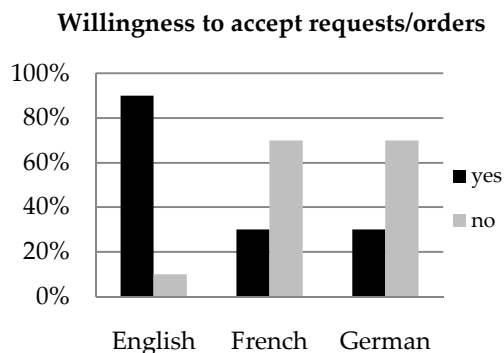


Figure 42. Willingness to accept requests/orders in English, French and/or German

The questionnaire also asked member states if proper translation and interpretation facilities were available to translate and interpret requests and orders from and into English, French, and/or German. English interpretation and translation facilities were most available in the responding member states, followed by German facilities and French facilities were in place the least. It is necessary to repeat that the most logical explanation for the German facilities' upper hand on the French is the fact that many Germany-linked member states were among the responding member states.

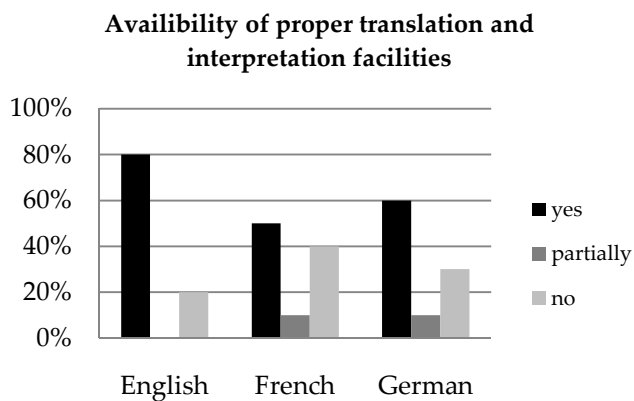


Figure 43. Availability of proper translation and interpretation facilities

3.4.2 *Technical capacity*

As previously mentioned, the 2009 *Green Paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility*⁴⁵, aimed at identifying current difficulties with cross-border cooperation in criminal matters and at formulating future prospects and solutions for identified difficulties. The Green Paper, among many other things, stressed that it is important to examine whether it would be appropriate to supplement any existing or future instrument with non-legislative measures. These non-legislative measures, according to the Green Paper, could include initiatives aimed at raising awareness of the instrument(s) among practitioners, such as drafting guidelines or providing training to practitioners on their application. The issues relating to language-difficulties in cross-border cooperation in criminal matters have already been analysed above. Other non-legislative measures which could facilitate cross-border cooperation and which deserve analysis can be put under the term “technical capacity issues”. Just as difficulties arise when member states receive requests or orders for assistance in a language they do not understand, answering to requests or orders without having the technical capacity to do so is problematic. Even though technical issues do not have any sort of legal framework in MLA nor MR-instruments, the project team recognized the importance of the issue and included questions about technical issues in the questionnaire. The following analysis will clarify why it was useful and necessary to include this aspect in the analysis and why it is certainly useful to consider these issues in the future broadening of MLA and MR in the EU.

It is of vital importance for the success of MLA to have the technical means and capacity to answer to incoming requests and send out own requests in a speedy and effective manner.

To investigate the *status questionis* of technical capacity of member states to effectively process requests for MLA, a number of relevant questions there-to were asked in the questionnaire. More specifically, the extent to which certain technical and other facilitators for the fluent and speedy processing of requests and orders were available in responding member states was assessed.

First, ICT equipment such as telephones, faxes, modem lines, e-mail, fast internet connectivity, etc. are either of high or medium-level availability to the responding member states. None of the member states claimed to have a low availability of such ICT-facilitators. 60% indicated high availability and the remaining 40% indicated a medium availability.

When asked about the availability of technical means for video or telephone conferences including available measures for protection in such a context (such as audio/video distortion), there were as many member states claiming a high

⁴⁵ Ibid.

availability thereof as member states claiming a low availability of such means (40% each). Only 20 of the member states claim medium-level availability. Art. 10 and 11 EU MLA Convention specifically deal with this issue.

According to the explanatory report of the EU MLA Convention, Art. 10 was designed to serve as a basis for and as a facilitator for the use of video conferencing to overcome difficulties that can arise in criminal cases when a person is in one member state and attendance at a hearing in a second member state is not desirable or possible. In particular, it lays down rules relating to requests for, and the conduct of, videoconference hearings. The article applies generally to hearings of experts and witnesses, but may, under particular conditions also be applied to hearings of accused persons. Where the relevant technical means are lacking, the requesting member state may, with the agreement of the requested member state, provide suitable equipment to permit the hearing to take place.

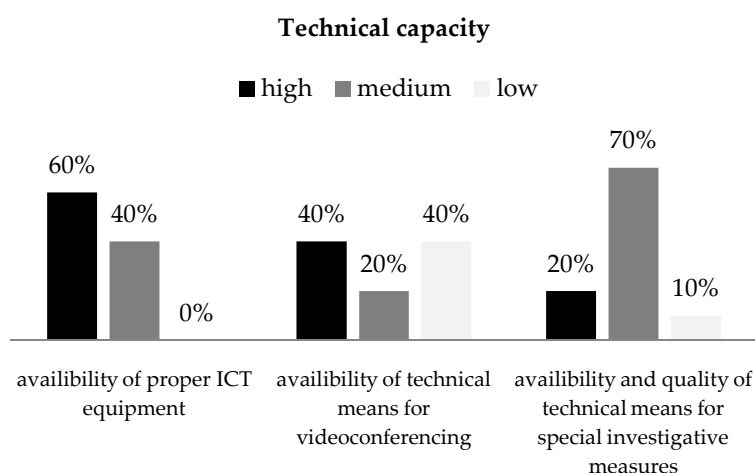
Art. 11 EU MLA Convention deals specifically with the hearing of witnesses and experts by telephone conference. Such hearings can be particularly useful in situations where, for example, a statement on a routine matter is required from a witness. In addition they can be arranged and conducted quite easily and economically. Art. 11.3 obliges the requested member state to comply with a request provided it is not contrary to the fundamental principles of its law. It is noteworthy that no provision is included in this article about technical capacity of member states to conduct telephone conferences. The obvious explanation for this is that member states are of course considered as having the technical capacity to be able to execute requests for telephone conferences.

When asked for the level of availability and quality of technical means required for special investigative measures such as interception, audio or video monitoring, etc. up to 70% of the member states reported only medium-level availability thereof. The importance of having the technical capacity to execute these kinds of measures is however not to be underestimated. In the last decade telecommunications technology has undergone considerable development, particularly in the field of mobile telecommunications. These are very widely used by offenders in the context of their criminal activities, especially in the field of cross-border crime. A considerable amount of attention has been paid especially to the interception of telecommunications in the EU MLA Convention, more specifically in Art. 17 to 22. This is not to place to offer a complete analysis of the extensive technical requirements and subsequent difficulties that arise in interceptions of telecommunications. It is however noteworthy that executing requests for interception of telecommunications is likely to face difficulties, be it in the execution of the request in a timely manner or in the execution of the request all together due to technical challenges. Furthermore, member states were asked about availability of and access to travel budgets for certain authorities to for example participate in joint investigation

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teams or to assist in the execution of requests abroad. Only 10% of the member states claimed that such budgets were highly available, half of the member states responded that such budgets were only available to a low extent. An important recommendation in this respect, especially considering the importance of successful JIT-cooperation and the need for extra impulses to engage in such cooperation, is that more budgets should urgently be made available. As a more general question, member states were asked about the availability and quality of off-line (paper and electronic versions) relevant legal documentation. 70% of the member states claimed a high availability and quality of such documentation and none of the member states reported a low availability and quality. More specifically, the availability and quality of circulars, practical guidelines, best practice manuals, model forms, and finally technical, legal and practical support was reported to be mostly high, only 30% of the member states claimed medium-level availability of such documentation and support.

As a very last question, member states were asked if the executions of requests were monitored for quality and speed. Again results were satisfying, as 70% of the member states reported that such a monitoring mechanism was indeed in place. The remaining 30% of the member states reported that such a mechanism was in place to a moderate extent. Art. 20 EEW provides for a legal framework for monitoring the general effectiveness of the framework decision, which should be understood as monitoring the success of EEW's, meaning among other things the assessed quality and speed of execution of EEW's across the member states. The article proscribes that if repeated problems in the execution of EEW's occur, the Council should be notified of the problem.



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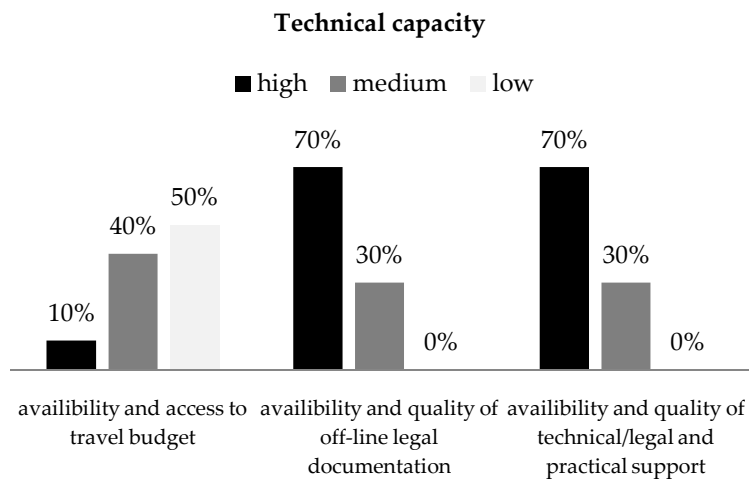


Figure 44. Technical capacity

The importance of all the above assessed issues is that member states might refuse to comply with or answer to certain orders or request for measures to be taken, because they are technically not capable of doing so. The implicit legal basis for such refusals is the overarching Art. 1 ECMA, stating that member states are obliged to grant each other the widest measure possible of mutual assistance. If member states do not have the capacity to answer to requests or orders, it is obviously not possible for them to grant assistance and cross-border cooperation fails. The importance of measures for the future in this respect, should not be underestimated.

4 Free movement of evidence

The second pillar of the study and thus this report is the possibility to introduce the concept of free movement of evidence. Effective prosecution in cases having a cross-border aspect is often hampered because evidence gathered in one member state is not automatically recognized in another member state of the EU. National rules of evidence are still too different in matters of detail across the Union. The question of mutual *admissibility* of evidence across EU-borders deserves a special focus in the light of the topics of this report.

Discussions about the admissibility of evidence are far from new. The 1999 Tampere conclusions note that “evidence lawfully gathered by one member states’ authorities should be admissible before the courts of other member states, taking into account the standards that apply there”.⁴⁶

The European Commission’s Green Paper on the European Public Prosecutor specifically addressed the question of the mutual admissibility of evidence. In summary, the Green Paper concluded that the prior condition for any mutual admissibility of evidence is that the evidence must have been obtained lawfully in the member state where it is found. The law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated.⁴⁷ A number of comments were submitted in response to the question in the Green Paper on mutual admissibility of evidence.⁴⁸ For example, some considered that such a system raised serious problems both for defence rights and for certainty as to the law. The differences between national criminal justice systems and alleged inequalities in the protection of fundamental rights were also reported to be seen as obstacles. Many of the member states were of the opinion that the mutual admissibility principle proposed by the Commission should therefore be adopted only if appropriate mechanisms are established to secure legal guarantees and the effective protection of fundamental rights.

The EEW does not explicitly address the issue of mutual admissibility of evidence, nor do other MR and MLA-instruments. Nevertheless, the EEW is intended to facilitate the admissibility of evidence obtained from the territory of another member state. Four techniques occur in the report which contribute to the chance at admissibility of the evidence in the state that requested the EEW.

Firstly, the admissibility of evidence should be facilitated by the overall inclusion of procedural safeguards to protect fundamental rights.

⁴⁶ European Council (15-16 October 1999). “Conclusions of the Presidency.” SN 200/1/99 REV 1.

⁴⁷ European Commission (2001). “Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.” COM (2001) 715 final of 11.12.2001.

⁴⁸ European Commission (2003). “Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.” COM (2003) 128 final of 19.3.2003.

Secondly, admissibility should be facilitated by maintaining and clarifying the approach of previous instruments with regards to requiring additional formalities and procedures for the execution of requests. The possibility for member states to attach additional requirements to their request is provided in several MLA instruments. Art. 3 ECMA provides for the execution of requests in the manner provided for by the law of the requested state. Art. 4.1 EU MLA Convention states that requested member states must comply with the additional formal or procedural requirements of requesting member states, when they agree to afford MLA. In other words, MLA does not have a compulsory character but when a state agrees to grant MLA, they are agreeing to the “full package”, unless of course the additional requirements are contrary to their fundamental principles of law or where the Convention itself expressly states that the execution of requests is governed by the law of the requested member state. According to an explanatory report of the EU MLA Convention, the reason for this provision is to facilitate the use of the information gathered by MLA as evidence in the subsequent proceedings in the requesting member state.

The EEW goes further than the EU MLA Convention by removing the possibility to refuse to comply with those formalities. Art. 12 EEW proscribes that the executing authority shall comply with the formalities and procedures expressly indicated by the requesting authority unless otherwise provided, and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing state. Differently put and obvious in the light of the compulsory character of EEW's, requested member states are not only obliged to answer to the request, but equally have to respect additional formal or procedural requirements attached by the requesting state provided that the requirements are not contrary to the requested member states' fundamental principles of law. This aspect has been thoroughly analysed in a previous chapter of this report.

Thirdly, the EEW should be issued only when the requesting authority is satisfied that it would be possible to obtain the objects, documents or data in similar circumstances if they were on the territory of its own member state. This should also facilitate the subsequent admissibility of the objects, documents or data as evidence in proceedings in the issuing state. This article equally prevents the EEW from being used to circumvent protections in the national law of the requesting state on admissibility of evidence.

Fourthly, there is an obligation to inform the issuing authority immediately if the executing authority believes that the warrant was executed in a manner contrary to its national law. This should provide further reassurance that the evidence was lawfully obtained, and thus facilitate its admissibility in the courts of the issuing state.

In the light of investigating the extent to which broadening the scope of the EEW would be desired and possible for the future, detailed evidence-related

questions were therefore included in the questionnaire. The project team wanted to assess the possibility of a future implementation of a system of mutual admissibility of evidence across the EU. Assessing the value of evidence, in principle, may seem as having little to do with MLA and MR as it is the national judge who, in the end-phase of the criminal justice process, will assess if certain evidence will be admissible or not. This does not seem to have anything to do with police or judicial cooperation and may occur as being a purely national issue. However, the entire question of MLA in obtaining evidence becomes completely useless if in the end, the obtained evidence will not serve any purpose in trial due to inadmissibility. It is now 100% unclear what will happen with the evidence, gathered or obtained on the basis of cross-border cooperation. Will it be admissible? Will its value be questioned? The question has never been properly addressed, except for some small and very detailed stand-alone issues. Therefore this question is closely related to the question of expansion of MR, which is the core topic of this report. The issues are “core businesses” for the goals of creating “one European area of Freedom, Justice and Security”.

This chapter of the report is split into two main parts. First member states were asked how they deal with unlawfully obtained evidence. A similar set of questions was presented for three different situations: evidence unlawfully obtained at domestic level, evidence unlawfully obtained abroad, and evidence unlawfully obtained abroad in execution of a national request. Second, member states were asked to clarify their position with regard to four investigative techniques. Being the center of attention in recent discussion and expecting difficulties as to their admissibility, the lie detection test, provocation, the use of anonymous witnesses and hearsay evidence, were singled out.

4.1 Unlawfully obtained evidence

4.1.1 *At domestic level*

As previously mentioned, the prior condition for any mutual admissibility of evidence is that the evidence must have been obtained lawfully in the member state where it is found. The question of the exclusion of evidence obtained contrary to the law therefore has to be considered.

The law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated. The rules governing exclusion would be those of the member state in which the evidence was obtained. This is why as a first point of focus, the status of rules on unlawfully obtained evidence in domestic cases was assessed.

Member states were asked in the questionnaire to what extent they have any general rule(s) rendering information/evidence which has been unlawfully or irregularly obtained inadmissible or reducing its probative value as evidence at

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domestic level, where the information/evidence has been obtained in breach of formalities or procedural rules. The question of availability of rules was asked for three types of scenario's; rules that sanction unlawfully obtained evidence with absolute nullity, rules that proscribe that the unlawfulness or irregularity impacts upon the reliability of the information/evidence, or rules that state that use of the information/evidence as evidence would violate the right to a fair trial. Subsequently, the project team assessed what the consequence of such absolute nullity, relative nullity or violations of the right to fair trial were for domestic cases. Furthermore, if member states had such rules in place at a domestic level, they were asked what the character of these rules was. From the results of the questionnaire, it seems that 80 up to 90% of the member states have rules in place for all three sets of rules for unlawfully or irregularly obtained evidence.

When it comes to the consequences of absolute nullity, 62% of the member states having rules that sanction with absolute nullity, claimed that the information/evidence would need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree', so that it could still be used as mere steering information. The other 38% of the member states claimed that the information/evidence would need to be excluded as evidence altogether and that the same would apply to the 'fruits of the poisonous tree', so that it could not even be used any longer as mere steering information. None of the member states claimed that the information/evidence would still be able to be used as supportive evidence, more specifically that it would have to be corroborated by other evidence and could not form the sole or decisive basis for a conviction, in which case the court would motivate the probative value it has attributed to such evidence. This is an important observation, as this option does appear when analysis the rules concerning foreign evidence.

When asked about the character of the rules that proscribed absolute nullity, the variety among answers was enormous. One conclusion, next to the one of large variety, can however be drawn; 80% of the member states answered affirmatively on the question if they had statutory rules on absolute nullity in evidence-matters.

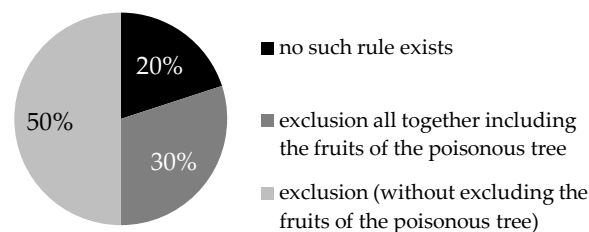
Absolute nullity at domestic level

Figure 45. Absolute nullity at domestic level

For the rules proscribing that unlawfulness or irregularity impacts upon the reliability of the information/evidence, the consequence of this can, on the basis of the answers of the member states, be all three scenario's; either the consequence of exclusion all together, the consequence of use as steering information or the consequence of use as supportive evidence. As for the character of the rule, the same conclusion as for the sanction of absolute nullity counts, however more member states also claimed the existence of jurisprudential rules.

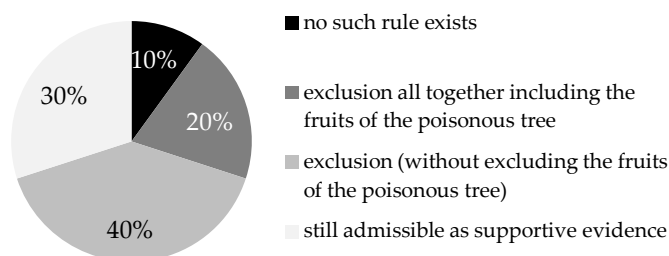
Impact on reliability at domestic level

Figure 46. Impact on reliability at domestic level

For rules on a domestic level stating that the use of the evidence would violate the right to a fair trial, the consequence there-of can also entail all three scenario's. As for the sort of rule, again statutory rules are most common to entail rules on unlawfully obtained evidence.

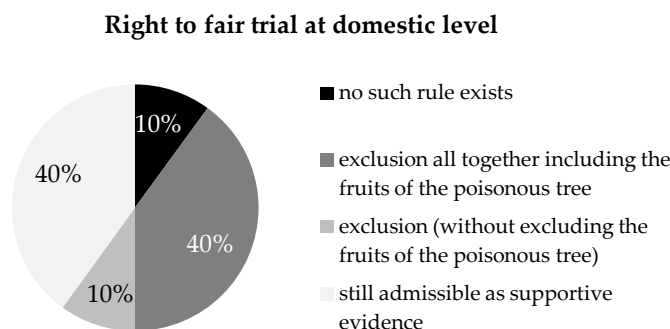


Figure 47. Right to fair trial at domestic level

The conclusions of this preliminary analysis on the consequences of unlawfully obtained evidence in a merely national context, is that rules are most likely to be statutory, that a variety of consequences is attributed to unlawfully obtained evidence and most importantly, that there is no pattern (except for the fact that rules are most likely to be statutory) in these rules and consequences to be found across borders. A variety of scenario's exists in different member states, rules are not at all harmonized, which can logically hamper mutual admissibility of evidence.

4.1.2 *Foreign unlawfully obtained evidence*

Existing, later transferred evidence

The exact same set of questions was asked for the situation in which unlawfully obtained evidence is transferred to a member state, after it was collected there or it was in another way already available in that member state. The transfer can be done spontaneously or following a request/order/warrant. Member states were again asked if they had any rules rendering that evidence inadmissible or reducing its probative value, what the consequences there-of where and what kinds of rules were in place. 70% of the member states claimed that rules were in place that sanctioned foreign unlawfully obtained and available evidence with absolute nullity. All three scenario's of consequences are possible. Whereas use as supportive evidence was never indicated in a purely domestic case, 10% of the member states indicated such an interpretation of "absolute nullity" in a foreign context. Rules were also most likely to be statutory.

Absolute nullity for foreign evidence



Figure 48. Absolute nullity for foreign evidence

80% of the member states claims to have rules who impact on the reliability of foreign evidence which is slightly less compared to a purely domestic situation. Again, all three scenario's are possible. No significant differences are revealed when compared to a strictly domestic situation.

Impact on reliability for foreign evidence

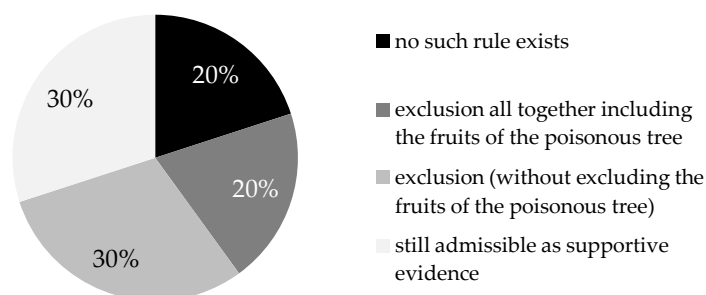


Figure 49. Impact on reliability for foreign evidence

As for rules on the use of this kind of evidence being a violation of the right to a fair trial, 80% of the member states equally had such rules in place, most of the rules being statutory or general principles of law. The consequences could be all three scenario's. It is interesting to note that the member states answered differently when compared to the responses of a purely domestic case. However no significant differences seem to exist.

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As a preliminary comparison to rules for unlawfully obtained evidence in a merely domestic context, no significant differences seem to exist.

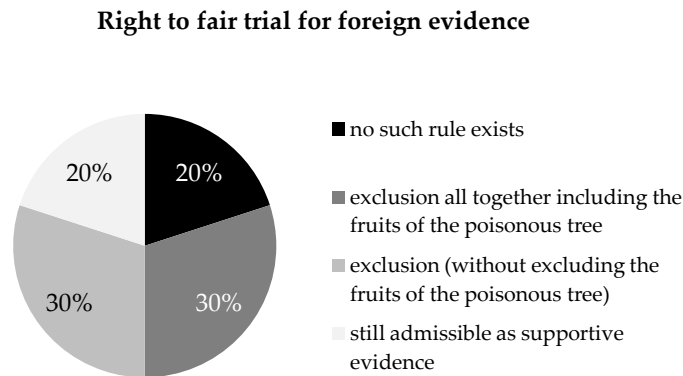


Figure 50. Right to fair trial for foreign evidence

Requested evidence

Finally, the set of questions was asked for the scenario in which a member state requests or orders information or evidence to another member state, and where the requested member state obtains this information or evidence in an unlawful or irregular manner.

For absolute nullity, there is no difference between foreign existing evidence and evidence collected upon a request as the responses are a perfect copy.

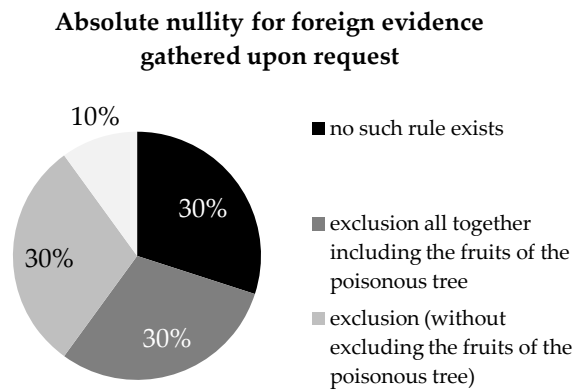


Figure 51. Absolute nullity for foreign evidence gathered upon request

This conclusion cannot be extended to rules that state the unlawfulness impacts on the reliability. Even though an equal 80% of the member states claim to have rules in place, a slight difference can be noticed between regulations with regard to foreign existing evidence and foreign evidence collected upon request. For the latter category, it is less likely that the sanction results in an exclusion all together (including the fruits of the poisonous tree). 10% of the member states shifted from such overall exclusion to exclusion without the fruits of the poisonous tree.

Even though this difference in reply might seem insignificant at first sight, it is important to note however that rules may not only differ between domestic and foreign evidence, but that an additional distinction may need to be made between existing foreign evidence and foreign evidence collected upon request.

For violations of the right to fair trial when using this kind of evidence, 80% of the member states have such rules in place, the consequences can be all three options, and the rules are most likely to be statutory with a significant amount of member states claiming to have general principles of law for this.

Impact on reliability for foreign evidence gathered upon request

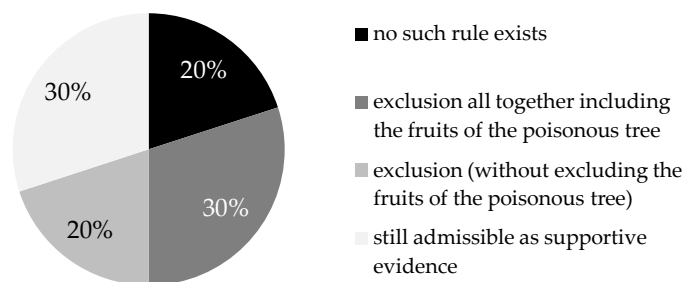


Figure 52. Impact on reliability for foreign evidence gathered upon request

For violations of the right to fair trial when using this kind of evidence, 80% of the member states have such rules in place, the consequences can be all three options, and the rules are most likely to be statutory with a significant amount of member states claiming to have general principles of law for this.

Right to fair trial for foreign evidence gathered upon request

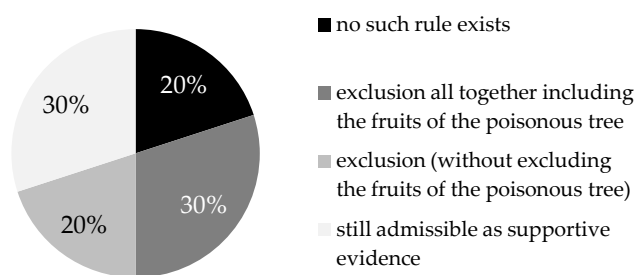


Figure 53. Right to fair trial for foreign evidence gathered upon request

The overall conclusion after the analysis of rules and their consequences and character for unlawfully obtained evidence both domestically and abroad is firstly that a multitude of scenario's are possible. Secondly, in most member states all of these rules are governed by statutory law, only a small fraction of member states has these rules imbedded in their constitution. This could mean that the future harmonization of rules for mutual admissibility of evidence would not necessarily pose major legal problems for the large majority of member states. The greatest variety exists in member states when it comes to the value that they attribute to unlawfully obtained evidence in further stages of the criminal justice process. Not only is there a great variety among member states as to the use of unlawfully obtained evidence in a merely national context as steering or supportive evidence or the complete exclusion thereof, some variation also exists as to the value that member states attribute to this evidence in a national context on the one hand, and to this evidence when it is obtained abroad on the other hand. While some member states attribute the exact same value to unlawfully obtained evidence in a national context and when it comes from another member state, others do show some difference in the validation of foreign evidence. Some member states are more strict in the validation of unlawfully obtained evidence in another member state, and surprisingly, sometimes more leniency is shown in this validation of foreign evidence.

The fact that a significant amount of member states already does not make any difference in the validation of unlawfully obtained evidence as to where it was obtained, is certainly a sign of the possibility of future complete mutual admissibility of evidence, and attributing the same value to any kind of evidence, no matter where in the EU it was obtained.

Furthermore, as nearly all member states have existing sets of rules of their own for attributing a certain value to unlawfully obtained evidence, the previously made remark of the law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated, poses no problems. As member states have sufficient rules in place to qualify the value of certain evidence, member states that request the obtainment and transfer of evidence should trust that these rules are of a high enough standard to mutually recognize the value that the requested member state has attributed to evidence that has moved across their borders. The rules governing exclusion can and should be those of the member state in which the evidence was obtained. This is an important recommendation for the future of mutual admissibility of evidence, and more generally for the future of mutual recognition.

4.2 Four techniques that deserve special focus

As previously mentioned, the EEW entails some important minimum safeguards to help protect fundamental rights. More specifically and of importance for this sub-chapter, Art. 6 ensures that the EEW will be issued only when the issuing authority is satisfied that the following conditions have been met: that the objects, documents and data are likely to be admissible in the proceedings for which it is sought. This prevents the EEW from being used to circumvent protections in the national law of the issuing state on admissibility of evidence, particularly if further action is taken in the future on the mutual admissibility of evidence obtained pursuant to the EEW.

This article is important, especially since a lot of differences exist among member states as to the admissibility of certain investigation techniques. If a member state does not allow for a certain technique and the evidence it brings forth, they should not request for such techniques and subsequent evidence to be transferred to them from another member state under the cover of cross-border cooperation. This would be a complete abuse of the system and jeopardise the future of MR. The rule of the EEW is clear: if a member state does not allow for a certain technique, they should not request for it to be done in another member state. The perfect solution for the future of the issue would be that no differences exist across member states as allowing certain investigation techniques, but as the complete harmonization of criminal procedural law across the EU is far from near, this rule of Art. 6 EEW is necessary and useful.

Four types of techniques and the evidence they bring with them have been assessed in the questionnaire. The reason for the selection of these particular four, is that they are under heavy discussion and the most differences across member states as to their admissibility can be expected. These large differences can be problematic if one wants to move in the direction of complete mutual

admissibility of evidence and MR in general. Therefore, the questionnaire has addressed just how big these differences in admissibility are across member states, and how willing member states are to accept evidence that these techniques bring forth, when having been conducted abroad.

4.2.1 *Lie detection test*

The first investigative technique the project team focused on, is the lie detection test.

Because its reliability is highly controversial, this investigative measure is heavily criticized. Even though it is a technical process that reflects physiological processes such as heart rate and blood pressure, the validity of the results is not generally accepted, because – unlike with tests such as a DNA test – the results are said to be possibly influenced by the subject. Therefore it is unlikely that the introduction of a lie detection test has the potential to expedite the proceedings. It might even be counterproductive because issues of reliability will inevitably be brought up in court.

When asked to what extent member states allowed for the technique of a lie detector test in their own country, 50% of the member states claimed that they do allow for it. 60% of the member states that do allow for it, said that it could be used as supportive evidence. 40% of the member states said it could be used as steering information. None of these member states claimed that it could be used as sole or decisive evidence.

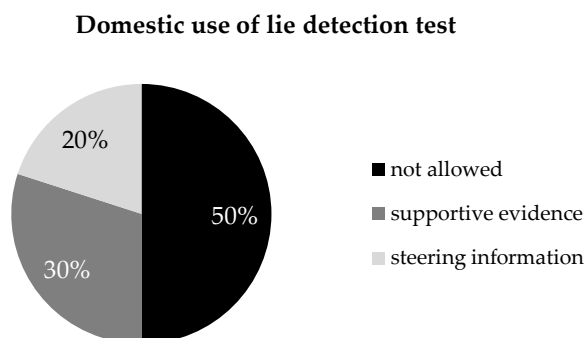


Figure 54. Domestic use of lie detection test

When asked how they would treat this type of evidence if it came from another member state, only 30% of the member states consider this evidence to be inadmissible. Considering that up to 50% does not allow for this technique

domestically, this means there are member states that allow a foreign lie detection test whereas such a technique is not allowed domestically. Member states that make this shift, allow evidence from a foreign lie detection test as steering information.

Admissibility of foreign lie detection test

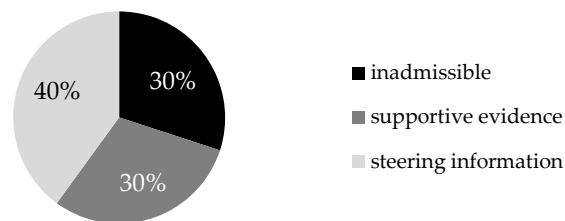


Figure 55. Admissibility of foreign lie detection test

This willingness to accept foreign evidence is an important finding which is not completely contradictory to Art. 6 EEW *per se*, as the foreign evidence can only be used as steering information, not as actual evidence. Member states that do allow for lie detection tests, attribute the exact same value to the foreign evidence as in a merely national context, which is perfectly in line with the MR principle.

4.2.2 *Provocation/entrapment/(the offence being provoked by the police/authorities)*

The second investigative technique the project team focused on, is the use of provocation or entrapment.

The ECtHR clarified that police incitement or provocation occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution. Provocation is not allowed.⁴⁹

In spite of this clear case law, it remains interesting to analyse how this relates to the exclusion of evidence.

⁴⁹ Teixeira de Castro v. Portugal, 9 June 1998, § 38; Malininas v. Lithuania, 1 July 2008, § 38.

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When asked to what extent member states allowed for the technique of provocation/entrapment in their own country, 70% of the member states claimed that they do not allow for it. 66% of the member states that do allow for it, said that it could be used as decisive or sole evidence, 33% said it could be used as supportive evidence. None of these member states claimed that it could be used as steering information.

Domestic use of provocation

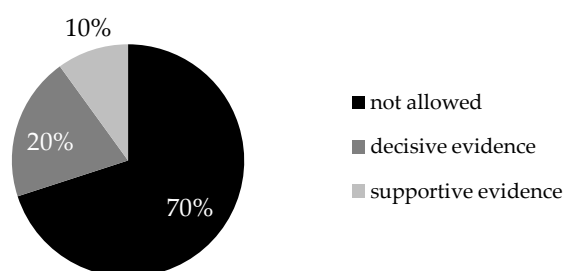


Figure 56. Domestic use of provocation

When asked how they would treat this type of evidence if it came from another member state, only 50% of the member states indicated that such evidence was inadmissible. Again, member states are more lenient and willing to accept foreign evidence. Some of them however claimed it could be used as steering information. This means that again a more lenient approach is taken towards foreign evidence in this matter.

Admissibility of foreign provocation

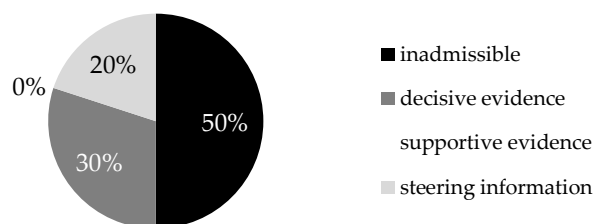


Figure 57. Admissibility of foreign provocation

The same remark can be made as to the compatibility with Art. 6 EEW. Most member states that do allow for the technique domestically, attribute the exact

same value to the foreign evidence as in a merely national context, this perfectly in line with the principle of MR. A very small fraction of the member states however claimed that the evidence, which would have the value of supportive evidence domestically, could be used as sole or decisive evidence when coming from abroad. This again means a more lenient approach towards foreignly obtained evidence.

4.2.3 *Using statements of anonymous witnesses taken in the requested/executing member state not covered in the EU MLA Convention*

The third investigative technique the project team focused on, is the use of anonymous witnesses.

An anonymous witness is defined as any person, irrespective of his status under national criminal procedural law, who provides or is willing to provide information relevant to criminal proceedings and whose identity is concealed from the parties during the pre-trial investigation or the trial proceedings through the use of procedural protective measures.

In several cases, the ECtHR dealt with the issue of anonymous witnesses.⁵⁰ The court either stated that there was a violation of Art. 6, §3 (d) ECHR on the ground that the statements of anonymous witnesses had been used as the sole or decisive reason for conviction⁵¹, or stated that there was no such violation because these statements were corroborated by other evidence.⁵² In light of this clear case law, and in light of the question whether future EU level minimum standards should be based on ECHR standards or be of lower or higher level, it is interesting to analyse how the member states interpret and use the current ECtHR acquis in their national practice.

When asked to what extent member states allowed for this in their own country, 80% of the member states claimed that they do allow for it. 62% of the member states that do allow for it, said that it could be used as supportive evidence. The remaining 38% of the member states said it could be used as sole or decisive evidence, which is contrary to the ECtHR case law. None of these member states claimed that it could be used as steering information.

⁵⁰ VERMEULEN, G. (2005). *EU standards in witness protection and collaboration with justice*. Antwerp-Apeldoorn, Maklu. p 47.

⁵¹ *Delta v. France*, 19 December 1990; *Kostovski v. The Netherlands*, 20 November 1989; *Windisch v. Austria*, 27 September 1990;

⁵² *Solakov v. The Former Yugoslav Republic of Macedonia*, 31 October 2001; *Isgro v Italy*, 19 February 1991; *Asch v. Austria*, 26 April 1991;

Domestic use of anonymous witnesses

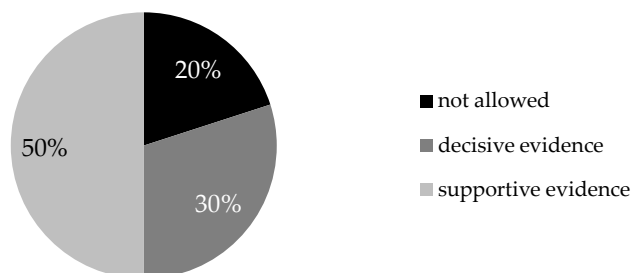


Figure 58. Domestic use of anonymous witnesses

When asked how they would treat this type of evidence if it came from another member state, half of the member states that claimed that the technique was inadmissible domestically would consider the foreign evidence inadmissible too. The other half however claimed it could be used as steering information. A more lenient approach is therefore again sometimes taken towards foreign evidence. Member states that allow for this technique domestically attribute the same value to evidence when it is gathered abroad.

Admissibility of foreign anonymous witnesses

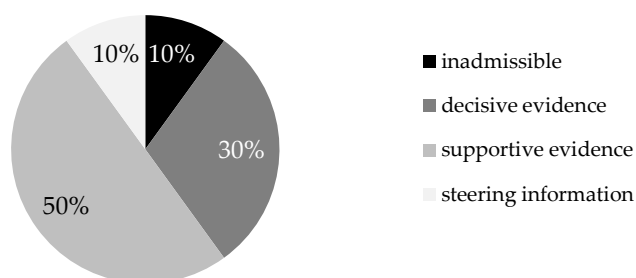


Figure 59. Admissibility of foreign anonymous witnesses

The same remark can again be made as to the compatibility with Art. 6 EEW, as it only would mean that it could be used as steering information. Most member states that do allow for the technique domestically, attribute the exact same value to the foreign evidence as in a merely national context, this perfectly

in line with the principle of MR. A very small fraction of the member states however claimed that the evidence, which would have the value of supportive evidence domestically, could be used as sole or decisive evidence when coming from abroad. This again means a more lenient approach towards foreignly obtained evidence. One small fraction is however more strict for this technique, saying that even when it would be considered as sole or decisive evidence domestically, it could only be used as supportive evidence if it came from abroad.

4.2.4 Hearsay evidence

The fourth and final investigative technique focused on by the project team is hearsay evidence.

Hearsay evidence is a typically common law feature. Most jurisdictions however, are quite reluctant to allow hearsay evidence, because it is felt that the assertions are often unreliable, insincere or subject to flaws in memory and/or perception. Because of this controversy, strict rules apply before hearsay evidence is considered admissible. The ECHR can be interpreted as holding a ground for exclusion of hearsay evidence. Although it is not prohibited as such, restrictions laid down for other types of evidences can be applied. Because the truthfulness and accuracy of the persons words – who are spoken by another – cannot be tested by cross-examination, the rights of the defence are in danger.

When asked to what extent member states allowed for hearsay evidence, which is indirectly obtained information, other than from direct witnesses, in their own country, 90% of the member states claimed that they do allow for it. 77% of the member states that do allow for it, said that it could be used as supportive evidence, 11% said it could be used as sole or decisive evidence and an equal 11% said it could be used as steering information.

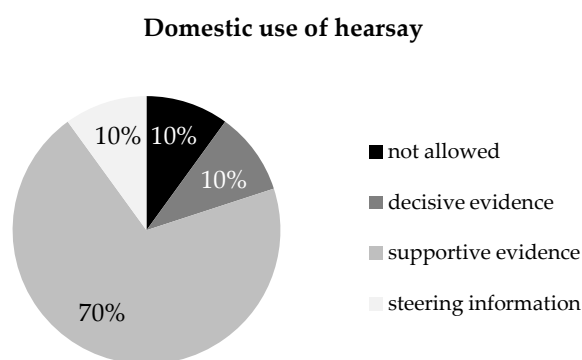


Figure 60. Domestic use of hearsay evidence

When asked how they would treat this type of evidence if it came from another member state, 11% of the member states that claimed that the technique was inadmissible domestically would consider the foreign evidence inadmissible too. Most member states that do allow for the technique domestically, attribute the exact same value to the foreign evidence as in a merely national context. The rest of the member states claimed the evidence, which would have the value of supportive evidence domestically, could be used as sole or decisive evidence when coming from abroad. Once again more leniency is shown towards foreignly obtained evidence.

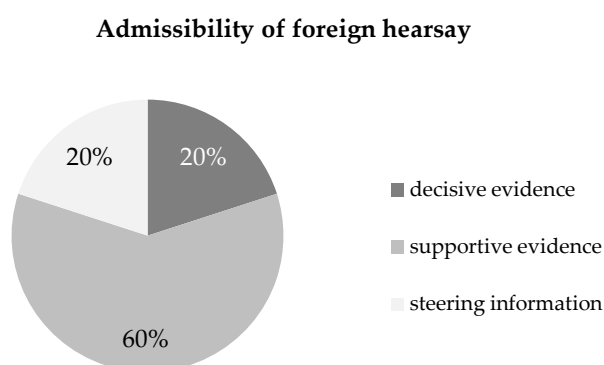


Figure 61. Admissibility of foreign hearsay evidence

The overall conclusion of this assessment is that most of the time, the same value is attributed to these techniques and the evidence that they bring forth, whether it comes from another member state or is domestically obtained. This is a very positive outcome for the MR principle. Even more, sometimes more leniency is shown for foreign evidence in comparison with domestically obtained evidence, which is a surprising outcome to say the least. This however does not violate Art. 6 EEW per se, for the reason explained above. When however comparing the admissibility and value of the techniques on a domestic level, as predicted, large differences exist. This could be problematic for the discussion of harmonization of procedural criminal law in the EU.

4.3 Admissibility and value of lawfully obtained foreign evidence

Finally, member states' views and current situations of mutual admissibility of lawfully obtained evidence was assessed.

More specifically, experts in member states were asked to what extent they felt that, according to their experience, information/evidence which has been collected in another member state in accordance with its domestic law and procedures, being eligible for use as evidence under its domestic law, was often considered inadmissible or of a reduced probative value because of the manner in which it has been gathered?

Most member states claimed that they did not feel this was often the case, which is a positive outcome for the future of MR. A smaller fraction of member states did however claim that this was often the case. These member states were asked what, in their experience, would often be the underlying reason for this inadmissibility or reduced probative value.

The provided reasons were;

- that the manner in which it was gathered was not fully in accordance with/the manner provided for in the own national law (and procedures)
- that the manner in which it was gathered did not respect specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc)
- that the manner in which it was gathered did not (fully) respect the formalities and procedures expressly indicated by the member state in the capacity of requesting/issuing authority/member state
- that the manner in which it was gathered had not granted the person(s) concerned by the execution of the measure(s) that has/have prompted the information/evidence the specific procedural guarantees or rights that would have accrued to him/her/them in the execution of such measure(s) in a similar case under the member states' law, or not having allowed the person(s) concerned to claim these
- that the manner in which it was collected, in a similar case under the member states' national law would be a breach of formalities or procedural rules the violation of which would be sanctioned with absolute nullity
- that the manner in which it was collected, in a similar case under respondents' national law would impact upon the reliability of the information/evidence
- that the manner in which it was collected, in a similar case under member states' national law would violate the right to a fair trial
- that the manner in which it was collected, in a similar case under member states' national law would constitute a violation of ECHR/other common

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fundamental rights texts and/or the ECtHR's jurisprudence (relating to other issues than to the right to a fair trial)

As for the third reason, being that the manner in which it was gathered did not respect specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc), member states that felt that this reason was often applied, were asked if it was their experience that this often was because the requested formalities were considered to be contrary to fundamental principles of their own law. The one member state that claimed to use this reason as a refusal ground or as a ground for reducing the probative value of the information/evidence, responded negatively on this question. This issue has already been detailedly addressed in a previous chapter. Art. 12 EEW proscribes that the executing authority shall comply with the formalities and procedures expressly indicated by the requesting authority unless otherwise provided, and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing state. Differently put and obvious in the light of the compulsory character of EEW's, requested member states are not only obliged to answer to the request, but equally have to respect additional formal or procedural requirements attached by the requesting state provided that the requirements are not contrary to the requested member states' fundamental principles of law. When asked about this in another part of the questionnaire, all member states claimed that when additional requirements were attached to a request, they were never refused to them as requesting member states on the basis of the contradiction with requested member states' fundamental principles of law. The answers in this chapter are consistent with these findings.

As a general question, member states were asked to what extent, according to their experience, they felt that where information/evidence has been collected in/from another member state, its admissibility, reliability or probative value is often being challenged or questioned by defence lawyers or judges? Almost half of member states answered that they do feel that this was often the case. As an overall positive outcome for the future of mutual admissibility of evidence, the majority claimed that the value of foreign evidence was not often challenged by judges or lawyers.

The question of admissibility of evidence was also assessed in a detailed manner. Member states were asked if information/evidence obtained in/from another member state in most cases would constitute admissible evidence under their national law, where it has been collected in the other member state concerned in accordance with/in the manner provided for in its domestic law (and procedures) or is otherwise available there, being eligible for use as evidence under its domestic law.

All member states answered affirmatively, which is a first positive outcome of this specific assessment for the future of complete mutual admissibility of evidence in the EU.

Secondly, the question was asked if information/evidence obtained in/from another member state in most cases would constitute admissible evidence under their national law under the condition that the person(s) concerned by the execution of the measure(s) that has/have prompted the information/evidence has/have been granted the specific procedural guarantees or rights that would accrue to him/her/them in the execution of such measure(s) in a similar case under either their national law or that of the requesting/issuing member state, or has/have been able to claim these. Only one member state claimed that this would not be the case, but did however accept this as a future policy option. Again, an overall positive outcome.

Thirdly, the question was asked if information/evidence obtained in/from another member state in most cases would constitute admissible evidence under their national law where it has been collected in the other member state concerned in accordance with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) standards, commonly agreed to at EU level. The same member state answered that this would not be the case but again accepted it as a future policy option. Member states that answered this question affirmatively were also asked what the minimum standards to be agreed upon should be. All but one member state claimed that the minimum standards would have to be based on or derived from ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available. One member state claimed that these standards would have to be of a lower standard than the ECHR. The outcomes of all three large questions are surprisingly positive for the question of mutual admissibility of evidence, and nothing seems to stand in the way of the development of such a system in the EU.

Two final questions were asked in this respect. First, member states were asked if they would consider it an acceptable EU future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute per se admissible evidence under the national law of the member states concerned? 90% of the member states would indeed consider this to be a good policy option. Secondly, member states were asked to what extent they currently accepted that competent authorities from other member states who are lawfully present on their territory in while executing a request/order/warrant (e.g. when seconded member of a joint investigation team operating on their territory, when present during a hearing or house search etc) draft official reports having the same probative value under their national law as if they had been drafted by their own

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competent authorities; Almost all member states currently accept this. Half of the ones that do not consider this to be a good future policy option. Only one member states would not be willing to accept this.

In globo, as a conclusion of this assessment of the status quo in member states of mutual admissibility of evidence, the outcome is very positive and no significant issues would have to be faced if the system of per se admissibility of evidence were to be installed in the EU. The Eurojust College also comes to this conclusion and considers that in principle, evidence taken abroad in an EU member state in conformity with the law of that state, should be admissible evidence in other member states, unless the way the evidence was obtained is contrary to their fundamental principles.

5 Findings and recommendations for the future

5.1 The use of the 32 MR offences

As far as the first MR characteristic, being the use of the 32 MR offences to abandon the double criminality requirement, is concerned, member states were asked to what extent either partial or general abandonment of the double criminality requirement is considered acceptable in MLA. Strikingly, only 10% of the member states indicated to attach great importance to a full fledged double criminality requirement. This means that no less than 90% of the member states are willing to cooperate even if the investigative measure relates to acts which do not constitute an offence in their own national law. In current practice 60% of the member states do not even apply the double criminality requirement, even though they are allowed to do so. Abandoning the double criminality requirement most definitely constitutes a significant improvement in terms of efficient cooperation. Considering that an additional 30% accept abandonment as a future policy, double criminality can and should no longer be inserted into the future legal framework.

Furthermore, the questionnaire aimed at assessing the feasibility to use the 32 MR offences beyond the double criminality framework.

First, the requirement to execute in consistency with the national law of the executing member state was put to the test. Because such a requirement might hinder efficient cooperation, it was worth looking into the willingness of member states to waive this right when execution is related to acts included in the 32 MR offences. The enquired situation concerned the execution for acts for which the requested measure cannot be taken/ordered in a national case according to the national law of the executing state. Analysis revealed that only 20% would never allow execution. No less than 80% of member states are either now executing or willing to accept a policy to oblige execution if the acts concerned are included in the 32 MR offences.

Second, the possibility to limit refusal and postponement grounds was put to the test. The MR philosophy requires refusal and postponement grounds to be limited as much as possible. The question again rises whether the introduction of the 32 MR offences would have an added value in this context. Analysis revealed that neither for operational, nor for financial capacity issues the preparedness of member states to limit refusal and postponement grounds is linked to the 32 MR offences.

Third, the questionnaire aimed at assessing the added value of the 32 MR offences in the context of admissibility of evidence. Member states were asked whether they would consider it to be an acceptable future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute per se admissible evidence

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under the national law of the member states concerned. Only 10% considered this not to be an option. The other 90% do not require that such admissibility is limited to the 32 MR offences.

Fourth and final, member states were asked whether they would consider it to be an acceptable future policy option that competent authorities from other member states who are lawfully present on their territory while executing a request/order/warrant draft official reports having the same probative value as if they had been drafted by their own competent authorities. 80% of the member states consider admissibility of “draft official reports having the same probative value as if they had been drafted by own competent authorities” to be an acceptable future policy and do not require such admissibility to be limited to the 32 MR offences.

It is safe to say that the introduction of the 32 MR offences in other areas than the abandonment of the double criminality requirement needs to be well considered. Whereas the introduction might seem a step forward, analysis clearly revealed that limiting such a step forward to the 32 MR offences, can actually hinder from taking an even bigger step forward. This view is shared by the Eurojust College. In its replies, it is clarified that in general, the taking of evidence should not be dependent on whether the underlying offence comes under the 32 MR offences set out in previous MR instruments.

5.2 Enhanced stringency in cooperation

5.2.1 *Grounds for refusal or non-execution*

The MR concept must turn traditional judicial cooperation into a more reliable and faster mechanism. This implies more stringency for the requested member state or authority, in that traditional grounds for refusal are reduced and requests must be replied to and effectively executed within strict deadlines.

First, the position of member states *vis-à-vis* the (revised) traditional grounds for refusal or non-execution was tested.

As far as the *ne bis in idem* principle is concerned, the vast majority of member states indicate that execution on the basis of *ne bis in idem* would be refused, or that it should be possible to refuse execution on the basis of it. The overall recommendation therefore must be that the *ne bis in idem* principle should be enshrined throughout future (MR-based) MLA instruments between the member states as (at least an optional) ground for refusal or non-execution.

Even though wholly new and introduced in the questionnaire as a suggested ground for refusal or non-execution, support among member states for refusal or non-execution for the situation where the proceedings in the issuing member state relate to a person who the executing member state has granted immunity from prosecution for the same facts as a benefit for his or her collaboration with

justice, is strikingly high. It is therefore recommended to introduce this newly suggested (optional) ground for refusal or non-execution throughout future (MR-based) MLA instruments between the member states.

Refusal or non-execution for reason of lack of double criminality, was also assessed. The granting of traditional MLA generically does not depend on the condition of double criminality, and the possibility of refusal on the basis of lack of double criminality is limited to a series of coercive or potentially intrusive investigative measures only. Therefore this refusal ground was only assessed for measures for which the refusal ground has not (yet) been prohibited. Only a small number of member states would not (insist to have the possibility to) invoke lack of double criminality as a ground for non-execution. Hence, complete removal of double criminality as a refusal or non-execution ground is illusory. However, the potential of introducing a prohibition to invoke it for the 32 MR offences in these cases is far more promising.

Subsequently, “impossibility to execute” as a refusal ground was assessed. Art. 13, 1, c EEW stipulates that recognition or execution of an EEW may be refused in the executing member state if it is not possible to execute it by any of the measures available to the executing authority in the specific case in accordance with the provisions of the EEW. This non-execution ground is EEW-specific, and is inexistent under current MLA instruments. Asked whether they would refuse execution of an EEW (or would want to be able to refuse it) if it is not possible to execute it by any of the measures which would be available to them in a similar domestic case the majority of member states answered affirmatively. Both for theoretical reasons and on the basis of the empirical research among member states, it is highly recommended to retain the ground for non-execution for measures related to the EEW (cluster 1), and stressing that it should obviously not be introduced for any other cluster, not even cluster 2.

Thereupon, the refusal ground of immunity or privilege under the law of the executing member state was assessed. The introduction of this ground for refusal or non-execution is a step backwards, compared to traditional MLA. Surprisingly, when tested, there was significant support among member states for keeping or even introducing the ground for non-execution concerned. Notwithstanding this empirical result, the project team strongly suggests redeliberation on the issue, for objectively it would be a step backwards to keep or further introduce the ground for non-execution throughout future (MR based) MLA.

The next refusal ground to be assessed was the extra-territoriality principle; this refusal ground was copied in the EEW from the EAW, which seems a regrettable mistake. The project team therefore opposes introduction of it in future (MR based) MLA instruments, and deletion of it in the EEW. This stance is supported by the assessments made with member states.

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As for the exception ground of *ordre public*, and notwithstanding the empirical results, the project team sees no reason for keeping the traditional *ordre public* exception in place. Traditionally, assistance may be refused if the requested party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country. However, in the EEW the exclusion ground has been significantly reduced in that it may only be invoked where, and to the extent that, the objects, documents or data would for those reasons neither be used as evidence in a similar domestic case. Through the latter interpretation, the traditional *ordre public* exception has lost the traditional inter-state dimension it has always had in judicial cooperation in criminal matters. The project team recommends a middle course, as was introduced in the Wittem Convention of 1979, and allow to impose conditions to execution if this can avoid affecting the interests of the requested state. Furthermore, the possibility to refuse cooperation referring to the political offence exception, was assessed. It has for long held an important position in cooperation instruments. Today this position cannot be maintained any longer for two main reasons. First, for reasons of internal consistency in the legislative framework it is advised to ban the political offence exception altogether. Second it should be noted that calling upon the political offence exception is a clear sign of distrust with regard to the requesting member state, which is odd having explicitly expressed confidence in the structure and operation of the legal systems of the other member states and confidence in the capacity of all the member states to ensure just legal procedures in the preamble to the TEU.

Also, the fiscal offence exception, which has already been drastically reduced in scope in the 2001 EU MLA Protocol has no real future any more. At least, its reduction along the lines of the EEW can be recommended throughout future (MR based) MLA between the member states.

The potential implications in terms of operational or financial capacity for the executing member state in executing under a stringent MR regime investigative measures that currently lack an explicit regulation may be very substantial. The project team has therefore chosen to not only test the position of member states *vis-à-vis* the (revised) traditional grounds for refusal or non-execution but also to check the preparedness of member states to accept semi-mandatory execution of the measures under clusters 5 en 6 irrespective of their potential financial and operational capacity impact. For the interception of telecommunications and the video conference hearing, there is a reverse financial cost regulation in place, which is why the project team has chosen to assess whether member states in the mean time would be willing to step away from the reverse financial cost regulation, or – alternatively – would be in for a new financial regulation for considerable-cost measures.

As for refusal for reasons of lack of financial capacity, none of the current MLA instruments explicitly provides for such a general refusal ground. Member states were asked if they felt that requests for investigative measures were often refused or should be able to be refused when it is felt that the implications of their execution in terms of financial capacity or resources is or would be substantial or extraordinary. Half of the member states did consider this an option. Also, member states were asked if they would be willing to execute the request anyway if a fair share, for example at a 50/50 rate, would be borne by the requesting/issuing member state. The results of the answers provided were spectacularly positive to say the least. The results are significant for the debate on a possible future policy option to introduce a 50/50 sharing of costs made in the execution of (MR based) MLA requests or orders, as an agreed fall-back position in case where the financial consequences of executing a request or order would be substantial or extraordinary, in that the cost involved would surpass an amount of e.g. 10.000 EUR (which the project team suggests to copy from the 2006 MR of confiscations framework decision, thus introducing a consistent mirroring regime in the sphere of (MR based) future MLA between the member states).

Concerning refusing execution for reasons of lack operational capacity, the large majority of member states indicated that irrespective of the cluster, lack of operational capacity would and should not count as a refusal or non-execution ground

5.2.2 *Strict reply and execution deadlines*

Of vital importance for the safeguarding of evidence, be it under traditional MLA or under MR, is that requests or orders are replied to in a timely fashion and swiftly executed.

The project team has chosen not to ask member states what deadlines they thought would be appropriate for replying to a request or order. On the basis of the EEW and other MR based instruments it could easily be set at e.g. 30 days, being the time limit then for agreeing to execution, refusing it or asking for postponement of effective execution of the request or order.

Questioned about deadlines relating to effective execution of requests, irrespective of the clusters, approximately half of the member states require the requested/executing member state to execute the measure concerned within a provided deadline. The project team here inclines to share the standpoint taken by the Eurojust College, i.e that, whilst recognising that it may be difficult to set a general deadline for the execution of requests for the taking of evidence, such requests should be executed as quickly as possible, and preferably within a 60 day term, with a possible extension for another 30 days in case postponement would be requested.

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The importance of postponement possibilities was tested separately. Interestingly however, a lot of the member states indicate they would not postpone execution, even if such execution would have a significant impact on routine domestic workload or other domestic priorities and even if such execution entails the risk of hampering the fluent functioning of their own criminal justice system. It is particularly encouraging to see that member states show this kind of willingness to cooperate. Member states that did indicate to use the possibility to postpone execution of a foreign order/request/warrant indicate that they are still willing to start execution within a reasonable deadline provided by the issuing/requesting member state, which is set at 45 to 60 days, which is only slightly longer than the Eurojust position which allows for a possible extension of 30 days in case postponement would be requested.

Based upon this analysis, the project team recommends that the time limit for agreeing to execution, refusing it or asking for postponement of effective execution of the request or order, be set at 30 days. Requests should be executed within a 60 day term, with a possible extension of 45 days in case postponement would be requested.

5.3 Accepting and executing orders

This section dealt with the general willingness of member states to step away from the traditional MR *locus regit actum* regime and the position of member states with respect to consistency problems. Furthermore, compliance with expressly indicated formalities was put to the test.

5.3.1 *Accepting the validity of domestic judicial decisions taken in the issuing member state*

All MR-based instruments that so far have been designed, prevent a decision or measure to be executed abroad unless it has first been taken or ordered domestically or – *mutatis mutandis* – could have been taken or ordered in a similar or comparable domestic case, in due conformity with the national law and procedures of the issuing member state. Given that the very essence of the MR principle lays precisely in the expectation that member states will trust one another sufficiently to mutually recognise each other's judicial decisions in criminal matters, as if it were their own, this is no more than logical. Consequently, the question at hand when considering to base the entirety of MLA between the EU member states as much as possible on a MR-based footing, is not whether that should be via a warrant-like or a domestic order & certificate-like instrument. The only and real question is whether the EEW – which apparently is the only MR instrument under which the actual taking or existence

of a domestic decision in the issuing member state must not be evidenced *vis-à-vis* the executing member state as a precondition for its execution by the latter – can or must serve as a model for reorienting MLA towards MR, if that were to be decided. The answer is negative, for the EEW (cluster 1) is extremely atypical in what it envisages, compared to traditional MLA requests (clusters 2-5). Whereas MLA essentially is a vehicle for requesting investigative measures or the transfer of precise objects, documents or data, the issuing of an EEW envisages a result, i.e. obtaining certain objects, documents or data, leaving it to the executing member state to take any investigative measures that it domestically may need to deploy (including, if necessary, search of premises and seizure) to that end. For it is not clear which investigative measures the executing member state will need to deploy in order to obtain the evidence sought, the EEW – even if categorized as a typical MR instrument – actually is no such instrument *stricto sensu*. For the bunch of MLA not covered by the EEW (comprised in clusters 2-5) the situation is different, in that it truly relates to the taking of investigative measures or to the transfer of objects, documents or data. It is hardly imaginable that a future EU MR-based system would envisage altering this situation, by allowing the issuing of e.g. ‘find the truth’ warrants, ‘get incriminating testimony’ warrants or the like by the issuing member state, instead of the latter spelling out which concrete measures or procedural steps it seeks the execution of in the executing member state. Consequently, only a single question remains: should it be required from the issuing member state to always first order these measures or take these steps in accordance with its domestic law and procedures. The answer is obviously no. For a vast majority of measures or procedural steps, it would not even be possible to have them formally decided or ordered, especially in the phase of preliminary (police) investigations. Even where the measures concerned would require a formal domestic decision if they would need to be taken on the territory of the issuing member state itself, it would largely undo the flexibility that characterizes current MLA if each time the taking of the measures concerned would need to be formally decided domestically – and embedded in a formalised decision eligible for recognition by the executing member state as if it were its own decision. Only to the extent that member states do not have sufficient trust in one another to suffice with self declared *observance potentialis* by the issuing member state of its domestic law and procedures in issuing investigation orders or warrants, it seems acceptable to require the issuing member state to actually deliver proof of the taking of a domestic decision or the issuing of a domestic order or warrant to the envisaged effect. Whether, even for far-reaching coercive or intrusive measures included in cluster 3 and – a fortiori – under cluster 5 – such distrust level is to be maintained when a roll-out of MR is envisaged, seems to be the only real question left. Therefore, member states have been asked for their position on the matter. The empirical results of the questionnaire are inconclusive, in that the

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position of member states varies greatly. The project team recommends to suffice with requiring the issuing member state to confirm or declare that the measure the execution of which is envisaged could be taken in a similar or comparable national case to promote full trust and hence allow for its execution without prior evidence of any formal domestic decision, order or warrant to the same effect in the issuing member state.

5.3.2 *Executing judicial decisions in the executing member state*

Member states were asked which position their own national law occupies with respect to the execution of a request/order warrant. For clusters 3 and 5, only 20% of the member states indicated that their own national role plays an essential role and that execution is only possible where fully in accordance with/in the manner provided for in their national law (and procedures). For cluster 6 none of the member states indicated this strict *locus regit actum* requirement. 10% of the member states give their own national law a complementary role in that execution can only take place under specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc). This 10% does not vary over the different clusters.

Considering the importance of admissibility of the gathered information/evidence in the course of criminal proceedings in the requesting/issuing member state, several instruments foresee the possibility to expressly indicate that the requested/ordered member state in the execution of the measure, should comply with certain formalities and procedures (e.g. compliance with certain formalities and procedures, purpose or use limitations etc). Interestingly, 60% (cluster 3 and 5) upto 70% (cluster 6) of the member states indicate to be willing to accept a *forum regit actum* regime.

Additionally, member states could indicate what the current position of the persons concerned by the execution of the measure is. Three scenarios were put to the test: first, the possibility to grant a person the national guarantees of the executing member state; second, the possibility to grant a person the best of both worlds, being the guarantees of either the executing or the requested member state; third, the possibility to introduce a set of commonly agreed upon minimum standards. The results of the current practice with regard to these three scenarios is contrasted by a larger support of either of them as a future policy. Between 70 and 80% of the member states (depending on the clusters and on the scope of the rights that would be granted to the persons concerned) consider either of these three scenarios to be an acceptable future policy. When going into detail on the elaboration of common minimum rules, 90% of the member states should based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available.

Secondly it was assessed to what extent member states are willing to go beyond the limits of their own legal system. This section of the questionnaire linked in with the possibility to require that the (execution of the) investigative measure is consistent with the law of the requested member state. Analysis revealed that member states are very reluctant to proceed with the execution of an investigative measure if it surpasses the national scope *ratione personae*. 70% indicated that execution would not be possible in such cases. Only 30% is prepared to go ahead with this investigative measure albeit this percentage increases with 10% in cluster 5. Member states are not willing to execute if the order/warrant/request relates to acts which do not constitute offences in the national law of the executing member state. Having anticipated this outcome, the questionnaire made a distinction between a general *ratione materiae* issue and an issue linked to the 32 MR offences featuring in mutual recognition instruments. As this list embodies the abandonment of the double criminality test, it is only logical for member states to be willing to cooperate if the acts concerned are included in 32 MR offences, regardless of criminalisation under the own national law. This hypothesis was confirmed by the results of the study in that 50% of the member states currently already applies this rule and an additional 30% considers it a valid future policy option to abandon the possibility to make execution dependant on double criminality. The project team anticipates similar results when the 32 MR offences are attempted to be used to avoid lack of execution for other types of inconsistency with the national law of the execution member state.

Furthermore, requested member states are not only obliged to answer to the request, but equally have to respect additional formal or procedural requirements attached by the requesting state provided that the requirements are not contrary to the requested member states' fundamental principles of law.

Considering the importance for the admissibility of evidence, it is interesting to note that not all member states use the possibility to request additional formal or procedural requirements. The percentage ranges from 50% in cluster 1 to 80% in cluster 6. This might indicate a great deal of trust in the legal systems of the executing member states. The end goal of mutual assistance is the obtaining of information/evidence to be used in the course of criminal proceedings in the issuing/requesting member state. Not complying with the formalities expressly indicated constitutes an important risk. The information/evidence gathered runs the risk of being inadmissible in the requesting/issuing member state. Therefore compliance with expressly indicated formalities is of utmost importance.

5.4 Horizontalisation of cooperation

The fourth MR characteristic relates to the horizontalisation of cooperation. MR typically takes place between the authorities of the member states.

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Derogation from this general rule is possible in special cases, without further clarifying what constitutes a special case. The project team considers it advisable to eliminate such possibility to derogate from the general rule, and only maintain one single exception for the transfer of persons held in custody. The only other exception currently generally used is the exchange of criminal records data, which will be replaced by the ECRIS system and therefore no longer needs to be an exception to the direct communication rule.

Direct communication and thus further horizontalisation of the cooperation environment impacts on the importance of institutional capacity at all authority levels within the member states. Further investment is vital to ensure that MLA becomes a well oiled machine. A reference to this discussion explains why questions related to institutional capacity were included in the questionnaire. Acceptance of requests issued in a foreign language and technical capacity issues judicial authorities are confronted with, were assessed.

In a Union which counts 27 members and 23 different languages, MLA and MR become empty concepts when member states do not have the institutional capacity to make sure that all requests are understandable for all parties involved. Linguistic and translation facilities and staff are of undeniable importance. Member states were asked to what extent they had translations in English, French or German of their criminal code, their code of criminal procedure or (other) MLA and MR legislation available. The relevance of the previously mentioned question lies in the fact that most request for MLA are accompanied by the corresponding extracts from the relevant legislation, applying to the circumstances of the case. Analysis revealed that as far as complete translated versions of relevant legislation are concerned, the general situation is that they are more available in member states in English than they are in French and German. In future (MR based) MLA it should be an obligation to accept requests/orders in English. Therefore, it is highly recommendable that all member states invest time, effort and resources in having at least partial translations of the most relevant passages of their criminal codes, their codes of criminal procedure or (other) MLA and MR legislation into English available.

Going further when examining language-related issues in relation to MLA, the questionnaire assessed member states' general willingness to accept requests and orders they receive from other member states, written in one of three aforementioned languages. The results of this assessment are clear; most requests and orders in English are accepted while requests and orders in French and German are not accepted by the large majority of the responding member states. This conclusion strengthens the position to make acceptance of incoming requests/orders in English an obligation.

The questionnaire also asked member states if proper translation and interpretation facilities were available to translate and interpret requests and orders from and into English, French, and/or German. English interpretation and

translation facilities were most available in the responding member states, followed by German facilities and French facilities were in place the least.

Other non-legislative measures which could facilitate cross-border cooperation and which deserve analysis can be put under the term “technical capacity issues”. Just as difficulties arise when member states receive requests or orders for assistance in a language they do not understand, answering to requests or orders without having the technical capacity to do so is problematic. Even though technical issues do not have any sort of legal framework in MLA nor MR-instruments, the project team recognized the importance of the issue and included questions about technical issues in the questionnaire. The importance of all the assessed issues is that member states might refuse to comply with or answer to certain orders or request for measures to be taken, because they are technically not capable of doing so. The implicit legal basis for such refusals is the overarching Art. 1 ECMA states that member states are obliged to grant each other the widest measure possible of mutual assistance. If member states do not have the capacity to answer to requests or orders, it is obviously not possible for them to grant assistance and cross-border cooperation fails. The importance of measures for the future in this respect, should not be underestimated.

To investigate the status questionis of technical capacity of member states to effectively process requests for MLA, a number of relevant questions there-to were asked in the questionnaire. More specifically, the extent to which certain technical and other facilitators for the fluent and speedy processing of requests and orders were available in responding member states was assessed.

First, ICT equipment such as telephones, faxes, modem lines, e-mail, fast internet connectivity, etc. are either of high or medium-level availability to the responding member states. None of the member states claimed to have a low availability of such ICT-facilitators. When asked about the availability of technical means for video or telephone conferences including available measures for protection in such a context (such as audio/video distortion), there were as many member states claiming a high availability thereof as member states claiming a low availability of such means. When asked for the level of availability and quality of technical means required for special investigative measures such as interception, audio or video monitoring, etc. the large majority of member states reported only medium-level availability there-of. The importance of having the technical capacity to execute these kinds of measures is however is however not to be underestimated. In the last decade telecommunications technology has undergone considerable development, particularly in the field of mobile telecommunications. These are very widely used by offenders in the context of their criminal activities, especially in the field of cross-border crime. Furthermore, member states were asked about availability of and access to travel budgets for certain authorities to for example participate

in joint investigation teams or to assist in the execution of requests abroad. Only a very small number of member states claimed that such budgets were available, most member states responded that such budgets were only available to a low extent. An important recommendation in this respect, especially considering the importance of successful JIT-cooperation and the need for extra impulses to engage in such cooperation, is that more budgets should urgently be made available. As a more general question, member states were asked about the availability and quality of off-line (paper and electronic versions) relevant legal documentation. Most member states claimed a high availability and quality of such documentation and none if the member states reported a low availability and quality. As a very last question, member states were asked if the executions of requests were monitored for quality and speed. Again results were satisfying, as most member states reported that such a monitoring mechanism was indeed in place.

5.5 Free movement of evidence

The project team wanted to assess the possibility of a future implementation of a system of mutual admissibility of evidence across the EU. The entire question of MLA in obtaining evidence becomes completely useless if in the end, the obtained evidence will not serve any purpose in trial due to inadmissibility. It is now 100% unclear what will happen with the evidence, gathered or obtained on the basis of cross-border cooperation.

As a first point of focus, the status of rules on unlawfully obtained evidence in domestic cases was assessed. The exact same set of questions was asked for the scenario in which unlawfully obtained evidence is transferred to a member state, after it was collected there or it was in another way already available in that member state. Thirdly, the set of questions was asked for the scenario in which a member state requests or orders information or evidence to another member state, and where the requested member state obtains this information or evidence in an unlawful or irregular manner. The overall conclusion after the analysis of rules and their consequences and character for unlawfully obtained evidence both domestically and abroad is first that a multitude of scenario's are possible. Secondly, in most member states all of these rules are governed by statutory law, only a small fraction of these rules imbedded are constitutionally embedded. This could mean that the future harmonization of rules for mutual admissibility of evidence would not necessarily pose major legal problems for the large majority of member states. The greatest variety exists in member states when it comes to the value that they attribute to unlawfully obtained evidence in further stages of the criminal justice process. Not only is there a great variety among member states as to the use of unlawfully obtained evidence in a merely national context as steering or supportive evidence or the complete exclusion

thereof, some variation also exists as to the value that member states attribute to this evidence in a national context on the one hand, and to this evidence when it is obtained abroad on the other hand. While some member states attribute the exact same value to unlawfully obtained evidence in a national context and when it comes from another member state, others do show some difference in the validation of foreign evidence. Some member states are more strict in the validation of unlawfully obtained evidence in another member state, and surprisingly, sometimes more leniency is shown in this validation of foreign evidence. The fact that a significant amount of member states already does not make any difference in the validation of unlawfully obtained evidence as to where it was obtained, is certainly a sign of the possibility of future complete mutual admissibility of evidence, and attributing the same value to any kind of evidence, no matter where in the EU it was obtained. Furthermore, as nearly all member states have existing sets of rules of their own for attributing a certain value to unlawfully obtained evidence, the previously made remark of the law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated, poses no problems. As member states have sufficient rules in place to qualify the value of certain evidence, member states that request the obtainment and transfer of evidence should trust that these rules are of a high enough standard to mutually recognize the value that the requested member state has attributed to evidence that has moved across their borders. The rules governing exclusion can and should be those of the member state in which the evidence was obtained. This is an important recommendation for the future of mutual admissibility of evidence, and more generally for the future of mutual recognition.

Furthermore, four types of techniques and the evidence they bring with them have been assessed in the questionnaire. The reason for the selection of these particular four, is that they are under heavy discussion and the most differences across member states as to their admissibility can be expected. These large differences can be problematic if one wants to move in the direction of complete mutual admissibility of evidence and mutual recognition in general. The EEW entails some important minimum safeguards to help protect fundamental rights. More specifically, Art. 6 ensures that the EEW will be issued only when the issuing authority is satisfied that the following conditions have been met: that the objects, documents and data are likely to be admissible in the proceedings for which it is sought. This prevents the EEW from being used to circumvent protections in the national law of the issuing state on admissibility of evidence, particularly if further action is taken in the future on the mutual admissibility of evidence obtained pursuant to the EEW. This article is important, especially since a lot of differences exist among member states as to the admissibility of certain investigation techniques. The four techniques analysed are the use of a lie detection test, the use of statements of anonymous witnesses taken in the

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requested/executing member state not covered in the EU MLA Convention, the technique of provocation/entrapment and the use of hearsay evidence. The questionnaire has addressed just how big the differences in admissibility are across member states, and how willing member states are to accept evidence that these techniques bring forth, when having been conducted abroad. The overall conclusion of this assessment is that most of the time, the same value is attributed to these techniques and the evidence that they bring forth, whether it comes from another member state or is domestically obtained. This is a very positive outcome for the principle of MR. Even more, sometimes more leniency is shown for foreign evidence in comparison with domestically obtained evidence, which is a surprising outcome to say the least. This however does not violate Art. 6 EEW *per se*, for the reason explained above. When however comparing the admissibility and value of the techniques on a domestic level, as predicted, large differences exist. This could be problematic for the discussion of harmonization of procedural criminal law in the EU.

Finally, member states' views and current situations of mutual admissibility of lawfully obtained evidence was assessed.

Finally, member states' views and current situations of mutual admissibility of lawfully obtained evidence was assessed. More specifically, experts in member states were asked in the questionnaire to what extent they felt that, according to their experience, information/evidence which has been collected in another member state in accordance with its domestic law and procedures, being eligible for use as evidence under its domestic law, was often considered inadmissible or of a reduced probative value because of the manner in which it has been gathered? Most member states claimed that they did not feel this was often the case, which is a positive outcome for the future of MR. A smaller fraction of member states did however claim that this was often the case. These member states were asked what, in their experience, would often be the underlying reason for this inadmissibility or reduced probative value.

Two very specific questions were asked in this respect. First, member states were asked if they would consider it an acceptable EU future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute *per se* admissible evidence under the national law of the member states concerned? 90% of the member states would indeed consider this to be a good policy option. Secondly, member states were asked to what extent they currently accepted that competent authorities from other member states who are lawfully present on their territory in while executing a request/order/warrant (e.g. when seconded member of a joint investigation team operating on their territory, when present during a hearing or house search etc) draft official reports having the same probative value under their national law as if they had been drafted by their own

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competent authorities; Almost all member states currently accept this. Half of the ones that do not, consider this to be a good future policy option. Only one member states would not be willing to accept this.

In globo, as a conclusion of this assessment of the status quo in member states of mutual admissibility of evidence, the outcome is very positive and no significant issues would have to be faced if the system of per se admissibility of evidence were to be installed in the EU. The Eurojust College also comes to this conclusion and considers that in principle, evidence taken abroad in an EU member state in conformity with the law of that state, should be admissible evidence in other member states, unless the way the evidence was obtained is contrary to their fundamental principles.

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7 Annex: Online questionnaire

7.1 Preliminary evidence-related issues

1. Is/are there any *general* rule(s) (constitutional, as a general principle of law, statutory, jurisprudential) rendering information/evidence which has been unlawfully or irregularly obtained inadmissible or reducing its probative value as evidence

[mutually non-exclusive categories: please tick all applicable boxes]

[optional: if yes: stipulate each time the type of rule [tickboxes, all applicable boxes to be ticked: constitutional, as a general principle of law, statutory, jurisprudential]

- at domestic level, in a merely national context

- 1) where the information/evidence has been obtained in breach of formalities or procedural rules the violation of which is sanctioned with absolute nullity

☐ yes

☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- ☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)
- ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
- ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence)]

- 2) where the unlawfulness or irregularity impacts upon the reliability

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of the information/evidence

☐ yes

☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- ☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)
- ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
- ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence)]

3) where use of the information/evidence as evidence would violate the right to a fair trial

☐ yes

☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- ☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)
- ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
- ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a

conviction, in which case the court will motivate the probative value it has attributed to such evidence)]

- abroad, having been collected or otherwise being available there, and only later on transferred to your member state before, either spontaneously by the (competent authorities from) another member state or following a request/order/warrant issued by (the competent authorities from) your member state

1) where the information/evidence has been obtained in breach of formalities or procedural rules the violation of which is sanctioned with absolute nullity

☐ yes

☐ no

[if yes:

[mutually exclusive categories: tick only one box]

☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)

☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)

☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence)]

2) where the unlawfulness or irregularity impacts upon the reliability of the information/evidence

☐ yes

☐ no

[if yes:

[mutually exclusive categories: tick only one box]

☐ would the information/evidence need to be excluded as evidence

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altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)

- ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
- ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence)]

3) where use of the information/evidence as evidence would violate the right to a fair trial

- ☐ yes
- ☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- ☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)
 - ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
 - ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence)]
- irregularly obtained by the requested/executing authority/member state in executing a request/order/warrant by (the competent authorities from) your member state

1) where the information/evidence has been obtained in breach of

formalities or procedural rules the violation of which is sanctioned with absolute nullity

- ☐ yes
- ☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- ☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)
 - ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
 - ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence)]
- 2) where the unlawfulness or irregularity impacts upon the reliability of the information/evidence
- ☐ yes
 - ☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- ☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)
- ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
- ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other

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evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence)]

- 3) where use of the information/evidence as evidence would violate the right to a fair trial

- ☐ yes
☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- ☐ would the information/evidence need to be excluded as evidence altogether and would the same apply to the so called 'fruits of the poisonous tree' (so that it could not even be used any longer as mere (steering) information)
- ☐ would the information/evidence need to be excluded as evidence altogether, without the same applying to the so called 'fruits of the poisonous tree' (so that it could still be used as mere (steering) information)
- ☐ could the information/evidence still be used as supportive evidence (meaning that it has to be corroborated by other evidence and cannot form the sole or decisive basis for a conviction, in which case the court will motivate the probative value it has attributed to such evidence

-
2. Do you allow for the following evidence (gathering techniques), and if so, how do you assess their probative value and, if the evidence has been gathered in another member state (using the techniques concerned), would you consider it admissible and what would the probative value of it be like

[mutually non-exclusive categories: please tick all applicable boxes]

- lie detection test

1. do you allow for this technique domestically

- ☐ yes
☐ no

[if yes: the evidence (gathered using this technique)

[mutually exclusive categories: tick only one box]

- ☐ could be used as the sole or decisive evidence
- ☐ could only be used as supportive evidence
- ☐ could only be used as mere (steering) information
- 2. if the evidence has been gathered in another member state (using the technique concerned), it
 - [mutually exclusive categories: tick only one box]
 - ☐ would be inadmissible
 - ☐ could be used as the sole or decisive evidence
 - ☐ could only be used as supportive evidence
 - ☐ could only be used as mere (steering) information
- provocation/entrapment (the offence being provoked by the police/authorities)
 - 1) do you allow for this technique domestically
 - ☐ yes
 - ☐ no
 - [if yes: the evidence (gathered using this technique)]
 - [mutually exclusive categories: tick only one box]
 - ☐ could be used as the sole or decisive evidence
 - ☐ could only be used as supportive evidence
 - ☐ could only be used as mere (steering) information
 - 2) if the evidence has been gathered in another member state (using the technique concerned), it
 - [mutually exclusive categories: tick only one box]
 - ☐ would be inadmissible
 - ☐ could be used as the sole or decisive evidence
 - ☐ could only be used as supportive evidence
 - ☐ could only be used as mere (steering) information
- Using statements of an anonymous witness (any person, irrespective of his status under national criminal procedural law, who provides or is willing to provide information relevant to criminal proceedings and whose identity is concealed from the parties during the pre-trial

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investigation or the trial proceedings through the use of procedural protective measures), taken in the requested/executing member state [not covered in EU MLA Convention]

1) do you allow for this technique domestically

- ☐ yes
- ☐ no

[if yes: the evidence (gathered using this technique)

[mutually exclusive categories: tick only one box]

- ☐ could be used as the sole or decisive evidence
- ☐ could only be used as supportive evidence
- ☐ could only be used as mere (steering) information

2) if the evidence has been gathered in another member state (using the technique concerned), it

[mutually exclusive categories: tick only one box]

- ☐ would be inadmissible
- ☐ could be used as the sole or decisive evidence
- ☐ could only be used as supportive evidence
- ☐ could only be used as mere (steering) information

- hearsay (indirectly obtained information, other than from a direct witness)

1) do you allow for this technique domestically

- ☐ yes
- ☐ no

[if yes: the evidence (gathered using this technique)

[mutually exclusive categories: tick only one box]

- ☐ could be used as the sole or decisive evidence
- ☐ could only be used as supportive evidence
- ☐ could only be used as mere (steering) information

2) if the evidence has been gathered in another member state (using the technique concerned), it

[mutually exclusive categories: tick only one box]

- ☐ would be inadmissible
- ☐ could be used as the sole or decisive evidence
- ☐ could only be used as supportive evidence
- ☐ could only be used as mere (steering) information

-
3. Where information/evidence has been collected in another member state in accordance with its domestic law and procedures or is otherwise available there, being eligible for use as evidence under its domestic law, is it your experience that it is often considered inadmissible or of a reduced probative value after having been transferred to your member state (either as a result of spontaneous information exchange or of a request/order/warrant made/issued by you) because of the manner in which it has been gathered (either in the requested/executing member state or in another state where it was initially collected)

- ☐ yes
- ☐ no

[if yes:

[mutually non-exclusive categories: please tick all applicable boxes]

- ☐ that manner being not fully in accordance with/the manner provided for in your national law (and procedures)
- ☐ that manner not respecting specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc)
- ☐ that manner not (fully) respecting the formalities and procedures expressly indicated by you in your capacity of requesting/issuing authority/member state

[if yes: is it your experience that (the authorities of) other member states often refuse to comply with such formalities or procedures because they are considered contrary to fundamental principles of their national law?

- ☐ yes
- ☐ no

- ☐ that manner not having granted the person(s) concerned by the execution of the measure(s) that has/have prompted the information/evidence the specific procedural guarantees or rights that would accrue to him/her/them in the execution of such measure(s) in a

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similar case under your national law, or not having allowed the person(s) concerned to claim these

- ☐ that manner in a similar case under your national law being in breach of formalities or procedural rules the violation of which would be sanctioned with absolute nullity
- ☐ that manner being considered in a similar case under your national law to impact upon the reliability of the information/evidence
- ☐ that manner being considered in a similar case under your national law to violate the right to a fair trial
- ☐ that manner being considered in a similar case under your national law as in violation of ECHR/other common fundamental rights texts and/or the ECtHR's jurisprudence (relating to other issues than to the right to a fair trial)

Eurojust

Where information/evidence has been collected in one member state in accordance with its domestic law and procedures or is otherwise available there, being eligible for use as evidence under its domestic law, is it Eurojust's experience that it is often considered inadmissible or of a reduced probative value after having been transferred to another member state (either as a result of spontaneous information exchange or of a request/order/warrant made/issued by you) because of the manner in which it has been gathered (either in the requested/executing member state or in another state where it was initially collected)

☐ yes

☐ no

[if yes:

[mutually non-exclusive categories: please tick all applicable boxes]

- ☐ that manner being not fully in accordance with/the manner provided for in the national law (and procedures) of the requesting state
- ☐ that manner not respecting specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc)
- ☐ that manner not (fully) respecting the formalities and procedures expressly indicated the requesting/issuing authority/member state

[if yes: is it Eurojust's experience that (the authorities of) member states often refuse to comply with such requested formalities or procedures because they are considered contrary to fundamental principles of their national law?

☐ yes

☐ no

- ☐ that manner not having granted the person(s) concerned by the execution of the measure(s) that has/have prompted the information/evidence the specific procedural guarantees or rights that would accrue to him/her/them in the execution of such measure(s) in a similar case under their national law, or not having allowed the person(s) concerned to claim these
- ☐ that manner in a similar case under the national law of the requesting state being in breach of formalities or procedural rules the violation of which would be sanctioned with absolute nullity
- ☐ that manner being considered in a similar case under the national law of the requesting state to impact upon the reliability of the information/evidence
- ☐ that manner being considered in a similar case under the national law of the requesting state to violate the right to a fair trial
- ☐ that manner being considered in a similar case under the national law of the requesting state as in violation of ECHR/other common fundamental rights texts and/or the ECtHR's jurisprudence (relating to other issues than to the right to a fair trial).

-
4. Where information/evidence has been collected in/from another member state, is it your experience that its admissibility, reliability or probative value is often being challenged or questioned by defence lawyers or judges?

☐ yes

☐ no

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5. Would information/evidence obtained in/from another member state in most cases constitute admissible evidence under your national law:

- where it has been collected in the other member state concerned in accordance with/in the manner provided for in its domestic law (and procedures) or is otherwise available there, being eligible for use as evidence under its domestic law

☐ yes

☐ no

[if not: do you consider it an acceptable EU future policy option that, in this case, it would constitute *per se* admissible evidence under your national law?]

☐ yes

☐ no

Eurojust

Would Eurojust consider it an acceptable EU future policy option that information/evidence obtained in/from one member state should constitute admissible evidence in another member state where it has been collected in the first member state concerned in accordance with/in the manner provided for in the domestic law of the obtaining state (and procedures) or is otherwise available there, being eligible for use as evidence under its domestic law?

☐ yes

☐ no

- under the condition that the person(s) concerned by the execution of the measure(s) that has/have prompted the information/evidence has/have been granted the specific procedural guarantees or rights that would accrue to him/her/them in the execution of such measure(s) in a similar case under either your national law or that of the requesting/issuing member state, or has/have been able to claim these

☐ yes

☐ no

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[if not: do you consider it an acceptable EU future policy option that, in this case, it would constitute *per se* admissible evidence under your national law?]

☐ yes

☐ no

Eurojust

Would Eurojust consider it an acceptable EU future policy option that information/evidence obtained in/from one member state should constitute admissible evidence in another member state under the condition that the person(s) concerned by the execution of the measure(s) that has/have prompted the information/evidence has/have been granted the specific procedural guarantees or rights that would accrue to him/her/them in the execution of such measure(s) in a similar case under either the national law of the requesting/issuing member state, or has/have been able to claim these?

☐ yes

☐ no

- where it has been collected in the other member state concerned in accordance with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) standards, commonly agreed to at EU level

☐ yes

☐ no

[if yes

[specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard]

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[if not: do you consider it an acceptable EU future policy option that, in this case, it would constitute per se admissible evidence under your national law]

- ☐ yes
- ☐ no

[if yes, specify: the minimum standards to be agreed to should
[mutually exclusive categories: tick only one box]

- ☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]
- ☐ be of a higher standard
- ☐ be of a lower standard]

Eurojust

Would Eurojust consider it an acceptable EU future policy option that information/evidence obtained in/from one member state should constitute admissible evidence in another member state where it has been collected in the other member state concerned in accordance with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) standards, commonly agreed to at EU level

- ☐ yes
- ☐ no

[if yes

[specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

- ☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]
- ☐ be of a higher standard
- ☐ be of a lower standard]

-
6. Do you consider it an acceptable EU future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute *per se* admissible evidence under the national law of the member states concerned
- ☐ yes
- ☐ no
- ☐ only where the acts/offences the team has been set up for constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the respective member states and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

Eurojust

Would Eurojust consider it an acceptable EU future policy option that information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the member states would constitute per se admissible evidence under the national law of the member states concerned?

- ☐ yes
- ☐ no
- ☐ only where the acts/offences the team has been set up for constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the respective member states and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years
-
7. Do you currently accept that competent authorities from other member states who are lawfully present on your territory in while executing a request/order/warrant (e.g. when seconded member of a joint investigation team operating on your territory, when present during a hearing or house search etc) draft official reports having the same probative value under your national law as if they had been drafted by your own competent authorities

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☐ yes

☐ no

[if not: do you consider this an acceptable EU future policy option]

☐ yes

☐ no

☐ only where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by your law and being punishable in your member state by a custodial sentence or a detention order for a maximum period of at least three years]

Eurojust

Would Eurojust consider it an acceptable EU future policy option that member states ought to accept that competent authorities from other member states who are lawfully present on their territory in while executing a request/order/warrant (e.g. when seconded member of a joint investigation team operating on their territory, when present during a hearing or house search etc) draft official reports having the same probative value their national law as if they had been drafted by their own competent authorities?

☐ yes

☐ no

☐ only where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law and being punishable in the respective member state by a custodial sentence or a detention order for a maximum period of at least three years

7.2 MLA/MR-related questions

The replies to the questions below may/are likely to differ depending on the type of mutual assistance (MLA) or mutual recognition (MR) concerned. Member states are therefore requested to answer a similar set of questions (and thus differ their replies) for the various types of MLA/MR, which have conveniently been logically clustered below in 6 categories (1-6), listed immediately below for your information.

1. Obtaining objects, documents or data which are already in the possession of the requested/executing authority/member state before a request/order/warrant is issued

(including from a third party, from a search of premises including the private premises of the suspect, historical data on the use of any services including financial transactions, historical records of statements, interviews and hearings, electronic data not located in the requested/executing state (to the extent possible under its law), and other records, including the results of special investigative techniques)

2. Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and the taking/execution of which the requested/executing member state/member state on the territory of which the measure is to be taken/executed may currently make dependent on the condition(s) of dual criminality, (dual) minimum threshold or consistency with its national law

i.e. (limitative list):

(house) search and seizure (other than required for the execution of a request/order/warrant in fine of obtaining objects, documents or data which are already in the possession of the requested/executing authority/member state before the request/order/warrant has been made/issued)

3. Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and which currently would only be taken/executed in accordance with/in the manner provided for in the national law (and procedures) of the requested/executing member state/member state on the territory of which the measure is to be taken/executed or under the condition(s) which would have to be observed in a similar national case in the latter member state

i.e. (limitative list):

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- *cross-border observation*
- *observation on the territory of the requested/executing member state by its own authorities*
- *cross-border hot pursuit;*
- *covert investigations (by officials)*
- *controlled delivery in the territory of the requested/executing member state (i.e. being the territory of destination of the delivery or where intervention is envisaged)*
- *interception of telecommunications if the subject of the interception is present in the requested/executing member state and his or her communications can be intercepted in that member state, with immediate;*
- *interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and without transcription of the recordings;*
- *interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and with transcription of the*
- *allowing an interception of telecommunications to be carried out or continued if the telecommunication address of the subject of the interception is being used on the territory of the requested/executing member state ('notified' member state) in case where no technical assistance from the latter is needed to carry out the*
- *monitoring of banking transactions*
- *collecting and examining cellular material and supplying the DNA profile obtained*

4. Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and the taking/execution of which the requested/executing member state/member state on the territory of which the measure is to be taken/executed may currently not make dependent on any condition of dual criminality, (dual) minimum threshold or consistency with its national law

i.e. (limitative list):

Interception of telecommunications where the technical assistance of the requested/executing member state is needed to intercept the telecommunications of the subject of the interception (irrespective of whether the latter is present in its territory or in that of a third member state) with immediate transmission

Interception of telecommunications where the technical assistance of the requested/executing member state is needed to intercept the telecommunications of the subject of the interception (irrespective of whether the latter is present in its territory or in that of a third member state) without immediate transmission and without transcription of the recordings

Interception of telecommunications where the technical assistance of the requested/executing member state is needed to intercept the telecommunications of the subject of the interception (irrespective of whether the latter is present in its territory or in that of a third member state) without immediate transmission and with transcription of the recordings

Transfer of detainees from the requested/executing to the requesting/issuing member state (provided the requested/executing member state may make such transfer dependent on the consent of the person concerned)

Transfer of detainees from the requesting/issuing to the requested/executing member state (provided the requested/executing member state may make such transfer dependent on the consent of the person concerned)

Hearing under oath (of witnesses and experts)

hearing by videoconference

hearing by telephone conference (of witnesses or experts, only if these agree that the hearing takes place by that method)

5. Investigative measures/measures of assistance (other than the aforementioned measures), which have not been explicitly regulated in MLA legal instruments applicable between the EU member states and could therefore fall under the scope of 'widest measure of mutual assistance', but for which (because of their coercive, covert or intrusive nature or their potential/likeliness to negatively impact upon/affect the reliability/evidential value of the information they seek to bring about) it is unlikely that the requested/executing member state/member state on the territory of which the measure is to be taken/executed will be willing to take/execute/allow for them unless in accordance with/in the manner provided for in its national law (and procedures), under the condition(s) which would have to be observed in a similar national case, or on the condition(s) of dual criminality, (dual) minimum threshold or consistency with its national law

including (non-limitative list):

- registration of incoming and outgoing telecommunication numbers
- interception of so-called direct communications
- obtaining communications data retained by providers of a publicly available electronic communications service or a public communications network

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- withholding/intercepting of mail (and reading it)
- cooperation with regard to electronic communications (other than telecommunications) (registration of incoming and outgoing communications, interception etc)
- controlled delivery through the territory of the requested/executing member state (i.e. across its territory, the territory of destination of the delivery or where intervention is envisaged being another member state or a third state)
 - This inclusion of this investigative measure in this cluster might not be self-explanatory, as it may seem that it is regulated in the EU MLA Convention. Unlike in the corresponding provision of the 1997 Naples II Convention, however, the provision relating to controlled deliveries in the EU MLA Convention does not relate to transit controlled deliveries also, and is limited to controlled deliveries ‘on’ the territory of the requested member state.
- (cross-border) use of (police) informers and civilian infiltrators
- (cross-border) use of (police) informers and civilian infiltrators
- (cross-border) use of technical devices (camera, electronic/GPS tracking) for the purposes of observation
- entry of premises without consent in view of discrete visual control or search
- confidence buy (either or not including flash-roll)
- establishing front business
- (discrete) photo and video registration
- assistance in non-procedural protection of protected witnesses and their family members (direct and physical protection; placement of a detainee in a specialised and protected section of the prison; relocation for a short period; relocation for a longer or indefinite period; change of identity, including the concealment of certain personal data by the administrative authorities; lesser measures, techno-preventative in nature)
- carrying out bodily examinations or obtaining bodily material or biometric data directly from the body of any person, including the taking of fingerprints (other than collecting and examining cellular material and supplying the DNA profile obtained: supra)
- exhumation and transfer of the corpse
- (exhumation and) forensic anatomist investigation
- lie detection test (of a non-consenting witness or suspect)
- line-up (including of a suspect, not consenting to appear)

6. Investigative measures/measures of assistance (other than the aforementioned measures) which have not been explicitly regulated in MLA legal instruments applicable between the EU member states and could therefore fall under the scope of ‘widest measure of mutual assistance’, and for which it is likely that the requested/executing member state/member state on the territory of which the measure is to be taken/executed will be willing to take/execute/allow for them in compliance with the formalities and procedures

expressly indicated by the requesting/issuing authority/member state provided that these are not contrary to the fundamental principles of its own law (i.e. lowest requirements regime)

including (non-limitative list):

- conducting analysis of existing objects, documents or data
 - conducting interviews or taking statements (other than from persons present during the execution of a European Evidence Warrant (EEW) and directly related to the subject thereof, in which case the relevant rules of the executing state applicable to national cases shall also be applicable in respect of the taking of such statements) or initiating other types of hearings involving suspects, witnesses, experts or any other party, other than under oath or by video or telephone conference (supra)
 - reconstruction
 - making of video or audio recordings of statements delivered in the requested/executing member state
 - video conference hearing of accused persons
 - video conference hearing of suspects
-

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B.1. Obtaining objects, documents or data which are already in the possession of the requested/executing authority/member state before a request/order/warrant is issued

This first category encompasses the types of assistance currently covered in the so called European Evidence Warrant Framework Decision of 18 December 2008, which will apply as from 19 January 2011 and introduce a MR-based system for the purpose of obtaining certain types of evidence abroad in criminal matters, whilst the entirety of other ways of gathering evidence abroad would still be governed by traditional MLA-based instruments.

This gives rise to a preliminary question:

Do you consider it the better policy option for the EU to base the entirety of MLA as much as possible on a MR-based footing, as in the European Evidence Warrant Framework Decision, instead of keeping a dual-track system in place, which may be likely to cause confusion among practitioners

- ☐ yes
- ☐ no

Eurojust

Would Eurojust consider it the better policy option for the EU to base the entirety of MLA as much as possible on a MR-based footing, as in the European Evidence Warrant Framework Decision, instead of keeping a dual-track system in place, which may be likely to cause confusion among practitioners

- ☐ yes
- ☐ no

Requesting formalities & procedures or providing deadlines

Can a request/order/warrant to take/execute/allow for this/these measure(s) in another member state be made?

- ☐ yes
- ☐ no

[if yes]

Would the requested/executing authority/member state be requested/ordered to comply with certain formalities and procedures expressly indicated in executing the measure(s) requested/ordered (in respect of legal or administrative processes which might assist in making the evidence sought admissible in your member state, e.g. the

official stamping of a document, the presence of a representative from your member state, or the recording of times and dates to create a chain of evidence)

- ☐ yes
☐ no

[if yes: is it your experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law]

- ☐ yes
☐ no

Eurojust

Is it Eurojust's experience that requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law?

- ☐ yes
☐ no

Grounds for refusal/non-execution

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution for any other reason) be refused, or should it be possible to refuse execution:

[mutually non-exclusive categories: tick all applicable boxes]

- ☐ if execution of the request/order/warrant would infringe the *ne bis in idem* principle
- ☐ If the person(s) concerned has been given immunity from prosecution in your member state for the same acts s given in the country itself for the same acts the request/order/warrant relates to
- ☐ if the request/order/warrant, where its execution necessitates to carry out a search or seizure, relates to acts which do not constitute an offence under your law, unless these acts, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a

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custodial sentence or a detention order for a maximum period of at least three years

- ☐ if it is not possible to execute the request/order/warrant by any of the measures which would be available to the requested/executing authority in a similar domestic case (provided that for the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, it must be ensured that there are measures, including search and seizure, available for the purpose of the execution of a request/order/warrant concerned)
 - ☐ if there is an immunity or privilege under your law which makes it impossible to execute the request/order/warrant
 - ☐ if the request/order/warrant relates to criminal offences which under the law of the requested/executing member 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 requesting/issuing member state and your law does not permit legal proceedings to be taken in respect of such offences where they are committed outside your territory
 - ☐ if, in a specific case, execution of the request/order/warrant would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities (be it only to the extent that the information obtained would not be used for those reasons as evidence in a similar domestic case)
-

B.2. Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and the taking/execution of which the requested/executing member state/member state on the territory of which the measure is to be taken/executed may currently make dependent on the condition(s) of dual criminality, (dual) minimum threshold or consistency with its national law

As member states have already accepted (in the European Evidence Warrant Framework Decision) (house) search and seizure required for the execution of a request/order/warrant in fine of obtaining objects, documents or data which are already in the possession of the requested/executing authority/member state before the request/order/warrant has been made/issued) to come under the principle of MR, it is only logical for them to be willing to agree that (house) search and seizure other than for the execution of European Evidence Warrant be brought under the same regime as the measure(s) falling under the scope of the European Evidence Warrant Framework Decision.

Therefore, this category only encompasses a single question:

Do you consider it an acceptable EU future policy option that the execution/taking of this/these measure(s) be governed by the same regime as you have accepted for the measure(s) falling under the scope of the European Evidence Warrant Framework Decision (meaning that there is no need to reply to the distinct questions listed under heading B.1 again, as the answers to them would be identical)

- ☐ yes
- ☐ no

Eurojust

Would Eurojust consider it an acceptable EU future policy option that the execution/taking of this/these measure(s) be governed by the same regime as has been accepted for the measure(s) falling under the scope of the European Evidence Warrant Framework Decision (meaning that there is no need to reply to the distinct questions listed under heading 2.1 again, as the answers to them would be identical)

- ☐ yes
- ☐ no

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B.3. Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and which currently would only be taken/executed in accordance with/in the manner provided for in the national law (and procedures) of the requested/executing member state/member state on the territory of which the measure is to be taken/executed or under the condition(s) which would have to be observed in a similar national case in the latter member state

Domestic scope *ratione materiae*

Can this/these measure(s) be taken/ordered in a national case, according to your national law?

[mutually non-exclusive categories: please tick all applicable boxes]

- ☐ For any offence
- ☐ For any offence punishable under your national law by a custodial sentence or a detention order for a maximum period of at least three years or less
- ☐ For a number of (serious) offences only (enumerated), punishable by a custodial sentence or a detention order for a maximum period of at least three years
- ☐ For less/a more limited series of offences only
- ☐ For no offence

Requesting formalities & procedures or providing deadlines

- Can a request/order/warrant to take/execute/allow for this/these measure(s) in another member state be made?
 - ☐ yes
 - ☐ no

[if yes]

would the requested/executing authority/member state be requested/ordered to comply with certain formalities and procedures expressly indicated in executing the measure(s) requested/ordered (in respect of legal or administrative processes which might assist in making the evidence sought admissible in your member state, e.g. the official stamping of a document, the presence of a representative from your member state, or the recording of times and dates to create a chain of evidence)

- ☐ yes

☐ no

[if yes: is it your experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law]

☐ yes

☐ no

Eurojust

Is it Eurojust's experience that requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law?

☐ yes

☐ no

- Would the requested/executing authority/member state be requested/ordered to comply with (strict) deadlines provided for the execution of the measure(s) requested/ordered

☐ yes

☐ no

[if not: is it your experience that, even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed]

☐ yes

☐ no

[if yes:

- specify? (closed list: asap, within specified deadline)
- is it your experience that the deadlines provided are often not respected by the requested/executing authority/member state]

☐ yes

☐ no

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Eurojust

Is it Eurojust's experience that even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed?

- ☐ yes
☐ no

Requirement domestic order/warrant requesting/issuing member state required

Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state:

[mutually exclusive categories: tick only one box]

- ☐ without an order/warrant for the measure(s) concerned having been formally issued by the competent authority in the requesting/issuing member state in accordance with its national law and procedures in connection with a criminal investigation
- ☐ only where an order/warrant for the measure(s) concerned has been formally issued by the competent authority in the requesting/issuing member state in accordance with its national law and procedures in connection with a criminal investigation

Incompatibility request/order/warrant with domestic scope *ratione materiae*

- Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state:

[mutually exclusive categories: tick only one box]

- ☐ if it relates to acts which do not constitute an offence under your national law
- ☐ if it relates to acts which do not constitute an offence under your national law, whereas these acts, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum

period of at least three years

[if not: do you consider this an acceptable EU future policy option?]

- ☐ yes
- ☐ no

- Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state:

[mutually exclusive categories: tick only one box]

- ☐ if it relates to acts/offences for which this/these measure(s) cannot be taken/ordered in national case, according to your national law
- ☐ if it relates to acts/offences for which this/these measure(s) cannot be taken/ordered in national case, according to your national law, whereas these acts/offences, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years

[if not: do you consider this an acceptable EU future policy option?]

- ☐ yes
- ☐ no

Eurojust

Would Eurojust consider it an acceptable EU future policy option to allow a request/order/warrant made/issued by (the competent authority in) one member state to take/execute/allow for this/these measure(s) be executed in another member state, in any of the following cases:

- if it relates to acts which do not constitute an offence under the national law, whereas these acts, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years

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☐ yes

☐ no

- if it relates to acts/offences for which this/these measure(s) cannot be taken/ordered in national case, according to the member states' national law, whereas these acts/offences, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years

☐ yes

☐ no

Incompatibility request/order/warrant with domestic scope *ratione personae*, *ratione temporis*, *ratione loci* or *ratione auctoritatis* or conditions of subsidiarity, necessity or proportionality

Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state if execution thereof would be otherwise inconsistent with your national law, in that the measure(s) to be taken/executed/allowed for:

[mutually non-exclusive categories: please tick all applicable boxes]

- surpass(es) the scope *ratione personae* for which this/these measure(s) could be taken/ordered in a similar national case, the scope being limited in such case to

[yes meaning: would/could be executed]

- criminal investigations into offences committed by natural persons only

☐ yes

☐ no

- a more limited category of natural persons (e.g. in terms of age, procedural status, definition, etc)

- ☐ yes
☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

- ☐ yes
☐ no

- surpass(ses) the scope *ratione temporis* for which this/these measure(s) could be taken/ordered in a similar national case, the duration of the measure(s) being more limited in such case either in absolute terms or in relative terms, i.e. the measure(s) being subject to intermediate renewal were it to last for the duration requested/ordered

[yes meaning: would/could be executed]

- ☐ yes
☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

- ☐ yes
☐ no

- surpass(ses) the scope *ratione loci* for which this/these measure(s) could be taken/ordered in a similar national case, the location(s)/place(s) where the measure(s) can be taken/ordered being more limited in such case

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[yes meaning: would/could be executed]

- ☐ yes
- ☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

- ☐ yes
- ☐ no

- surpass(es) the scope *ratione auctoritatis* for which this/these measure(s) can be taken/ordered in a similar national case, for the requesting/issuing authority (or the authority having validated the request/order/warrant) is not a judge, a court, an investigating magistrate or a public prosecutor, whereas in a similar national case the measure(s) would need to be ordered or supervised by such authority

[yes meaning: would/could be executed]

- ☐ yes
- ☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

- ☐ yes
- ☐ no

- could not be taken in a similar national case because the conditions of subsidiarity, necessity or proportionality would not be met

[yes meaning: would/could be executed]

- ☐ yes
- ☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

- ☐ yes
- ☐ no

Eurojust

Would Eurojust consider it an acceptable EU future policy option to require a request/order/warrant made/issued by (the competent authority in) one member state to take/execute/allow for this/these measure(s) be executed in another member state if execution thereof would be otherwise inconsistent with the national law of the latter member state, in that the measure(s) to be taken/executed/allowed for

- surpass(ses) the scope **ratione personae** for which this/these measure(s) could be taken/ordered in a similar national case, the scope being limited in such case to:

- ☐ criminal investigations into offences committed by natural persons only, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

- ☐ yes
- ☐ no

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- ☐ a more limited category of natural persons (e.g. in terms of age, procedural status, definition, etc), *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

- surpass(ses) the scope **ratione temporis** for which this/these measure(s) could be taken/ordered in a similar national case, the duration of the measure(s) being more limited in such case either in absolute terms or in relative terms, i.e. the measure(s) being subject to intermediate renewal were it to last for the duration requested/ordered, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

- surpass(ses) the scope **ratione loci** for which this/these measure(s) could be taken/ordered in a similar national case, the location(s)/place(s) where the measure(s) can be taken/ordered being more limited in such case, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

- surpass(es) the scope **ratione auctoritatis** for which this/these measure(s) can be taken/ordered in a similar national case, for the requesting/issuing authority (or the authority having validated the request/order/warrant) is not a judge, a court, an investigating magistrate or a public prosecutor, whereas in a similar national case the measure(s) would need to be ordered or supervised by such authority, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

- could not be taken in a similar national case because the **conditions of subsidiarity, necessity or proportionality** would not be met, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

Compatibility requirements for executing request/order/warrant

Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state (regardless of possible non-execution relating to the scope *ratione materiae* of the measure(s) requested/ordered, other inconsistencies with your national law in executing it/them, specific grounds for refusal/non-execution that could be invoked,

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implications of its/their execution in terms of operational or financial capacity/resources):

[mutually exclusive categories: tick only one box]

- ☐ only where fully in accordance with/in the manner provided for in your national law (and procedures)
- ☐ only under specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc)

[specify which conditions?]

- ☐ in compliance with the formalities and procedures expressly indicated by the requesting/issuing authority/member state provided that these are not contrary to the fundamental principles of your national law
 - [specify the fundamental principles concerned of your national law?]
- ☐ under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under either your national law or that of the requesting/issuing member state

[if not: do you consider this an acceptable EU future policy option?]

- ☐ yes
- ☐ no

- ☐ under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under your national law

[if not: do you consider this an acceptable EU future policy option?]

- ☐ yes
- ☐ no

- ☐ if, in executing the measure(s) concerned, you would need to comply with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) with a view to ensuring the admissibility of evidence obtained in the requesting/issuing member state, commonly agreed to at EU level

- if yes

[specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard]

- if not: do you consider this an acceptable EU future policy option?

☐ yes

☐ no

[if yes, specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard]

Eurojust

Would Eurojust consider it an acceptable EU future policy option to require a request/order/warrant made/issued by (the competent authority in) one member state to take/execute/allow for this/these measure(s) be executed in another member state (regardless of possible non-execution relating to the scope ratione materiae of the measure(s) requested/ordered, other inconsistencies with the national law of the second member state in executing it/them, specific grounds for refusal/non-execution that could be invoked, implications of its/their execution in terms of operational or financial capacity/resources):

- under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under the national law of either of the member

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states

☐ Yes

☐ No

- under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under the national law of the executing member state

☐ Yes

☐ No

- if, in executing the measure(s) concerned, you would need to comply with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) with a view to ensuring the admissibility of evidence obtained in the requesting/issuing member state, commonly agreed to at EU level

☐ Yes

☐ No

[if yes, specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard

Refusal or postponement execution for operational or financial capacity/resources reasons

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution or postponement of execution for any other reason):

[mutually non-exclusive categories: tick all applicable boxes]

- be refused, or should it be possible to refuse execution

- where it is felt that the implications of its/their execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of your own criminal justice system)

☐ yes

☐ no

[if yes: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

- where it is felt that the implications of its/their execution in terms of financial capacity/resources would be substantial or extraordinary

☐ yes

☐ no

[if yes:

- would you execute the request/order/warrant only if the costs/expenses involved would be fully borne/refunded by the requesting/issuing authority/member state

☐ yes

☐ no

- would you be willing to execute the request/order/warrant provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state

☐ yes

☐ no

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- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years

☐ yes
☐ no

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, and provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state] be postponed, or should it be possible to postpone execution where it is felt that the implications of its/their immediate execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of your own criminal justice system)

☐ yes
☐ no

- be postponed, or should it be possible to postpone execution where it is felt that the implications of its/their immediate execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of your own criminal justice system)

☐ yes

☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- would you be willing to execute the request/order/warrant or, where the measure(s) is enduring in nature, to start the execution thereof before a reasonable deadline provided by the requesting/issuing authority/member state

☐ yes

☐ no

[if yes: what deadline do you consider reasonable: enter [number] of days]

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for, or, where the measure(s) is enduring in nature, to start taking/executing/allowing for it before a reasonable deadline provided by the requesting/issuing authority/member state only where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

[if yes: what deadline do you consider reasonable: enter [number] of days]

Eurojust

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to deny member states the possibility to invoke a ground for refusal with regard to the execution in their member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for

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this/these measure(s) (regardless of possible non-execution or postponement of execution for any other reason)

- a. where it is felt that the implications of its/their execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of its own criminal justice system)
 - ☐ yes
 - ☐ no
- b. where it is felt that the implications of its/their execution in terms of financial capacity/resources would be substantial or extraordinary
 - ☐ yes
 - ☐ only provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state
 - ☐ no

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to deny member states the possibility to postpone execution where it is felt that the implications of its/their immediate execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of its own criminal justice system)

- ☐ yes
- ☐ no

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the

requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for, or, where the measure(s) is enduring in nature, to start taking/executing/allowing for it before a reasonable deadline provided by the requesting/issuing authority/member state only

☐ yes

☐ no

What deadline would Eurojust consider reasonable where the measure is enduring in nature? enter [number] of days

Grounds for refusal/non-execution

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution for any other reason) be refused, or should it be possible to refuse execution:

[mutually non-exclusive categories: tick all applicable boxes]

- ☐ if execution of the request/order/warrant would infringe the *ne bis in idem* principle
- ☐ If the person(s) concerned has been given immunity from prosecution in your member state for the same acts s given in the country itself for the same acts the request/order/warrant relates to
- ☐ if there is an immunity or privilege under your law which makes it impossible to execute the request/order/warrant
- ☐ if the request/order/warrant relates to criminal offences which under the law of the requested/executing member 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 requesting/issuing member state and your law does not permit legal proceedings to be taken in respect of such offences where they are committed outside your territory
- ☐ if, in a specific case, execution of the request/order/warrant would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to

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specific intelligence activities (be it only to the extent that the information obtained would not be used for those reasons as evidence in a similar domestic case)

- ☐ if, execution of the request/order/warrant is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of your state
 - ☐ if the request/order/warrant concerns a (n offence connected with a) political offence, unless the act(s) concerned, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years
 - ☐ if, to the extent that you would only execute a request/order/warrant where it relates to acts which do also constitute an offence under your national law, you consider the acts concerned a fiscal offence and they do not constitute an offence of the same nature under your national law (a refusal, however, not being allowed in relation to offences in connection with taxes or duties, customs and exchange, recognition or execution on the ground that your national law 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 requesting/issuing authority/member state)
-

B.4. Investigative measures/measures of assistance (other than the aforementioned measures) which have been explicitly regulated in MLA legal instruments applicable between the EU member states and the taking/execution of which the requested/executing member state/member state on the territory of which the measure is to be taken/executed may currently not make dependent on any condition of dual criminality, (dual) minimum threshold or consistency with its national law

Requesting formalities & procedures or providing deadlines

Can a request/order/warrant to take/execute/allow for this/these measure(s) in another member state be made?

- ☐ yes
- ☐ no

[if yes

- would the requested/executing authority/member state be requested/ordered to comply with certain formalities and procedures expressly indicated in executing the measure(s) requested/ordered (in respect of legal or administrative processes which might assist in making the evidence sought admissible in your member state, e.g. the official stamping of a document, the presence of a representative from your member state, or the recording of times and dates to create a chain of evidence)

- ☐ yes
- ☐ no

[if yes: is it your experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law]

- ☐ yes
- ☐ no

- would the requested/executing authority/member state be requested/ordered to comply with (strict) deadlines provided for the execution of the measure(s) requested/ordered

- ☐ yes
- ☐ no

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[if not: is it your experience that, even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed]

- ☐ yes
☐ no

[if yes:

- specify? (closed list: asap, within specified deadline)
- is it your experience that the deadlines provided are often not respected by the requested/executing authority/member state]

- ☐ yes
☐ no

Eurojust

Is it Eurojust's experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law?

- ☐ yes
☐ no

Is it Eurojust's experience that, even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed

- ☐ yes
☐ no

Is it Eurojust's experience that the deadlines provided are often not respected by the requested/executing authority/member state

- ☐ yes
☐ no

Grounds for refusal/non-execution

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution for any other reason) be refused, or should it be possible to refuse execution:

[mutually non-exclusive categories: tick all applicable boxes]

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- ☐ If the person(s) concerned has been given immunity from prosecution in your member state for the same acts as given in the country itself for the same acts the request/order/warrant relates to
 - ☐ if, in a specific case, execution of the request/order/warrant would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities (be it only to the extent that the information obtained would not be used for those reasons as evidence in a similar domestic case)
 - ☐ if, execution of the request/order/warrant is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of your state
 - ☐ if the request/order/warrant concerns a (n) offence connected with a) political offence, unless the act(s) concerned, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years
 - ☐ If, to the extent that you would only execute a request/order/warrant where it relates to acts which do also constitute an offence under your national law, you consider the acts concerned a fiscal offence and they do not constitute an offence of the same nature under your national law (a refusal, however, not being allowed in relation to offences in connection with taxes or duties, customs and exchange, recognition or execution on the ground that your national law 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 requesting/issuing authority/member state)
-

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B.5. Investigative measures/measures of assistance (other than the aforementioned measures), which have not been explicitly regulated in MLA legal instruments applicable between the EU member states and could therefore fall under the scope of 'widest measure of mutual assistance', but for which (because of their coercive, covert or intrusive nature or their potential/likeness to negatively impact upon/affect the reliability/evidential value of the information they seek to bring about) it is unlikely that the requested/executing member state/member state on the territory of which the measure is to be taken/executed will be willing to take/execute/allow for them unless in accordance with/in the manner provided for in its national law (and procedures), under the condition(s) which would have to be observed in a similar national case, or on the condition(s) of dual criminality, (dual) minimum threshold or consistency with its national law

Domestic scope *ratione materiae*

Can this/these measure(s) be taken/ordered in a national case, according to your national law?

[mutually non-exclusive categories: please tick all applicable boxes]

- ☐ For any offence
- ☐ For any offence punishable under your national law by a custodial sentence or a detention order for a maximum period of at least three years or less
- ☐ For a number of (serious) offences only (enumerated), punishable by a custodial sentence or a detention order for a maximum period of at least three years
- ☐ For less/a more limited series of offences only
- ☐ For no offence

Requesting formalities & procedures or providing deadlines

Can a request/order/warrant to take/execute/allow for this/these measure(s) in another member state be made?

- ☐ yes
- ☐ no

[if yes

- would the requested/executing authority/member state be requested/ordered to comply with certain formalities and procedures expressly indicated in executing the measure(s) requested/ordered (in respect of legal or administrative processes which might assist in

making the evidence sought admissible in your member state, e.g. the official stamping of a document, the presence of a representative from your member state, or the recording of times and dates to create a chain of evidence)

- ☐ yes
- ☐ no

[if yes: is it your experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law]

- ☐ yes
- ☐ no

- would the requested/executing authority/member state be requested/ordered to comply with (strict) deadlines provided for the execution of the measure(s) requested/ordered

- ☐ yes
- ☐ no

[if not: is it your experience that, even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed]

- ☐ yes
- ☐ no

[if yes:

- specify? (closed list: asap, within specified deadline)
- is it your experience that the deadlines provided are often not respected by the requested/executing authority/member state]

- ☐ yes
- ☐ no

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Eurojust

Is it Eurojust's experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law?

☐ Yes

☐ No

Is it Eurojust's experience that, even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed

☐ Yes

☐ No

Is it Eurojust's experience that the deadlines provided are often not respected by the requested/executing authority/member state

☐ Yes

☐ No

Requirement domestic order/warrant requesting/issuing member state required

Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state:

[mutually exclusive categories: tick only one box]

- ☐ without an order/warrant for the measure(s) concerned having been formally issued by the competent authority in the requesting/issuing member state in accordance with its national law and procedures in connection with a criminal investigation
- ☐ only where an order/warrant for the measure(s) concerned has been formally issued by the competent authority in the requesting/issuing member state in accordance with its national law and procedures in connection with a criminal investigation

Incompatibility request/order/warrant with domestic scope *ratione materiae*

- Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state:

[mutually exclusive categories: tick only one box]

- ☐ if it relates to acts which do not constitute an offence under your national law
- ☐ if it relates to acts which do not constitute an offence under your national law, whereas these acts, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years

[if not: do you consider this an acceptable EU future policy option?]

☐ yes

☐ no

- Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state:

[mutually exclusive categories: tick only one box]

- ☐ if it relates to acts/offences for which this/these measure(s) cannot be taken/ordered in national case, according to your national law
- ☐ if it relates to acts/offences for which this/these measure(s) cannot be taken/ordered in national case, according to your national law, whereas these acts/offences, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years

[if not: do you consider this an acceptable EU future policy option?]

☐ yes

☐ no

Eurojust

Would Eurojust consider it an acceptable EU future policy option, to require member states to take/execute/allow for this/these measure(s) to be executed in its member state?

- if it relates to acts which do not constitute an offence under the national law of the executing member state, whereas these acts, as defined by the law of the requesting/issuing

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authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years

☐ yes

☐ no

- if it relates to acts/offences for which this/these measure(s) cannot be taken/ordered in national case, according to the national law of the executing member state, whereas these acts/offences, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years

☐ yes

☐ no

Incompatibility request/order/warrant with domestic scope *ratione personae*, *ratione temporis*, *ratione loci* or *ratione auctoritatis* or conditions of subsidiarity, necessity or proportionality

Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state if execution thereof would be otherwise inconsistent with your national law, in that the measure(s) to be taken/executed/allowed for:

[mutually non-exclusive categories: please tick all applicable boxes]

- surpass(ses) the scope *ratione personae* for which this/these measure(s) could be taken/ordered in a similar national case, the scope being limited in such case to

[yes meaning: would/could be executed]

- criminal investigations into offences committed by natural persons only

☐ yes

☐ no

- a more limited category of natural persons (e.g. in terms of age, procedural status, definition, etc)

☐ yes

☐ no

if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

- surpass(ses) the scope *ratione temporis* for which this/these measure(s) could be taken/ordered in a similar national case, the duration of the measure(s) being more limited in such case either in absolute terms or in relative terms, i.e. the measure(s) being subject to intermediate renewal were it to last for the duration requested/ordered

[yes meaning: would/could be executed]

☐ yes

☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

- surpass(ses) the scope *ratione loci* for which this/these measure(s)

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could be taken/ordered in a similar national case, the location(s)/place(s) where the measure(s) can be taken/ordered being more limited in such case

[yes meaning: would/could be executed]

☐ yes

☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

- surpass(ses) the scope *ratione auctoritatis* for which this/these measure(s) can be taken/ordered in a similar national case, for the requesting/issuing authority (or the authority having validated the request/order/warrant) is not a judge, a court, an investigating magistrate or a public prosecutor, whereas in a similar national case the measure(s) would need to be ordered or supervised by such authority

[yes meaning: would/could be executed]

☐ yes

☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

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- ☐ yes
- ☐ no

- could not be taken in a similar national case because the conditions of subsidiarity, necessity or proportionality would not be met

[yes meaning: would/could be executed]

- ☐ yes
- ☐ no

[if not: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

- ☐ yes
- ☐ no

Eurojust

Would Eurojust consider it an acceptable EU future policy option to require a request/order/warrant made/issued by (the competent authority in) one member state to take/execute/allow for this/these measure(s) be executed in another member state if execution thereof would be otherwise inconsistent with the national law of the latter member state, in that the measure(s) to be taken/executed/allowed for

- surpass(es) the scope **ratione personae** for which this/these measure(s) could be taken/ordered in a similar national case, the scope being limited in such case to:

- ☐ criminal investigations into offences committed by natural persons only, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of*

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the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years

☐ yes

☐ no

☐ a more limited category of natural persons (e.g. in terms of age, procedural status, definition, etc), *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

- surpass(es) the scope **ratione temporis** for which this/these measure(s) could be taken/ordered in a similar national case, the duration of the measure(s) being more limited in such case either in absolute terms or in relative terms, i.e. the measure(s) being subject to intermediate renewal were it to last for the duration requested/ordered, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

- surpass(es) the scope **ratione loci** for which this/these measure(s) could be taken/ordered in a similar national case, the location(s)/place(s) where the measure(s) can be taken/ordered being more limited in such case, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as*

defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years

☐ yes

☐ no

- surpass(es) the scope **ratione auctoritatis** for which this/these measure(s) can be taken/ordered in a similar national case, for the requesting/issuing authority (or the authority having validated the request/order/warrant) is not a judge, a court, an investigating magistrate or a public prosecutor, whereas in a similar national case the measure(s) would need to be ordered or supervised by such authority, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

- could not be taken in a similar national case because the **conditions of subsidiarity, necessity or proportionality** would not be met, *notwithstanding the inconsistency concerned where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years*

☐ yes

☐ no

Compatibility requirements for executing request/order/warrant

Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state (regardless of possible non-

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execution relating to the scope *ratione materiae* of the measure(s) requested/ordered, other inconsistencies with your national law in executing it/them, specific grounds for refusal/non-execution that could be invoked, implications of its/their execution in terms of operational or financial capacity/resources):

[mutually exclusive categories: tick only one box]

- ☐ only where fully in accordance with/in the manner provided for in your national law (and procedures)
- ☐ only under specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc)
 - [specify which conditions?]
- ☐ in compliance with the formalities and procedures expressly indicated by the requesting/issuing authority/member state provided that these are not contrary to the fundamental principles of your national law
 - [specify the fundamental principles concerned of your national law?]
- ☐ under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under either your national law or that of the requesting/issuing member state

[if not: do you consider this an acceptable EU future policy option?]

☐ yes

☐ no

- ☐ under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under your national law

[if not: do you consider this an acceptable EU future policy option?]

☐ yes

☐ no

- ☐ if, in executing the measure(s) concerned, you would need to

comply with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) with a view to ensuring the admissibility of evidence obtained in the requesting/issuing member state, commonly agreed to at EU level

- if yes

[specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard]

- if not: do you consider this an acceptable EU future policy option?

☐ yes

☐ no

[if yes, specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard]

Eurojust

Would Eurojust consider it an acceptable EU future policy option to require a request/order/warrant made/issued by (the competent authority in) one member state to take/execute/allow for this/these measure(s) be executed in another member state (regardless of possible non-execution relating to the scope *ratione materiae* of the measure(s) requested/ordered, other inconsistencies with the

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national law of the second member state in executing it/them, specific grounds for refusal/non-execution that could be invoked, implications of its/their execution in terms of operational or financial capacity/resources):

- under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under the national law of either of the member states

☐ Yes

☐ No

- under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under the national law of the executing member state

☐ Yes

☐ No

- if, in executing the measure(s) concerned, you would need to comply with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) with a view to ensuring the admissibility of evidence obtained in the requesting/issuing member state, commonly agreed to at EU level

☐ Yes

☐ No

[if yes, specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the

extent available]

- ☐ be of a higher standard
- ☐ be of a lower standard

Refusal or postponement execution for operational or financial capacity/resources reasons

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution or postponement of execution for any other reason):

[mutually non-exclusive categories: tick all applicable boxes]

- be refused, or should it be possible to refuse execution
 - where it is felt that the implications of its/their execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of your own criminal justice system)

☐ yes

☐ no

[if yes: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

- where it is felt that the implications of its/their execution in terms of financial capacity/resources would be substantial or extraordinary

☐ yes

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☐ no

[if yes:

- would you execute the request/order/warrant only if the costs/expenses involved would be fully borne/refunded by the requesting/issuing authority/member state

☐ yes

☐ no

- would you be willing to execute the request/order/warrant provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state

☐ yes

☐ no

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years

☐ yes

☐ no

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state

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and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, and provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state

☐ yes

☐ no

- be postponed, or should it be possible to postpone execution where it is felt that the implications of its/their immediate execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of your own criminal justice system)

☐ yes

☐ no

[if yes:

[mutually exclusive categories: tick only one box]

- would you be willing to execute the request/order/warrant or, where the measure(s) is enduring in nature, to start the execution thereof before a reasonable deadline provided by the requesting/issuing authority/member state

☐ yes

☐ no

[if yes: what deadline do you consider reasonable: enter [number] of days]

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for, or, where the measure(s) is enduring in nature, to start taking/executing/allowing for it before a reasonable deadline provided by the requesting/issuing authority/member state only where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition

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list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

[if yes: what deadline do you consider reasonable: enter [number] of days]

Eurojust

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to deny member states the possibility to invoke a ground for refusal with regard to the execution in their member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution or postponement of execution for any other reason)

- where it is felt that the implications of its/their execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of its own criminal justice system)
 - ☐ yes
 - ☐ no
- where it is felt that the implications of its/their execution in terms of financial capacity/resources would be substantial or extraordinary
 - ☐ yes
 - ☐ only provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state

☐ no

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to deny member states the possibility to postpone execution where it is felt that the implications of its/their immediate execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of its own criminal justice system)

☐ yes

☐ no

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for, or, where the measure(s) is enduring in nature, to start taking/executing/allowing for it before a reasonable deadline provided by the requesting/issuing authority/member state only

☐ yes

☐ no

What deadline would Eurojust consider reasonable where the measure is enduring in nature? enter [number] of days

Grounds for refusal/non-execution

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution for any other reason) be refused, or should it be possible to refuse execution:

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[mutually non-exclusive categories: tick all applicable boxes]

- ☐ if execution of the request/order/warrant would infringe the *ne bis in idem* principle
- ☐ If the person(s) concerned has been given immunity from prosecution in your member state for the same acts s given in the country itself for the same acts the request/order/warrant relates to
- ☐ if there is an immunity or privilege under your law which makes it impossible to execute the request/order/warrant
- ☐ if the request/order/warrant relates to criminal offences which under the law of the requested/executing member 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 requesting/issuing member state and your law does not permit legal proceedings to be taken in respect of such offences where they are committed outside your territory
- ☐ if, in a specific case, execution of the request/order/warrant would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities (be it only to the extent that the information obtained would not be used for those reasons as evidence in a similar domestic case)
- ☐ if, execution of the request/order/warrant is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of your state
- ☐ if the request/order/warrant concerns a (n offence connected with a) political offence, unless the act(s) concerned, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years
- ☐ If, to the extent that you would only execute a request/order/warrant where it relates to acts which do also constitute an offence under your national law, you consider the acts concerned a fiscal offence and they do not constitute an offence of the same nature under your national law (a refusal, however, not being allowed in relation to offences in connection with taxes or duties, customs and exchange, recognition or execution on the ground that your national law 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 requesting/issuing authority/member state)
- ☐ _____

B.6. Investigative measures/measures of assistance (other than the aforementioned measures) which have not been explicitly regulated in MLA legal instruments applicable between the EU member states and could therefore fall under the scope of 'widest measure of mutual assistance', and for which it is likely that the requested/executing member state/member state on the territory of which the measure is to be taken/executed will be willing to take/execute/allow for them in compliance with the formalities and procedures expressly indicated by the requesting/issuing authority/member state provided that these are not contrary to the fundamental principles of its own law (i.e. lowest requirements regime)

Requesting formalities & procedures or providing deadlines

Can a request/order/warrant to take/execute/allow for this/these measure(s) in another member state be made?

☐ yes

☐ no

[if yes

- would the requested/executing authority/member state be requested/ordered to comply with certain formalities and procedures expressly indicated in executing the measure(s) requested/ordered (in respect of legal or administrative processes which might assist in making the evidence sought admissible in your member state, e.g. the official stamping of a document, the presence of a representative from your member state, or the recording of times and dates to create a chain of evidence)

☐ yes

☐ no

[if yes: is it your experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law]

☐ yes

☐ no

- would the requested/executing authority/member state be requested/ordered to comply with (strict) deadlines provided for

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the execution of the measure(s) requested/ordered

☐ yes

☐ no

[if not: is it your experience that, even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed]

☐ yes

☐ no

[if yes:

- specify? (closed list: asap, within specified deadline)
- is it your experience that the deadlines provided are often not respected by the requested/executing authority/member state]

☐ yes

☐ no

Eurojust

Is it Eurojust's experience that the requested/executing authority/member state often refuses to comply with formalities or procedures expressly indicated because they are considered contrary to the fundamental principles of its national law?

☐ Yes

☐ No

Is it Eurojust's experience that, even without providing (strict) deadlines, the measure(s) requested/ordered are usually sufficiently rapidly taken/executed

☐ Yes

☐ No

Is it Eurojust's experience that the deadlines provided are often not respected by the requested/executing authority/member state

☐ Yes

☐ No

Compatibility requirements for executing request/order/warrant

Would/could a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) be executed in your member state (regardless of possible non-execution relating to the scope *ratione materiae* of the measure(s) requested/ordered, other inconsistencies with your national law in executing it/them, specific grounds for refusal/non-execution that could be invoked, implications of its/their execution in terms of operational or financial capacity/resources):

[mutually exclusive categories: tick only one box]

- ☐ only where fully in accordance with/in the manner provided for in your national law (and procedures)
- ☐ only under specific condition(s) which would have to be observed in a similar national case (e.g. compliance with certain formalities and procedures, purpose or use limitations etc)
 - [specify which conditions?]
- ☐ in compliance with the formalities and procedures expressly indicated by the requesting/issuing authority/member state provided that these are not contrary to the fundamental principles of your national law
 - [specify the fundamental principles concerned of your national law?]
- ☐ under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under either your national law or that of the requesting/issuing member state

[if not: do you consider this an acceptable EU future policy option?]

- ☐ yes
- ☐ no
- ☐ under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under your

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national law

[if not: do you consider this an acceptable EU future policy option?]

☐ yes

☐ no

- ☐ if, in executing the measure(s) concerned, you would need to comply with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) with a view to ensuring the admissibility of evidence obtained in the requesting/issuing member state, commonly agreed to at EU level

- if yes

[specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard]

- if not: do you consider this an acceptable EU future policy option?

☐ yes

☐ no

[if yes, specify: the minimum standards to be agreed to should

[mutually exclusive categories: tick only one box]

☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]

☐ be of a higher standard

☐ be of a lower standard]

Eurojust

Would Eurojust consider it an acceptable EU future policy option to require a request/order/warrant made/issued by (the competent authority in) one member state to take/execute/allow for this/these measure(s) be executed in another member state (regardless of possible non-execution relating to the scope *ratione materiae* of the measure(s) requested/ordered, other inconsistencies with the national law of the second member state in executing it/them, specific grounds for refusal/non-execution that could be invoked, implications of its/their execution in terms of operational or financial capacity/resources):

- under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under the national law of either of the member states
 - ☐ Yes
 - ☐ No
- under the condition that the person(s) concerned by the execution of the measure(s) must be granted/may claim the specific procedural guarantees or rights that would accrue to him/her/them in the execution of the measure(s) in a similar case under the national law of the executing member state
 - ☐ Yes
 - ☐ No
- if, in executing the measure(s) concerned, you would need to comply with certain (specific) minimum procedural standards for gathering information/evidence (other than merely technical or forensic) with a view to ensuring the admissibility of evidence obtained in the requesting/issuing member state, commonly agreed to at EU level
 - ☐ Yes
 - ☐ No

[if yes, specify: the minimum standards to be agreed to should

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[mutually exclusive categories: tick only one box]

- ☐ be based on/derived from the ECHR/other common fundamental rights texts and the ECtHR's jurisprudence, to the extent available]
- ☐ be of a higher standard
- ☐ be of a lower standard

Refusal or postponement execution for operational or financial capacity/resources reasons

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution or postponement of execution for any other reason):

[mutually non-exclusive categories: tick all applicable boxes]

- be refused, or should it be possible to refuse execution
 - where it is felt that the implications of its/their execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of your own criminal justice system)

☐ yes

☐ no

[if yes: do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

- where it is felt that the implications of its/their execution in terms of financial capacity/resources would substantial or extraordinary

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☐ yes

☐ no

[if yes:

- would you execute the request/order/warrant only if the costs/expenses involved would be fully borne/refunded by the requesting/issuing authority/member state

☐ yes

☐ no

- would you be willing to execute the request/order/warrant provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state

☐ yes

☐ no

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for anyway where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual

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recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, and provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state]

☐ yes

☐ no

- be postponed, or should it be possible to postpone execution where it is felt that the implications of its/their immediate execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of your own criminal justice system)

☐ yes

☐ no

[if yes:

- would you be willing to execute the request/order/warrant or, where the measure(s) is enduring in nature, to start the execution thereof before a reasonable deadline provided by the requesting/issuing authority/member state

☐ yes

☐ no

[if yes: what deadline do you consider reasonable: enter [number] of days]

- do you consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for, or, where the measure(s) is enduring in nature, to start taking/executing/allowing for it before a reasonable deadline provided by the requesting/issuing authority/member state

only where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years]

☐ yes

☐ no

[if yes: what deadline do you consider reasonable: enter [number] of days]

Eurojust

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to deny member states the possibility to invoke a ground for refusal with regard to the execution in their member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-execution or postponement of execution for any other reason)

- where it is felt that the implications of its/their execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of its own criminal justice system)
 - ☐ yes
 - ☐ no
- where it is felt that the implications of its/their execution in terms of financial capacity/resources would substantial or extraordinary
 - ☐ yes

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- ☐ only provided that a fair share (e.g. 50/50 or otherwise agreed after negotiation) of the cost/expenses would be borne/refunded by the requesting/issuing authority/member state
- ☐ no

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to deny member states the possibility to postpone execution where it is felt that the implications of its/their immediate execution in terms of operational capacity/resources (e.g. impact on routine domestic workload, other domestic priorities) would be too heavy (and thus hamper the proper functioning of its own criminal justice system)

- ☐ yes
- ☐ no

Where the acts/offences the request/order/warrant relates to constitute any of the 32 offences from the 'mutual recognition list' as defined by the law of the requesting/issuing authority member state and being punishable there by a custodial sentence or a detention order for a maximum period of at least three years, would Eurojust consider it an acceptable EU future policy option to require this/these measure(s) to be taken/executed/allowed for, or, where the measure(s) is enduring in nature, to start taking/executing/allowing for it before a reasonable deadline provided by the requesting/issuing authority/member state only

- ☐ yes
- ☐ no

What deadline would Eurojust consider reasonable where the measure is enduring in nature? enter [number] of days

Grounds for refusal/non-execution

Would execution in your member state of a request/order/warrant made/issued by (the competent authority in) another member state to take/execute/allow for this/these measure(s) (regardless of possible non-

execution for any other reason) be refused, or should it be possible to refuse execution:

[mutually non-exclusive categories: tick all applicable boxes]

- ☐ If the person(s) concerned has been given immunity from prosecution in your member state for the same acts s given in the country itself for the same acts the request/order/warrant relates to
 - ☐ if, in a specific case, execution of the request/order/warrant would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities (be it only to the extent that the information obtained would not be used for those reasons as evidence in a similar domestic case)
 - ☐ if, execution of the request/order/warrant is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of your state
 - ☐ if the request/order/warrant concerns a (n offence connected with a) political offence, unless the act(s) concerned, as defined by the law of the requesting/issuing authority/member state, do constitute any of the 32 offences from the 'mutual recognition list' and are punishable there by a custodial sentence or a detention order for a maximum period of at least three years
 - ☐ If, to the extent that you would only execute a request/order/warrant where it relates to acts which do also constitute an offence under your national law, you consider the acts concerned a fiscal offence and they do not constitute an offence of the same nature under your national law (a refusal, however, not being allowed in relation to offences in connection with taxes or duties, customs and exchange, recognition or execution on the ground that your national law 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 requesting/issuing authority/member state)
-

7.3 Questions relating to institutional capacity (in order to assess the potential need for/added value of more practical tools, best practice exchange, training, monitoring etc)

1. Availability of translation of criminal code/code of criminal procedure/(other) MLA and mutual recognition legislation
 - a. in English
 - ☐ yes
 - ☐ partially
 - ☐ no
 - b. in French
 - ☐ yes
 - ☐ partially
 - ☐ no
 - c. in German
 - ☐ yes
 - ☐ partially
 - ☐ no

2. availability of technically and linguistically (including foreign languages) qualified staff
 - a. in English
 - ☐ yes
 - ☐ partially
 - ☐ no
 - b. in French
 - ☐ yes
 - ☐ partially
 - ☐ no
 - c. in German

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- ☐ yes
- ☐ partially
- ☐ no

3. availability of both specialised and basic technical/legal and foreign language training

a. in English

- ☐ yes
- ☐ partially
- ☐ no

b. in French

- ☐ yes
- ☐ partially
- ☐ no

c. in German

- ☐ yes
- ☐ partially
- ☐ no

4. willingness to accept incoming requests/orders in

a. in English

- ☐ yes
- ☐ no

b. in French

- ☐ yes
- ☐ no

c. in German

- ☐ yes
- ☐ no

5. availability of proper translation and interpretation facilities

a. into/from English

- ☐ yes
- ☐ partially

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- ☐ no
- b. into/from French
 - ☐ yes
 - ☐ partially
 - ☐ no
- c. into/from German
 - ☐ yes
 - ☐ partially
 - ☐ no
- 6. availability of proper ICT equipment (fixed telephone/fax/modem lines with authorisation for international dialling, hard/software, e-mail, fast internet connectivity, adequate security levels, mobile/cellular telecommunication means, ...)
 - ☐ high
 - ☐ medium
 - ☐ low
- 7. availability of technical means required for video/telephone conference, including for taking measures of protection in such context (such as audio/video distortion)
 - ☐ high
 - ☐ medium
 - ☐ low
- 8. availability and quality of technical means required for special investigative measures (interception, audio/video monitoring, electronic monitoring, satellite monitoring, ...)
 - ☐ high
 - ☐ medium
 - ☐ low
- 9. availability of and access to travel budgets (for competent (judicial) authorities willing to assist in the execution of requests abroad, in joint investigation teams, ...)
 - ☐ high
 - ☐ medium
 - ☐ low
- 10. availability and quality of off-line (paper and electronic) relevant legal

documentation

- ☐ high
- ☐ medium
- ☐ low

11. availability and quality of circulars, practical guidelines, best practice manuals, model forms, technical/legal and practical support

- ☐ high
- ☐ medium
- ☐ low

12. monitoring quality and speed in executing requests

- ☐ yes
- ☐ moderate
- ☐ no