Mutual Recognition in Practice: Foreign Evidence

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Structure

› gathering & using foreign evidence
  › problems not limited to “foreign” evidence *sensu stricto*
  › problems not limited to “evidence” only - also: information
  › difference generic term evidence and evidence before court
› introduction - state of play
  › investigation in criminal matters & evidence
› complications in practice
› future challenges and perspectives
› questions & discussion
Investigation in criminal matters & evidence (1)

- obtaining existing (available) evidence
  - house search
  - freezing order (with 3rd parties)
  - seizure (often requiring house search)
  - order to provide/allow access to
- obtaining “new” evidence
  - hearing, confrontation, covert investigations, analysis, expertise
- obtaining evidence “in real time”
  - interception telecommunication
  - covert investigations
  - monitoring bank accounts
Investigation in criminal matters & evidence (2)

- traditional legal instruments
  - overview
  - principal rules of play
    - inter-state cooperation
    - exequatur or transfer procedure
    - compatibility with law requested state
    - dual criminality
  - MR plan
    - remove obstacles in contexts (house) search/seizure
    - remove/tackle fiscal or ordre public exceptions
    - recognition of orders freezing evidence
Investigation in criminal matters & evidence (3)

- forthcoming instruments
  - at international/EU level (to be implemented domestically)
  - principal rules of play
    - between locally competent judicial authorities
    - no more exequatur or transfer procedures
    - blind recognition – via order+certificate or warrant
    - dual criminality requirement basically abandoned
    - refusal for (disguised) fiscal reasons further restricted

- which EU legal instruments?
  - 2003 FD European Freezing Order
  - Protocol 16 October 2001
  - 2008 FD European Evidence Warrant (EEW)
  - MR order/warrant for all forms of MLA?
  - Free movement of evidence?
  - European Pre-Evidence Warrant?
2003 FD European Freezing Order

- immediate execution (within 24 hours)
- of freezing orders, aimed at preventing transfer, destruction, conversion, disposition or movement etc of objects, documents or data which could be produced as evidence in criminal proceedings in the issuing MS
  - also of alleged proceeds from crime, equivalent goods, instrumentalities + objectum sceleris
- if accompanied by standard certificate
- no exequatur procedure
- no dual criminality check for offences
  - punishable in issuing MS with +3 years
  - and appearing in the standard list of 32 “warrant” offences
- freezing maintained until transmission
  - following a separate request to that end
Protocol 16 October 2001

- further reduction (disguised) fiscal exception
  - no banking secrecy exception allowed
  - acquis 1978 “fiscal” protocol to 1959 ECMA integrated
  - 2x without possible recourse to reservations
  - effectiveness dependant on state’s willingness to ratify
- Article 1: information about (existence) bank accounts
  - owned or controlled (as proxy) by (legal) person
- Article 2: information about specific accounts/transactions
- Articles 1-2
  - may be subjected to search/seizure restrictions
  - however: evidence warrant (infra)
- Article 3: ‘monitoring’ bank accounts: bank account tap
2008 FD European Evidence Warrant (1)

- execution within strict time limits of requests
  - for transmission of objects, documents and data
  - for seizure, transfer, house search
- via uniform European Evidence Warrant
- no conversion or exequatur procedure
- no dual criminality check if
  - no house search is required
  - offence in 32-list
  - Germany allowed opt-out
    - reintroduction dual criminality check for 6/32 offences
2008 FD European Evidence Warrant (2)

- fast/efficient mechanism for obtaining existing evidence
  - including accounts/transactions (Articles 1-2 Protocol 2001)
  - not for new evidence evidence gathering
  - not for evidence gathering in real time, such as through telecom or bank account tapping
- access to info on servers on non-EU territory
  - yes, if lawfully accessible from territory executing MS
  - = beyond CoE Cybercrime Convention
Complications in practice

- where gathered
  - in another MS, in a 3rd state, internally?
- by whom (foreign/own authorities?)
- context of gathering
  - primarily internal purposes, following MLA request, in JIT context?
- status (existing, new, real-time?)
- type of measures required?
  - coercive/intrusive/privacy-invading?
- type of source (administrative, military, criminal justice?)
- type of purpose of use? (similar as for source)
- use (information/pre-evidence, evidence)
- type of authorities involved (police, customs, prosecutor ...)
- in context of police (LE) or judicial cooperation?
Future challenges and perspectives

- clarification relation between MLA and police cooperation/Europol - Principle of Availability (PoA)
- FD data protection 3rd pillar
- (future) “mutual recognition (MR)” -based MLA
  - explanatory memorandum 2003
    - additional fd’s announced ultimately to be consolidated in a single instrument
    - that can replace mutual assistance altogether
    - including 2000 EU-MA/2001 Protocol
  - mutual recognition evidence
    - if lawfully collected in locus MS?
- 2009 Green Paper – 2010 impact assessments
- 2009-10 IRCP EC study cross-border gathering & use of evidence
- 2010 draft directive for a European Investigation Order
- 2010-11 IRCP EC study future framework judicial cooperation
IRCP 2009-10 study for EC

> Introduction
  > Rapidly changing environment
  > Project assumptions
  > Project methodology
> Clustering investigative measures
> MR of investigative measures
  > 32 MR offences
  > Enhanced stringency in cooperation
  > Accepting and executing orders
  > Horizontalisation of cooperation
> Free movement of evidence
> Concluding remarks
Rapidly changing environment

- 2000 – EU MLA Convention (entry into force 2005)
- 2003 – Freezing order (implementation by 2005)
- 2004 – Study by British Law Society
- 2008 – EEW (implementation by 2010)
- 2009 – Awarding study to IRCP
- 2009 – Green Paper (obtaining/admissibility)
Project assumptions

- Overcomplexity of the environment
  - Combination of MR and MLA instruments
  - Partial coverage of investigative measures
  - Need for benchmarking framework

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

- Free movement of evidence
  - Usually not covered by cooperation instruments
Project methodology

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- Eurojust college decision 17 July 2009
- Online questionnaire management
  - General evidence related issues
  - MR/MLA characteristics
    - 6 cluster strategy => Recurring patterns
    - 4 MR characteristics
      - 32 MR offences
      - Enhanced stringency
      - Accepting and executing orders
      - Horizontalisation of cooperation
- Institutional capacity
Project methodology

- **Aim:** map existing legal framework and assess possible support for the introduction of MR in current MLA regime
- **Feedback from 10 MS** does not negatively impact on representative value of the study
- **Additional input** Eurojust College
- **Validation of results** at expert group meeting
Clustering investigative measures

Basis for clustering

- MLA flexibility through “widest possible measure” allows cooperation for not explicitly regulated investigative measures
  - Distinction between explicitly regulated and non regulated investigative measures
  - Manadatory for any new comprehensive instrument to properly reflect this
- MR or MLA regime entirely different approach
  - Distinction according to way of execution

Investigative measures categorised into 6 clusters
Clustering investigative measures

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Clustering investigative measures

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Cluster 5
most likely degree of LRA and/or dual criminality, dual threshold and consistency

Cluster 6
most likely no dual criminality, no dual threshold and no consistency, and FRA upon request

Not explicitly regulated
Clustering investigative measures

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- Obtaining existing objects, documents or data
- Including via (house)search or seizure if necessary

“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”
Clustering investigative measures

- No valid reason to distinguish between (house)search and seizure for existing or not yet existing objects, documents or data
- Implicit step forward made by EEW => assumption other forms of (house)search and seizure follow same regime
Clustering investigative measures

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- Execution
  - In accordance with or in the manner provided for in its national law
  - Under (certain of) the condition(s) which would have to be observed in a similar national case
- Examples (from limitative list):
  - Cross-border observation
  - Covert investigations
  - Monitoring bank transactions
  - Interception telecom (certain types + remote access)
Clustering investigative measures

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- Clustering investigative measures

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- Execution may not be made dependent on conditions
- Examples (from limitative list):
  - Interception telecom (certain types)
  - Hearing under oath
  - Hearing by video conference
  - Hearing by telephone conference
  - Transfer of detainees (…)

Cluster 4
no dual criminality
no dual threshold
no consistency
FRA upon request
Clustering investigative measures

- Likeliness of conditions because of intrusive character
- Examples (from non-limitative list):
  - Interception of direct communication
  - Withholding / interception email
  - Confidence buy
  - Lie detection test
  - Extra: trans-border access to computer data
Clustering investigative measures

- Likeliness of lenient cooperation because of non-intrusive character
- Examples (from non-limitative list):
  - Analysis of existing objects, documents or data
  - Conducting interviews / take statements
  - Reconstruction
  - Video conference hearing of suspects
MR of investigative measures

- Principle acceptance
  - For idea of future MR based MLA regime
  - For cluster 2 hypothesis

- 32 MR offences
  - Can be either an incentive or an artificial limitation

- Enhanced stringency in cooperation
  - "issuing" and "execution"
  - Strict reply and execution deadlines
    - Reply (agree, refuse, ask postponement) 30 days
    - Executing within 30 day term
    - Possibility for 45 day extension (postponement)
MR of investigative measures

- Grounds for refusal and non-execution
  - Operational and financial capacity
    - Operational capacity not accepted as refusal or non-execution ground
    - Introduce 50/50 share (extraordinary) financial burden (above 10,000 EUR), together with 32 MR offences
  - Substantive grounds
    - High importance attributed to ne bis in idem: general preservation recommended
    - Striking support for immunity from prosecution considering non-inclusion in existing instrumentarium: need for inclusion
MR of investigative measures

- Analysis reveals decreasing importance for *double criminality*: support for roll-out for the 32 MR offences
- *Impossibility to execute* should not be maintained considering it is EEW-specific and inexistent under current MLA regime
- Incomprehensible support for *immunity and privileges*
- *(extra)territoriality principle* is EAW inspired and is incompatible with MLA
MR of investigative measures

- In spite of empirical results, *essential national security, classified information and ordre public*, should not be maintained (successful reduction in EEW of traditional *ordre public* exception, but unrealistic for broader roll-out)

- Continued support for traditional *ordre public* justify retention, be it reduced

- *Political offences* should be abolished as was accepted for extradition and EEW

- *Fiscal offences*: at least as in EEW
MR of investigative measures

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- Clustering investigative measures

- MR of investigative measures
  - 32 MR offences
  - Enhanced stringency in cooperation

- Accepting and executing orders
  - Accepting validity: Prior domestic decision/order unacceptable restriction on flexibility of MLA

- Executing
  - Compatibility issues
    - Broad support for FRA (atypical for MR)
    - Broad support for option to allow persons concerned to claim specific guarantees of a similar national case
    - Broad support for option to allow persons concerned to claim the best of both worlds
    - Broad support for option to introduce EU level minima based on/derived from ECHR

- Concluding remarks
MR of investigative measures

- Consistency issue (scope ratione materiae/ temporis/ personae / auctoritatis)
  - Execution currently limited to 32 MR offences
  - Recommend further looking into added value 32 MR offences to increase execution surpassing different scopes

- Compliance with requested formalities
  - Not all member states use possibility to request compliance with formalities
  - Important for admissibility of evidence
  - High compliance with requested formalities
MR of investigative measures

› Horizontalisation of cooperation
  › Direct communication in stead of central authority
    › Exception: transfer persons held in custody
    › Possibility to deviate “in special cases” cannot be maintained any longer
  › Impacts on importance of institutional capacity

› Requests in foreign language
  › Good availability of legislation translated to EN
  › Good availability of staff and training
  › Willingness to accept requests/orders in EN
  › Good availability of proper translation and interpretation services for EN, DE, FR (best for EN)
MR of investigative measures

- Technical capacity
  - Very good availability of proper ICT equipment
  - Lesser availability of technical means for videoconferencing
  - Modest availability and quality of technical means for special investigative measures
  - Low availability and access to travel budget
  - Very good availability and quality of off-line legal documentation
  - Very good availability and quality of technical/legal and practical support
Free movement of evidence

- Admissibility of evidence
- Not explicitly dealt with in cooperation instruments

- Unlawfully obtained evidence
  - Comparing regulation in domestic and foreign (existing or obtained upon request) situation
  - Consequences different: absolute nullity, impact on reliability, importance of fair trial guarantees
  - Rules rarely constitutionally embedded
Free movement of evidence

- Investigative techniques singled out
  - Lie detection: reliability issues reflected in high refusal
  - Provocation: ignorance for prohibition by ECHR
  - Anonymous witnesses: acceptance in line with ECHR
  - Hearsay: reluctance to attribute decisive value

- Admissibility of foreign evidence
  - Two specific situations were analysed
    - information lawfully obtained by a member or seconded member while part of a JIT is accepted (90%) to constitute admissible evidence
    - Official reports drafted by a foreign authority lawfully present on the territory are accepted to have the same probative value as national official reports
Free movement of evidence

Admissibility of foreign evidence

General conclusions

- Rarely inadmissible or of reduced probative value
- Admissibility abroad reflected in acceptance of domestic admissibility, unless the way the evidence was obtained is contrary to their fundamental principles
- Relationship with FRA principle = core question
- Clear that introduction of either one/three procedural rights options (supra) would facilitate acceptance
Concluding remarks (1)

- Comprehensive MR-based MLA instrument?
  - Yes for comprehensive and some MR characteristics
    - 32 list + some use beyond traditional use
    - Reduction grounds for non-execution (# buts!)
    - Horizontalisation
  - No for certain MR characteristics
    - EEW marginally useful as example
    - No prior effective issuing of decision required
    - FRA support (opposite to MR execution)
    - Especially if backed up with one/three procedural guarantees options presented
Concluding remarks (2)

- Comprehensive MR-based MLA instrument?
  - No for certain measures
    - Spontaneous information exchange
    - JITs
      - bulk of non-regulated measures
        - Either keep flexibility of ‘widest measure possible’
        - Or bring cluster 5 & 6 measures under MR
  - Free movement of evidence?
    - Per se admissibility unless contrary to fundamental principles *forum* state
    - JIT-evidence + assimilation value official reports
    - Keep FRA principle in place (even if atypical for MR)
    - Introduction of either one/three procedural rights options
Further challenges

- internal coherence judicial cooperation instruments
- mutual coherence police/LE and judicial cooperation
  - introduction MR for police/LE
  - Swedish FD – PoA - pre-evidence warrants
- intelligence/pre-evidence/evidence
- future of Eurojust/Eppo - Eurojust
Questions & discussion