Obtaining Foreign Evidence and Confiscating Proceeds of Crime in the EU

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Approach

› economic crime: concept
› 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
  › only briefly: freezing proceeds of crime & confiscation
› complications in practice
› future challenges and perspectives
› questions & discussion
Introductory classification

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

› overview (non-limited)
  › Coe 1990 Laundering Convention
  › Schengen 1990 (SIC)
  › Naples II 1997
  › EU 2000 MLA Convention + 2001 Protocol
  › 1988 Vienna Convention, 2000 UN TOC Convention, etc

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

› convention shopping for special cooperation forms
  › hot pursuit, cross-border surveillance, controlled delivery, covert investigations, JITs
  › systematic overview hereafter
Special cooperation forms

- scope ratione materiae special cooperation forms
  - Naples II: limited to infringements listed in Article 19(2)
  - other conventions: different (often: wider scope)
    - details hereafter per cooperation form
- use as evidence of information obtained in using special cooperation forms
  - Naples II (19.7): yes (= potentially strong point), but
    - in accordance with national law (provisions available?)
    - subject to particular conditions laid down by state where obtained
  - other conventions: nothing specified
- locus regit actum! (all conventions)
Hot pursuit

- Naples II (20)
- comparison with SIC (41)
  - only over land (Naples II: also over sea)
  - different offence scope
    - either for all extraditable offences
      - = likely wider than Naples II, limited to
        extraditable offences listed in Article 19(2)
    - or for offences listed in 41(4a) SIC
      - including: forgery of money, receiving stolen
        goods, extortion, illicit waste transportation
  - + Commission proposal decision July 2005
    - replacement by sole criterion: maximum penalty
      of at least 12 months
Cross-border surveillance (1)

- Naples II (21)
- comparison with (almost) equally
  - SIC (40, revised version)
  - CoE 2001 MLA Protocol (17)
- common characteristics
  - 2 scenario’s
    - prior authorisation following assistance request
    - urgency does not allow prior request & authorisation
    - general conditions for both scenario’s
- remark
  - does not expressly allow for requesting (continuation of) observation by officials requested state
Cross-border surveillance (2)

- difference: SIC and CoE 2001 Protocol more flexible
  - scope ratione personae
    - of a person presumed to have taken part in an [...] offence or who is strongly believed will lead to the identification or location of such a person
    - instead of (as in Naples II): of persons of whom there are serious grounds for believing that they are involved in infringements [...]
  - scope ratione materiae
    - in case of prior authorization: extraditable offences
      - whereas Naples II: only offences listed in Article 19(2)
    - in case of urgency (only SIC): list including offences of 41 (4a) (forgery of money, receiving stolen goods, extortion, illicit waste transportation) + counterfeiting, serious fraud,, money laundering, participation in a criminal organisation
    - + Commission proposal decision July 2005
      - sole criterion: maximum penalty of at least 12 months
Controlled delivery

- Naples II (22)
  - Common characteristics: law & procedures requested state
  - Scope ratione materiae
    - 1988 Vienna Convention (11) & SIC (73): drugs trafficking
    - Naples II: extraditable offences listed in Article 19(2)
    - 2000 Palermo Convention (20): TOC
    - EU 2000 MLA Convention (12) & 2001 CoE MLA Protocol (18): extraditable offences
  - Only on its territory or also continuation through its territory?
Covert investigations

- Naples (23)
- comparison with
  - EU 2000 MLA Convention (14) & 2001 CoE MLA Protocol (19)
  - common characteristics
    - officers acting under covert or false identity
    - no obligation to cooperate + total opt-out allowed for
  - differences
    - ratione materiae: potentially for any offence (vs Naples II)
    - number of scenario’s
      - Naples II: only 1
        - officers requesting state on territory requested state
      - other conventions: 3 scenario’s (implicitly): +2
        - officers requested state on territory requesting state
        - officers requested state on territory requested state
  - opt-outs!
Joint (special) investigation teams (1)

- added value JITs depending on (1)
  - entry into force conventions providing legal basis for JITs
    - Naples II (24)
    - EU 2000 MLA Convention (13)
      - = most complete convention basis
    - 2001 CoE 2nd Additional Protocol MLA (20)
      - copy of Article 13 EU 2000 MLA Convention
    - 2000 UN TOC Convention (19)
    - EU-US 2003 MLA Convention (5)
  - applicable convention provisions
    - vague/detailed? non/self-executing (NSE/SE)?
Joint (special) investigation teams (2)

- added value JITs depending on (2)
  - extent/quality of adoption proper implementing JIT legislation
    - convention-basis required or not?
    - which (how many) conventions qualify as valid JIT basis?
    - implementation of NSE convention provisions?
    - implementation even of SE convention provisions?
      - especially relevant if no convention is required or where less elaborate convention (e.g. Naples II) is relied on
    - provisions beyond Article 13-covered issues?, such as e.g.
      - capacity national/foreign members to draw up official reports
      - use of evidence
    - compatibility of national combinations relating to above items
Joint (special) investigation teams (3)

- common characteristics all conventions
  - difficult & demanding investigations requiring coordination
  - for specific purpose & limited time
  - leadership with country of operation
  - locus regit actum
  - much more potential
  - potential full use EU concepts
    - Europol intelligence (AWF’s)
    - Europol request MS to start/coordinate investigations
  - MS set up team, with support Europol analyst
  - OLAF participation?
  - MS inform Eurojust
  - Eurojust coordinates prosecution
New generation EU instruments

- to be implemented domestically
- principal rules of play
  - between locally competent judicial authorities
  - no more exequatur or transfer procedures
  - blind recognition – via order+certificate or warrant
  - dual criminality requirement basically abandoned
  - refusal for (disguised) fiscal reasons further restricted
- which instruments?
  - 2003 FD European Freezing Order
  - 2006 FD Confiscation Order (+ indirectly: 2005 Confiscation FD)
  - 2008 FD European Evidence Warrant (EEW)
  - MR order/warrant for all forms of MLA?
    - cfr also next keynote on European Investigation Order
  - Free movement of evidence?
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
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
Freezing/seizure crime proceeds

- traditional conventions/treaties
- European Freezing Order (supra)
  - also applicable to orders freezing
    - alleged proceeds from crime
      - for offences from 32-list
      - punishable in issuing MS with +3 years
    - equivalent goods
    - instrumentalities + objectum sceleris
  - immediate execution
  - no exequatur
  - no dual criminality check
Confiscation crime proceeds

- traditional conventions/treaties
- FD confiscation 2005
  - confiscation crime-related proceeds, instrumentalities and property
  - approximation domestic law MS
  - major novelties: extended confiscation (reasonable suspicious period; property from similar offences; reversal burden of proof) + net-widening)
- FD “Confiscation Order” 2006
  - mutual recognition-based
  - add-on to European Freezing Order
  - like it was the case with the European Evidence Warrant
  - recognition confiscation corporate property
  - grounds for refusal essentially for ‘extended’ confiscation
  - introduction mandatory asset sharing mechanism
Evidence 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

› 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
A 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)
- no for certain measures
  - spontaneous information exchange
  - JITs
  - bulk of non-regulated measures
    - either keep flexibility of ‘widest measure possible’
    - or bring non-regulated measures under MR
    - & foresee (capacity) refusal grounds (?!?)
Free movement of evidence?

› per se admissibility unless contrary to fundamental principles *forum state*
› massive support for two specific suggestions for improvement
   › information lawfully obtained by a member or seconded member while part of a JIT to constitute admissible evidence
   › give official reports drafted by a foreign authority lawfully present on the territory same probative value as national reports
› keep FRA principle in place (even if atypical for MR)
› introduction of either one/three procedural rights options
   › allow persons concerned to claim
     › specific guarantees of a similar national case
     › the best of both worlds
› introduce EU level minima based on/derived from ECHR
Questions & discussion