Mutual Recognition in Practice: Gathering and Using Foreign Evidence

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Structure

› introduction
  › investigation in criminal matters & evidence

› problems in practice
  › perspective taken
  › scenarios of information/evidence gathering/use
    › analysis – evaluation – discussion
  › beyond

› 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)

▶ current 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 into domestic law
  - 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?
  - European Freezing Order 2003
  - Protocol 16 October 2001
  - European Evidence Warrant 2008
  - European Pre-Evidence Warrant?
  - MR order/warrant for all forms of MLA?
European Freezing Order 2003

- 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
- 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
European Evidence Warrant 2008 (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
European Evidence Warrant 2008 (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

- additional fd’s announced
  - ultimately to be consolidated in a single instrument
  - that can replace mutual assistance altogether
    - including new EU instruments: 2000 EU-MA/2001 Protocol

- mutual recognition evidence?
  - yes, if lawfully collected in locus MS!

- access to info on servers on non-EU territory
  - yes, if lawfully accessible from territory executing MS
  - = beyond CoE Cybercrime Convention
Broad perspective

- gathering & using foreign evidence - unlike in title
  - problems not limited to “foreign” evidence only
    - also: evidence gathered by foreign JIT members
  - problems not limited to “evidence” only
    - also: information

- various spheres/elements in discussion
  - regular mutual legal assistance (MLA)
  - cooperation in joint investigation teams (JITs)
  - (future) “mutual recognition (MR)” -based MLA
  - police cooperation/Europol
  - Principle of Availability (PoA)
  - FD data protection 3rd pillar
  - forum choice (involving Eurojust)
Scenarios of info/evidence gathering/use

- 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)
- in context of police (LE) or judicial cooperation?
Where/By whom/Context

> relevant scenario combinations
  > abroad (in another MS - in a 3rd state)
    > by local authorities for primarily internal purposes
    > by local authorities following regular MLA request
    > by local/foreign authorities in JIT context (JIT operating abroad)
  > by local authorities in JIT context (JIT operating elsewhere), following request by local JIT-member
  > by own authorities in JIT context (JIT operating abroad)
  > internally
    > by foreign authorities in JIT context
Abroad (1)

> information
  > internally collected – later transferred
    > acceptable, often even where not in accordance with own legal system
  > if collected following request for investigative measures which would not be acceptable in own system
    > exclusion?
  > lawfully collected by JIT member
    > may be used in all JIT-involved states (para 10)
Abroad (2)

- evidence
  - internally collected – later transferred
    - acceptable, except usually where (manifestly) not in accordance with own legal system
  - in accordance with fundamental principles of domestic legal system and with own legislation (forum regit actum following MLA request)
  - in JIT context (i.e. locus regit actum): no guaranteed evidential use
    - by local authorities, either when JIT operating abroad or following request local JIT member when team operates elsewhere
    - by own authorities, where bestowed with investigative powers (locus regit actum) and within national mandate
      - strict dual locus check
      - additional questions: mandated to draw up official domestic reports? having evidential value back home?
    - by foreign authorities, where bestowed with investigative powers and within national mandate
      - worst case scenario = strict triple locus check
Internally

- i.e. by foreign authorities in JIT context
  - where bestowed with investigative powers
  - and within their national mandate

- distinction
  - information
    - no problem
  - evidence
    - mandated to draw up reports having domestic evidential value in MS of evidence gathering?
Assessment

- JIT-collected information
  - may be used as information
    - depending on JIT treaty basis
      - which treaty – applicability
    - in the absence of applicable SE convention provision
      - fully depending on domestic legislation
      - of all states involved (compatibility issue)
  - no guaranteed use as evidence whatsoever
    - due to locus regit actum rule
  - for evidential purpose therefore
    - inferior to information collected through forum regit actum-based MLA request
Status (1)

- scenarios
  - existing
  - new
    - requires investigative measure/execution of request
  - real-time
    - telecom interception & bank account monitoring
Status (2)

- relevance
  - regular MLA: irrespective of status
  - JIT-cooperation
    - possible advantages: request home, right to presence, active investigative position
  - as for existing information/evidence: inferior to
    - PoA: obligation to provide LE-relevant information
    - European Evidence Warrant
  - as for new/real-time information
    - inferior to announced full replacement MLA with binding MR-based orders/warrants issued by forum state, rendering (almost) automatically information evidence-worthy
Type of measures required

- Y/N coercive/intrusive/privacy-invading?
- relevance for police cooperation
  - Schengen (Article 39): “for police use only” info exchange only where no coercive/… measures are required
  - JIT cooperation: no improvement
  - as opposed to: Prüm Treaty, PoA (for existing information)
- relevance for judicial cooperation
  - regular MLA: dual criminality + compatibility law requested state
  - JIT cooperation: no changes
  - as opposed to
    - for existing evidence: European Evidence Warrant
      - no dual criminality requirement for 32 offences
    - for new/real-time evidence: announced MLA-replacement with MR
      - similar irrelevance dual criminality
      - Shift to primarily law executing state
Type of source

› traditionally
  › criminal intelligence operation or criminal investigation/proceedings

› trend
  › administrative/military (OLAF, terrorism, Echelon …)
  › violating upon purpose limitation principle and upon separation of powers

› JIT cooperation
  › traditional cooperation in criminal matters
  › luckily! also for practitioners?
Type of purpose of use (specialty rule)

- traditional police cooperation
  - Schengen/Europol
    - prevention and detection criminal/administrative offences
    - preventing immediate/serious threat to public security
- traditional judicial cooperation
  - regular MLA
    - criminal proceedings (including administrative offences)
    - related judicial + administrative proceedings
    - preventing immediate and serious threat to public security
    - other use on request
- proposed FD data protection police & judicial cooperation
  - similar
- as opposed to JIT cooperation
  - limited in 1st instance to only investigated offences
Beyond

› full MR in “pre-evidence” cooperation?
  › instead of MR mitigated by equivalent access principle
  › genuine “pre-evidence” warrant for use in criminal intelligence operation or criminal investigation/proceedings
  › to be issued by police, customs + even: judicial authorities

› mutual recognition evidence
  › as contemplated by EC: if gathered lawfully in locus state: per se admissible?
    › bypassing judicial review/scrutiny in MS?

› better options?
  › minimum harmonization of criminal procedural law standards?
  › MR of procedural guarantees?
  › combined with MR of evidence gathered accordingly
  › see: Lisbon Treaty
  › current IRCP study on evidence gathering
Questions & discussion