

Future Options for Free Movement of Evidence

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Approach | Research base

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possibilities and preconditions for enhanced freedom

- in *gathering* (i.e. during the pre-trial investigation stage)
- respectively *using* (i.e. during the trial stage)

evidence in criminal matters in the EU

- generic notion (pre-trial stage)
- 'admissibility in court' focused notion (trial stage)

research base [all open access]

- [2009-10 IRCP EC study cross-border evidence gathering & use](#)
- [2010-12 IRCP EC study future judicial cooperation](#)
- summarized in: [Free gathering and movement of evidence](#)
- PhD Dr. Martyna Kusak: [Mutual admissibility of evidence](#) (end 2016)
 - telephone tapping, house search
 - procedural rules, procedural rights (remedies, notification)
 - *per se* admissible evidence | non *per se* admissible and *per se* inadmissible irregular evidence
- PhD Sofie Depauw: Mutual admissibility of forensic evidence (end 2018)
 - DNA, fingerprints, e-evidence
 - collection, storage, access
 - procedural rules, procedural safeguards, scientific/lab standards, staff proficiency

research

publications

consultancy

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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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Rethinking international cooperation in criminal matters in the EU

Moving beyond
actors, bringing
logic back, footed
in reality

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(eds.)

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

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

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

GERT VERMEULEN

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Mutual
admissibility
of evidence in
criminal matters
in the EU

A study of telephone
tapping and house
search

Martyna Kusak

IRCP 2009-10 Evidence study for EC

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overcomplexity of the environment

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

feasibility of future MR based MLA

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

free movement of evidence

- usually not covered by cooperation instruments

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Results: A comprehensive MR-based instrument?

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yes for comprehensive and some MR characteristics

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

no for certain MR characteristics

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

no for certain measures

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

introduction of either one/three procedural rights options

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

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Free gathering of evidence

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By whichever authorities?

With whichever finality?

Irrespective of the offence (definition)?

Any investigative measure?

Without borders?

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By whichever authorities? (*ratione auctoritatis*)

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A matter of judicial cooperation, by judicial authorities only?

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

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

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

Limited necessity for 'judicial' safeguards

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

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With whichever finality?

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Decisive marker: Criminal justice finality

- Irrespective of *type* of authorities involved

Part of the EU *acquis*

- Unfortunately in a fragmentary and *ad hoc* fashion

Lack of finality demarcation problematic

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

Flexible finality demarcation?

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

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Irrespective of the offence (definition)?

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Traditionally limited dual criminality requirement

- For coercive and intrusive investigative measures only (examples)

Further outruling?

- EIO: only limited 'breakthrough' based on 32 list
- 32 list approach highly discussable
 - Lack of common definitions (EULOCS)
- Not beyond 32 list
 - Except through EULOCS

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Any investigative measure?

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Traditionally: consistency test

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

Inconsistencies will prevail

- *Ratione loci*
- *Ratione temporis*
- *Ratione personae*
 - Natural persons: in terms of age, procedural status, definition
 - Legal persons: no breakthrough with 2012 IRCP study for EC
- *Ratione materiae*
 - Limited breakthrough on the basis of 32 list only

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Without borders?

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New *aut exequi aut tolerare* rule?

- JIT and Naples II acquis – no constitutional hurdles

More radical option: *tolerare* principle?

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

Legal basis available since A'dam Treaty

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Free *movement* of evidence

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Mutual admissibility of evidence gathered following a cooperation request

- Forum regit actum (FRA) | conceptual flaws and weaknesses
- Quick wins: *per se* admissibility
 - Lawful JIT evidence & reports drafted by foreign officials
- Quantum Leap
 - Common minimum standards instead of FRA (examples)

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

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

common minimum standards

- procedural: ECHR-based per investigative measures
- scientific (techniques/laboratories, staff) | European Forensic Area

+ MR of guarantees

- specific guarantees of a similar national case
- best of two worlds

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Discussion | Q&A

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