

Towards mutual recognition of investigative measures and free movement of evidence

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1 Introduction

1.1 Cross-border gathering and use of evidence

Nobody will deny that providing an adequate answer to crime is very complex. Having to deal with cross-border crime only further complicates things, as this requires cross-border cooperation which brings along a whole new series of challenges. One of those challenges is the cross-border gathering and use of evidence.

In spite of the emergence of mutual recognition in criminal matters¹ in general and more specifically the recent evolutions in the fields of evidence and investigative measures raise questions as to the feasibility of mutual recognition of investigative measures and free movement of evidence. Traces of these questions can also be found at European policy level.

In 2004 the European Commission sponsored a study conducted by the British Law Society² obtaining data from the bar associations in each of the member states concerning the national laws on gathering and handling of evidence. Soon after the conclusion of the study, the legal framework in the member states significantly changed due to two crucial developments at EU level. First, in 2005, the EU Convention on mutual assistance in criminal matters (EU MLA) entered into force³. 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).⁴ 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

¹ In recent years, mutual recognition (MR) gained more importance. The 1999 Tampere Conclusions identified MR as the cornerstone of judicial co-operation. The 2001 Program of measures 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 order and the EEW. However, today the bulk of cross-border cooperation on obtaining evidence is still centred around mutual legal assistance (MLA) techniques. A possible next step is the introduction of the MR principle in the remaining MLA field.

² 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.

³ 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.

⁴ 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.

mutual legal assistance (MLA) within the EU by the MR principle.⁵ In 2009, the European Commission awarded the Institute for International Research on Criminal Policy (IRCP) a contract to perform a follow up study on the laws of evidence.⁶ At the onset of the Study, the European Commission launched the *2009 Green Paper on obtaining evidence in criminal matters from one Member state to another and securing its admissibility*.⁷

1.2 Over complexity of the current environment

The existing rules on obtaining evidence in criminal matters in the EU are of two different kinds. First, there are instruments based on the MLA principle. MLA, short for mutual legal assistance, starts from the principle of requesting for assistance and leaving the requested member state room to assess whether or not to respond to that request.⁸ The most notable MLA instruments include the European Convention on mutual assistance in criminal matters (ECMA)⁹, supplemented by the Schengen Agreement (SIC)¹⁰ and the Convention on mutual assistance in criminal matters (EU MLA)¹¹ and its Protocol (EU MLA Protocol)¹². Second, there are instruments based on the MR principle, of which the EEW is the best known. MR, short for mutual recognition, starts from the

⁵ 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 DUYNÉ, 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

⁶ 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*.

⁷ 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.

⁸ 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

⁹ Council of Europe (1959). "European Convention on mutual assistance in criminal matters " ETS n°30 of 20.4.1959.

¹⁰ "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

¹¹ 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.

¹² 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.

principle of ordering and executing leaving little or no room for appreciation in the executing member state.¹³

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.

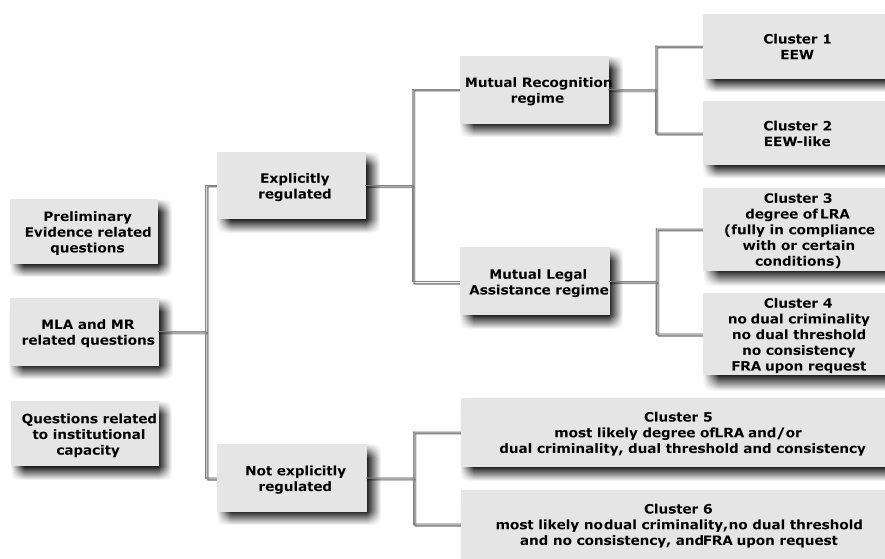
As a result, it cannot be denied that the current environment which – only partially – regulates investigative measures and the use of evidence lacks transparency. The over complexity is confusing and above all counterproductive.

1.3 A six clustered benchmarking framework

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 supports future policy making. To create this benchmarking framework, an in depth analysis of the existing legal instruments was performed 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.

¹³ See more elaborately on the principle of mutual recognition: PEERS, S. (2004). "Mutual recognition and criminal law in the European Union: Has the Council got it wrong?" *Common Market Law Review* 41: 5, MITSILEGAS, V. (2006). "The constitutional implications of mutual recognition in criminal matters in the EU." *Common Market Law Review* 43: 1277, NILSSON, H. G. (2006). "From classical judicial cooperation to mutual recognition." *Revue Internationale de Droit Pénal* 77(1-2): 53, SATZGER, H. and ZIMMERMANN, F. (2008). From traditional models of judicial assistance to the principle of mutual recognition: new developments of the actual paradigm of the european cooperation in penal matters. in BASSIOUNI, C., MILITELLO, V. and SATZGER, H. *European Cooperation in Penal Matters: Issues and Perspectives*. Milan, CEDAM - Casa Editrice Dott. Antonio Milani: 337-361, VERMEULEN, G. (2008). Mutual recognition, harmonisation and fundamental (procedural) rights protection. in MARTIN, M. *Crime, Rights and the EU. The future of police and judicial cooperation*. Londen, JUSTICE - advancing access to justice, human rights and the rule of law: 89-104, MORGAN, C. (2010). The Potential of Mutual Recognition as a Leading Policy Principle. in FIJNAUT, C. and OUWERKERK, J. *The Future of Police and Judicial Cooperation in the European Union*. Leiden, Brill: 231-239, VERMEULEN, G. (2010). How far can we go in applying the principle of mutual recognition? in FIJNAUT, C. and OUWERKERK, J. *The Future of Police and Judicial Cooperation in the European Union*. Leiden, Koninklijke Brill: 241-257.

This exercise has led to a set of six clusters, as shown on the figure below.¹⁴



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.

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 is 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

¹⁴ This figure and the high level overview of the clustering is taken from VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. (2010). *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu.

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 likeliness 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 consist 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.

Having unravelled the current environment and developed a series of working hypotheses, a questionnaire was prepared, aiming at obtaining up to date information on the possibility to move ahead and introduce a more MR based MLA.

1.4 Data collection via online-questionnaire

1.4.1 Design of the questionnaire

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 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.

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

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 are 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.

1.4.2 Qualified respondents: (National) expert groups and Eurojust

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 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.

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.

The draft final report is to be presented at the European Commission Expert group on Evidence on 9 February 2010, to validate the research results.

2 Findings and recommendations¹⁵

2.1 MR of investigative measures

2.1.1 *The use of the 32 MR offences*

For the analysis of the first MR characteristic – the use of the 32 MR offences (most commonly used to abandon the double criminality requirement)¹⁶ – member states were asked to what extent either partial or general abandonment of the double criminality requirement is considered acceptable in MLA. Surprisingly, no less than 90% of the member states are willing to grant their cooperation even if the investigative measure relates to acts which do not constitute an offence in their own national law. This means that only 10% of the member states attach great value to a full fledged double criminality requirement. 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 among member states. Furthermore, an additional 30% accept abandonment of the double criminality requirement as a future policy option. All of the above findings considered together, together with theoretical reasoning, make it acceptable to conclude that 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 assessed. Because such a requirement might hinder efficient cooperation, it was worth investigating the willingness of member states to waive this right when execution is related to acts included in the 32 MR offences. The assessed situation concerned the execution for acts for which the requested measure cannot be taken or ordered in a national case according to the national law of the executing state. Analysis revealed that only 20% would never allow such execution. No less than 80% of member states are either currently 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 in future instruments limit refusal and postponement grounds for the execution of requests was put to the test. It is essential to the MR philosophy that refusal and postponement grounds be limited as much as possible. The question again rises whether the introduction

¹⁵ This section is largely based on the executive summary included in the final report published as VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. (2010). *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu.

¹⁶ See more elaborately on the used of the 32 MR offences in 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.

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, has a significant link to the 32 MR offences. 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 1 out of 3 up to 1 out of 2 member states accepts removing the possibility to refuse when acts are included in the 32 MR offences list, the result would be marginal as only a small number of member states refuses on this ground to begin with. Similarly, financial capacity as a refusal ground would not benefit from the introduction of the 32 MR offences. Member states favour a system in which a fair share of the costs/expenses 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

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.

To conclude, it is reasonable to accept that the introduction of the 32 MR offences in other areas than the abandonment of the double criminality requirement needs to be thoroughly considered. In some areas member states are willing to move ahead and accept obligations when cooperation is linked to any of the 32 MR offences. Additionally, member states are even willing to move even further, as they indicate to be willing to accept obligations for cooperation, even beyond the 32 MR offences. 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 supported 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.

2.1.2 *Enhanced stringency in cooperation*

Grounds for refusal or non-execution

Expanding the MR philosophy must in due time render traditional MLA more reliable and more speedy. 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. In this respect it is recommendable that in future instruments the *ne bis in idem* principle should be enshrined 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 in future (MR-based) MLA instruments.

Refusal or non-execution for reason of *lack of double criminality* was also assessed.¹⁷ Granting 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 unwanted and unachievable. However, the potential of introducing a prohibition to invoke it for the 32 MR offences in these cases seems 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

¹⁷ 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 search or seizure (cluster 2 and, the case being, cluster 1) and for the investigative measures comprised in cluster 3.

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, considering the EEW-specificity of the refusal ground

Furthermore, refusing execution for reasons of *immunity or privilege* under the law of the executing member state was assessed. Surprisingly, when tested, there was significant support among member states for keeping or even introducing this ground for non-execution concerned. Article 13, 1, d EEW, as Article 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. It is important to stress 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, its deletion is proposed even for the sphere of the EEW (cluster 1) and the freezing of evidence.

The next refusal ground under assessment was the *extra-territoriality principle*.¹⁸ This refusal ground was copied in the EEW from the EAW, which seems a regrettable mistake as extradition and surrender law cannot be simply assimilated with MLA. Introduction of it in future (MR based) MLA instruments is therefore opposed, 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, there is 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.¹⁹ 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. A middle course is recommended, as was introduced in the

¹⁸Art 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.

¹⁹ Art 13, 1, g EEW

Wittem Convention of 1979²⁰, and to allow imposing conditions to the execution if this can avoid affecting the interests of the requested state.

Also, 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 considering that member states have 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, as noted in the preamble to the TEU.

Also, 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, 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. Empirical results from the questionnaire do not significantly challenge this recommendation.

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 significant. Therefore the choice was made to not only test the position of member states vis-à-vis the (revised) traditional grounds for refusal or non-execution as assessed above 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 choice was made 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 willing to accept 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. Member state reality clearly contrasts here with the stance of the Eurojust College, i.e. that MLA should not be refused solely on the basis that the

²⁰ "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. 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'

execution of a request would have substantial implications as to financial resources. 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. 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 is suggested to be copied 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 choice was made 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. It was inclined to share the stance taken by the Eurojust College, which is 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 that member states attribute to the possibility to postpone execution 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 indicated to indeed use the possibility to postpone execution of a foreign order/request/warrant equally 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 proposal which allows for a possible extension of 30 days in case postponement would be requested.

Based upon this analysis, it is recommended 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.

2.1.3 *Accepting and executing orders*

Caution is needed when looking into the feasibility of a future more MR based MLA. MR features are meticulously tested for their compatibility with MLA features. Particular attention needs to be paid to the law applicable to the execution.

Introducing MR characteristics in MLA applications will cause tension with regard to the law applicable to the execution. Traditional MR foresees execution in the manner provided for by the national law of the executing member state, whereas traditional MLA applications 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. In sum, MR usually applies the *locus regit actum* rules, whereas MLA usually applies the *forum regit actum* rules.

This section deals 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 as requested by the issuing member state 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 they 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 this should happen 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 specific 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 bulk 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 contend themselves 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 obtain 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 positions of member states vary greatly. It is recommended 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

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. 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.

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% for cluster 3 and 5 up to 70% for cluster 6 of the member states indicate to be willing to accept a *forum regit actum* regime.

Additionally, member states were asked to 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, which is supported by Eurojust. The results of the current practice with regard to these three scenarios are 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 any 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 indicated that this should be 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 apply this rule and an additional 30% considers it a valid future policy option to abandon the possibility to make execution dependant on double criminality. It is anticipated that similar results will show, 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 to obtain 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.

2.1.4 Horizontalisation of cooperation

The fourth MR characteristic under assessment 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. In general, communication via **central** authorities will only take place for transfer of persons held in custody and for the exchange of criminal records information²¹. Besides these explicit exceptions, the option to derogate from the rule of direct communication between authorities is foreseen in Art. 6, 2 EU MLA Convention, which allows for a derogation of the general rule in special cases, without further clarifying what constitutes a special case. It is advisable to

²¹ 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, which means that it no longer needs to be an exception to the direct communication rule. See 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*.

eliminate such possibility to derogate from the general rule, and only maintain one single exception for the transfer of persons held in custody. 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.

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. The above made points explain 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 specific circumstances of the case. Analysis revealed that as far as fully translated versions of relevant legislation are concerned, the general situation is that they are more likely to be available in member states in English than in French and German. Even though this might seem like a boldly ambitious recommendation, it is however considered to be highly recommendable that 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 supports and further strengthens the recommendation 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. French facilities were the least in place.

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 importance of the issue is recognised and questions about technical issues included in the questionnaire. The importance of all of the issues assessed 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.

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 processing of requests and orders are 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 are 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 reports only medium-level availability there-of. 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.

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 claims that such budgets are available, most member states report that such budgets are 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 claim 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.

2.2 Free movement of evidence

The fact that evidence gathered in one member state is not automatically recognized in another member state of the EU, often poses difficulties to effective prosecution in cases which have a cross-border aspect. National rules of evidence are still perceived to be too different in matters of detail across the Union. This is why the question of mutual admissibility of evidence across EU-borders deserves a special focus in the light of this topic. What was particularly assessed in this respect was 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 superfluous if in the end, the obtained evidence will not serve any real purpose in trial due to inadmissibility. It is now completely unclear what happens in the end with evidence, gathered or obtained on the basis of cross-border cooperation.

The EEW does not explicitly address the issue of mutual admissibility of evidence, nor do other MR and MLA-instruments, but certain techniques of the EEW do however facilitate the final mutual admissibility of evidence. An example there-of is that the EEW removes the possibility for an executing member state to refuse to comply with certain formalities, requested by the issuing member state, an option that is indicated in other MLA instruments. 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.

As a first focus point, rules on unlawfully obtained evidence in domestic cases in the member states were assessed. 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. The questionnaire also assessed what the consequences of the sanctions 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. The overall conclusion after this preliminary analysis is first that a multitude of scenarios is possible and that the landscape varies according to the member state. Also, 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 differences exists among 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 the 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 real challenges for the future of MR. 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 that show large differences across member states as to their value and the value of the evidence they bring forth have been assessed in the questionnaire. 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 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 Convention²², 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, in a certain member state the same value is attributed to these techniques and the evidence that they bring forth, whether it comes from another member state or if it is obtained in the member state in question. This is a very positive outcome for the principle of MR. Even more so, sometimes more leniency is shown for evidence that these techniques bring forth coming from another member state, in

²² See more elaborately on the use of anonymous witnesses in the report of a previous study conducted by IRCP: VERMEULEN, G. (2005). *EU standards in witness protection and collaboration with justice*. Antwerp-Apeldoorn, Maklu.

comparison with domestically obtained evidence, which is a surprising outcome to say the least. When however comparing the admissibility and value of the techniques on a domestic level across member states, 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 were assessed. More specifically, 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 accept this, 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 reached 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 of law.

3 Conclusion

Cross-border cooperation is indispensable in the fight against cross-border crime. Even though many differences exist between the different criminal justice systems, they should not render cooperation impossible. The study has pointed to the unnecessary over complexity of the current environment and the counterproductiveness the lack of transparency causes. It is clear that the investigative measures currently explicitly regulated, can be clustered according to the regime that is applicable to them. Furthermore, a series of currently not explicitly regulated investigative measures can also be brought into the clustering exercise.

A lot of progress can be made.

First, the introduction of the 32 offence list can entail a significant step forward. However it should be noted that member states can also be willing to move ahead regardless of the offence types involved. Therefore, the 32 MR offences should not be regarded as a magical “open sesame”, because limiting all progress accordingly, can equally prevent from making even more progress.

Second, the current use of ground for refusal or non-execution seem to be a work of copy pasting from other instruments and seems to depend on the feel of the day rather than the result of coherent and well considered policy making. There are good reasons to keep a number of grounds for refusal or non-execution and even to introduce a new one. However, in line with the MR philosophy which requires these grounds should be limited to the absolute minimum, there are solid legal reasons to abandon most of them.

Third, considering the importance for the safeguarding of evidence, cooperation requests need to be dealt with in a timely fashion. Deciding on cooperation should take no longer than 30 days. Subsequent execution should be concluded within a time span of 60 days, which can be extended with another 45 days if a ground for postponement was brought up.

Fourth, the validity of domestic judicial decisions should be accepted when the issuing member states confirms that – in accordance with its national law – the investigative measure can be taken in a similar national case.

Fifth, considering that cooperation requests are ultimately intended to gather evidence to be used in the requesting member state, acceptance of the *forum regit actum* rule is of utmost importance.

Sixth, the speediness direct cooperation offers, also impacts on the importance of institutional capacity. Both member states and the European Commission need to support initiatives to increase such capacity.

Final, free movement of evidence is not as difficult as perceived. Evidence lawfully obtained in one member state should be accepted as evidence in all other member states, unless it was obtained contrary to any of the member state’s fundamental principles of law.

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