



Procedural Rights in the Context of Evidence-Gathering

Online, 15-16 April 2021

15 April 2021 - 13:00-17:30 CEST

16 April 2021 - 09:30-13:30 CEST

**UP
GRADE**
YOUR LEGAL
EXPERTISE

**Criminal
Law**



Speakers and chairs

Ingrid Breit, Team Leader – Procedural Rights and Confiscation, Procedural Criminal Law, DG Justice and Consumers, European Commission, Brussels

Sławomir Buczman, Judge, JITs Network Secretariat, Eurojust, The Hague

Vânia Costa Ramos, Criminal Lawyer, Partner, Carlos Pinto de Abreu e Associados, Lisbon

Klaus Hoffmann, Senior Prosecutor, Prosecutor's Office, Freiburg

Gwen Jansen, Defence Lawyer, Amsterdam

Giulia Lasagni, Junior Assistant Professor in Criminal Procedure, University of Bologna

Cristian Nicolau, Head of Unit, Unit JUST.B.3 – e-Justice, IT and Document Management, DG Justice and Consumers, European Commission, Brussels

Frank Verbruggen, Professor of Criminal Law, Catholic University of Leuven

Thomas Wahl, Senior Researcher, Max Plank Institute for the Study of Crime, Security and Law, Freiburg

Key topics

- The gathering of cross-border evidence and its admissibility
- Update on the state of play regarding the EU Directives on procedural rights, i.e. the right to information, legal aid and access to a lawyer, presumption of innocence, and the position of children in criminal proceedings
- Setting a legal framework to address the challenges posed by the gathering of e-evidence
- The need for further measures in the EU

Language
English

Event number
321DT13e

Organisers
ERA (Cornelia Riehle) in cooperation with ECBA, EJTN and EULITA



With the support of the Justice Programme 2014-2020 of the European Union

Procedural Rights in the Context of Evidence-Gathering

Thursday, 15 April 2021

- 12:45 Connecting to the videoconference platform
- 13:00 **Opening of the seminar and getting to know each other**
Cornelia Riehle (ERA)

I. Evidence-gathering in the EU

- 13:15 **The gathering of cross-border evidence and its admissibility**
Thomas Wahl
- 13:45 **The European Investigation Order (EIO) and its effectiveness in collecting evidence located abroad: a case example**
Thomas Wahl
- 14:30 break
- 14:45 **A new side of the coin: online investigations and the challenges of dealing with electronic evidence in criminal proceedings**
 - Principles of dealing with electronic evidence
 - Common procedures for recognising and handling evidence on digital devices
 - International investigations (search and seizure – obtaining evidence from the Internet)*Klaus Hoffmann*
- 15:30 **Discussion: What to expect from the proposed European Production and Preservation Orders?**
Frank Verbruggen
- 16:15 Break
- 16:30 **Key features of the e-Evidence Digital Exchange System**
Cristian Nicolau
- 17:00 **The admissibility of (electronic) evidence in the EU**
Giulia Lasagni
- 17:30 End of day one

Friday, 16 April 2021

II. New procedural safeguards in the EU

- 09:15 Connecting to the videoconference platform
- 09:30 **Rights ahead: Access to a lawyer and legal aid in criminal proceedings throughout the EU: where are we?**
Gwen Jansen and Vânia Costa Ramos
- 10:15 Discussion
- 10:30 Break
- 10:45 **The rights to interpretation and translation and information: status quo**
Ślawomir Buczma
- 11:15 **State of play regarding the transposition of the rights on the presumption of innocence and children's rights**
Ingrid Breit
- 11:45 Break

Objective

This seminar will take a detailed look at procedural rights in the context of evidence-gathering with a special focus on new developments in the field of e-evidence.

About the project

The project consists of four seminars taking place in 2020 and 2021. Each event has a specific focus. For more information, see: procedural-rights.legal-training.eu

Who should attend?

This seminar is targeted at judges, prosecutors and defence lawyers from all over the EU (Denmark does not participate in the Justice Programme 2014-2020).

Interactive online seminar

The online seminar will be hosted on ERA's own online platform. You will be able to interact immediately and directly with our top-level speakers and other participants. We will make the most of the technical tools available to deliver an intensive, interactive experience. As the platform is hosted on our own server, the highest security settings will be applied to ensure that you can participate safely in this high-quality online conference.

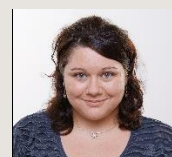
CPD

ERA's programmes meet the standard requirements for recognition as Continuing Professional Development (CPD). This event corresponds to **8 CPD hours**.

Your contact persons



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III. Next steps: The need for further procedural safeguards in the EU

- 12:00 **Procedural rights in the context of evidence-gathering**
Vânia Costa Ramos and Gwen Jansen
- 12:30 **Challenges ahead – the position of the European Commission**
Ingrid Breit
- 13:00 Discussion
- 13:30 End of online seminar

For programme updates: www.era.int
Programme may be subject to amendment.

Apply online for this seminar:
“Procedural Rights in the Context of Evidence-Gathering”:

www.era.int/?130416&en

e-Presentations

**Cyber Risks in Financial Institutions:
Lessons Learned in Responding to
Them**

Liviu Chirita

**Approaches to Prepare Proactively for
Cybercrime Incidents**

Dave O'Reilly

**Cyber Menaces and Different Types of
Cybercrime Offences**

Cormac Callanan

Specialised e-Courses

**Fighting Child Pornography Online:
10 Key Questions**

Alisdair Gillespie

www.era.int/elearning

Save the date

**Annual Conference on White-Collar
Crime in the EU 2021**

Online, 17-19 March 2021

**Data Protection and the Law
Enforcement Directive**

Online, 20-21 May 2021

**Summer Course on European Criminal
Justice**

Online, 21-25 June 2021



This programme has been produced with the financial support of the Justice Programme 2014-2020 of the European Union.

The content of this programme reflects only ERA's view and the Commission is not responsible for any use that may be made of the information it contains.



THE GATHERING OF CROSS-BORDER EVIDENCE AND ITS ADMISSIBILITY

ERA-Seminar Procedural Rights in the Context of Evidence-
Gathering, 15 April 2021



Co-funded by the Justice Programme of the
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TRICKY SURVEILLANCE

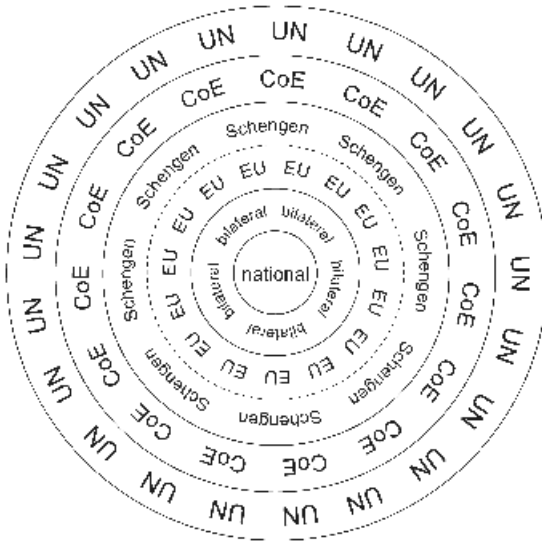
- **Case Study:**
- German prosecutor P is investigating against X who is allegedly part of a gang that is specialised in deriving unwarranted Value Added Tax. X stays conspicuously often in the United Kingdom, Denmark and France. German prosecutor P would like to intercept X's telephone during his travels, but needs the technical assistance of the British, Danish and French authorities to do so.
- Which legal bases enable P to request the surveillance of telecommunications in the three countries?
- Would evidence collected in the foreign countries be admissible in Germany?

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THE SOURCES OF LAW



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National: In particular, the domestic acts/law on cooperation in criminal matters: <https://www.ejn-crimjust.europa.eu/ejn/>

Bilateral: Infos on bilateral treaties via the EJM Atlas: <https://www.ejn-crimjust.europa.eu/ejn/>

EU: The law on the European Union:

- <https://eur-lex.europa.eu/homepage.html?locale=lv>
- https://eur-lex.europa.eu/summary/chapter/justice_freedom_security.htm?root_default=SUM_1_CODED%3D23%2CSUM_2_CODED%3D2303&locale=lv

Schengen: The applicable law between MS of the Schengen Area: <https://eur-lex.europa.eu/homepage.html?locale=lv>

CoE: Council of Europe Conventions: <https://www.coe.int/en/web/conventions/>

UN: United Nations Conventions: <https://www.unodc.org/unodc/en/treaties/index.html>

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LEGAL BASES FOR MUTUAL LEGAL ASSISTANCE



- European Convention on Mutual Assistance in Criminal Matters ("mother convention")
<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030>
- Additional Protocol (AP) 1978
<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/099>
- Additional Protocol (AP) 2001
<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/182>
- **EU-UK Trade and Cooperation Agreement (TCA) 2020 (Part III, Title VIII)**
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AQJL_2020.444.01.0014.01.ENG



- Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union
<https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/32/-1/-1/-1>
- Protocol to the Convention (2001)
<https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/395/-1/-1/-1>



- National laws transposing Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0041>

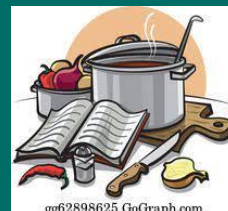
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BASIC GRID OF MLA SCHEMES



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FIRST STEP: ADMISSIBILITY OF THE MEASURE IN THE REQUESTING STATE



Formal Requirements (Section 100e German Criminal Procedure Code):

- Order by the court (investigative judge), unless exigent circumstances.

Substantive Requirements (Section 100a German Criminal Procedure Code):

- Certain facts give rise to the suspicion that a person has, either as an offender or participant, committed a serious crime of the kind referred to in subsection (2) – catalogue crime (!);
- The offence is one of particular severity in the individual case as well and
- Other means of establishing the facts would be much more difficult or would offer no prospect of success;
- There are no factual indications to assume that the telecommunication surveillance will only lead to findings in the core area of the private conduct of life (Sec. 100d (1)).

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SECOND STEP: GENERAL FORMAL REQUIREMENTS FOR MUTUAL LEGAL ASSISTANCE

- Form and contents of a request
- Type of the requesting authority
- Channels for transmission (*Geschäftswege*)
- Time limits
- Language regime
- Authentication
- Costs

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THIRD STEP: GENERAL SUBSTANTIVE REQUIREMENTS FOR MUTUAL LEGAL ASSISTANCE

▪ Refusal Grounds

- Subject matter (scope and applicability of the legal act)
- Reciprocity
- Ordre public and human rights clauses
- National security clauses
- Double criminality
- Extraditable offence
- Proportionality / de minimis clauses
- Political offence exception
- Military offence exception
- Fiscal offence exception
- Immunities and privileges
- Double jeopardy/ (transnational) ne bis in idem
- Extraterritoriality clause / double jurisdiction

• Suspension Grounds

- Prejudice of ongoing criminal investigations/proceedings
- Required objects, documents or data are in use in other proceedings

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FOURTH STEP: SPECIFIC SUBSTANTIVE REQUIREMENTS FOR MUTUAL LEGAL ASSISTANCE

- Search and seizure of property (Art. 5 CoE MLA Conv. 1959)
- Appearance of witnesses and experts (Art. 7-10 CoE MLA Conv. 1959)
- Temporary transfer of persons in custody (Art. 11 CoE MLA Conv. 1959, Art. 13 AP 2001; Art. 9 EU MLA Conv. 2000; Art. 22 Directive EIO)
- Exchange of information from criminal records (Art. 22 CoE MLA Conv. 1959, Art. 4 AP 1978)
- Hearings of witnesses and experts by video conference (Art. 9 AP 2001; Art. 10 EU MLA Conv. 2000; Art. 24 Directive EIO)
- Hearings of accused persons by video conference (Art. 9 AP 2001; Art. 10 EU MLA Conv. 2000)
- Cross-border observations (Art. 17 AP 2001)
- Controlled delivery (Art. 18 AP 2001; Art. 12 EU MLA Conv. 2000; Art. 28 Directive EIO)
- Covert investigations (Art. 19 AP 2001; Art. 14 EU MLA Conv. 2000; Art. 29 Directive EIO)
- Joint Investigation Teams (Art. 20 AP 2001; Art. 13 EU MLA Conv. 2000)

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FOURTH STEP: SPECIFIC SUBSTANTIVE REQUIREMENTS FOR MUTUAL LEGAL ASSISTANCE (II)

- Requests for information on bank accounts (Art. 1 Protoc. EU MLA Conv. 2001; Art. 26 Directive EIO)
- Requests for information on banking transactions (Art. 2 Protoc. EU MLA Conv. 2001; Art. 27 Directive EIO)
- Requests for the monitoring of banking transactions (Art. 3 Protoc. EU MLA Conv. 2001; Art. 28 Directive EIO)
- Interception of telecommunications (Art. 17-21 EU MLA Conv. 2000; Art. 30, 31 Directive EIO)

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APPLICATION: COUNCIL OF EUROPE



Conventional MLA Regime

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MUTUAL LEGAL ASSISTANCE ON COUNCIL OF EUROPE BASIS



- **Case Study:** German prosecutor P requests surveillance of telecommunications from UK authorities (England & Wales)
 - Form and contents of a request → *see below “specific requirements”*
 - Type of the requesting authority
 - **“judicial authorities” as declared by the requesting State (Art. 1, 24 CoE MLA Conv 1959, Art. 6 AP 2001) → Declaration of Germany: Public prosecution offices are deemed judicial authorities for the purpose of the Convention**
 - Channels for transmission
 - **Principle:** between Ministries of Justice - direct transmission in cases of urgency (Art. 15 CoE MLA Conv. 1959) – **Exception:** Direct transmission between judicial authorities (e.g. prosecutor-prosecutor) allowed (Art. 4 AP 2001) – **BUT: Declaration UK:** All requests must be sent to central UK authority (in cases of indirect tax matters: HM Revenue and Customs, London) + **Declaration Germany:** Requests within the CoE system must be sent via the Federal Office of Justice, Bonn, (except in cases of urgency)
 - Direct transmissions *de facto* excluded; transmission between central authorities.

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MUTUAL LEGAL ASSISTANCE ON COUNCIL OF EUROPE BASIS (II)

- Time limits
 - **Principle**: No time limits in 1959 Conv. **Exception**: Art. 1 AP 2001: “**promptly** afford mutual assistance”
 - **BUT**: TCA 2020 (Art. LAW.MUTAS 120): 45 days for decision on request, 90 days for execution (after decision)
- Language regime
 - **Principle**: No translation required (Art. 16(1) CoE MLA Conv.1959). **Exception**: Declarations (Art. 16(2)) → **Declaration** UK: “requests and annexed documents shall be addressed to it accompanied by translations into English”.
- Authentication → not required (Art. 17 CoE MLA Conv. 1959)
- Costs → Art. 20 CoE MLA Conv.1959

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MUTUAL LEGAL ASSISTANCE ON COUNCIL OF EUROPE BASIS (III)

- **General refusal grounds**
 - **Principle**: 1959 Mother Convention only provides for refusals because of:
 - Military offence (Art. 1(2));
 - Political offence or offence connected with political offence (Art. 2(1));
 - Fiscal offence (Art. 2 (1))
 - Prejudice of sovereignty, security and other essential interests of the country (Art. 2(2));
 - Ordre public (Art. 2(2)).

Only for letters rogatory for search or seizure of property, the Contracting Parties may – by declaration – make the execution dependent on: doubly criminality and/or extraditable offence and/or consistency with the law of the requested party.

Exception for fiscal offences: Art. 2 AP 1978: Fiscal offence exception **no** refusal ground

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MUTUAL LEGAL ASSISTANCE ON COUNCIL OF EUROPE BASIS (IV)

- **Additional refusal grounds** on the basis of the TCA 2020
 - Ne bis in idem (Art. LAW.MUTAS.119);
 - Proportionality tests
 - Requested authority can consult the requesting authority if it is of the view that MLA request a) is not necessary and proportionate for the purpose of the proceedings or b) could not have been ordered under the same conditions in a similar domestic case (Art. LAW.MUTAS.116(2)) → withdrawal of request
 - The requested authority can make recourse to a different type of investigative measure if:
 - The investigative measure as indicated in the request does not exist under the law of the requested State;
 - The investigative measure as indicated in the request would not be available in a similar domestic case (in the requested State);
 - The same result is achievable by less intrusive means. (Art. LAW.MUTAS.117(1) and (3))

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MUTUAL LEGAL ASSISTANCE ON COUNCIL OF EUROPE BASIS (V)

- **Specific requirements** for surveillance of telecommunications
 - Committee of Ministers Recommendation No. R (85) 10 (<https://rm.coe.int/09000016804e6b5e>):
 - Additional requirements for the contents of the request (supplement to Art. 14 CoE MLA Conv. 1959);
 - Refusal possible if
 - according to the law of the requested Party, the nature or gravity of the offence or the status of the person whose telecommunications are to be intercepted do not permit the use of this measure;
 - in view of the circumstances of the case, the interception would not be justified according to the law of the requested Party governing the interception of telecommunications in that state.
 - **Principle of “double legality”**
 - Execution may be made dependent on specific conditions.

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APPLICATION: EUROPEAN UNION



Conventional MLA Regime

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MUTUAL LEGAL ASSISTANCE ON EUROPEAN UNION BASIS



- **Case Study:** German prosecutor P requests surveillance of telecommunications from Danish authorities

→ **EU MLA Conv. 2000 and its 2001 Protocol do not replace but supplement the CoE scheme!! (Art. 1)**

- Form and contents of a request → *see below "specific requirements"*

- Type of the requesting authority

→ **"judicial authorities" as declared for CoE Conventions. NOTE: Special provision for interceptions of telecommunic.: Art. 17 EU MLA Conv. 2000: If declared, requests from authorities other than judicial authorities must be accepted (e.g. police constables)**

- Channels for transmission

→ **Principle:** direct transmission between territorially competent judicial authorities - involvement of central authorities not excluded – in urgent cases transmissions via Interpol, Europol or Eurojust possible (Art. 6 EU MLA Conv. 2000). → Declaration DK: The Danish Ministry of Justice can provide information which judicial authority has territorial competence to receive and process MLA requests
→ P has choice → Direct transmissions *de lege lata* possible.

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MUTUAL LEGAL ASSISTANCE ON EUROPEAN UNION BASIS (II)

- Time limits
- **Principle**: "execution as soon as possible", requesting State can indicate deadlines in the request which must be taken full account (Art. 4(2)) → principle of "speedy trial"
- Language regime → CoE system applies
- **Declaration** DK: "Requests and annexed documents from countries other than Austria, France, the Federal Republic of Germany, Ireland, Norway, Sweden or the United Kingdom must be accompanied by a translation into either Danish or one of the official languages of the Council of Europe. With regard to longer documents, the Danish Government reserves the right, in any specific case, to require a Danish translation or to have one made at the expense of the requesting State".
- Authentication → not required (Art. 17 CoE MLA Conv. 1959)
- Costs → Art. 20 CoE MLA Conv. 1959 + Art. 21 EU MLA Conv. 2000 (bearing of costs made by telecommunications operators)

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MUTUAL LEGAL ASSISTANCE ON EUROPEAN UNION BASIS (III)

General refusal grounds

- **Principle**: 1959 Mother Convention applies but partly modified by 2001 EU Protocol:
 - Military offence (Art. 1(2) CoE MLA Convention 1959);
 - Prejudice of sovereignty, security and other essential interests of the country (Art. 2(2) CoE MLA Convention 1959);
 - Ordre public (Art. 2(2) CoE MLA Convention 1959).

Exception for fiscal offences: Art. 8(1) Protocol 2001: Fiscal offence exception **no** refusal ground anymore

Exception for political offences: Art. 9 Protocol 2001: In **principle**, political offence no refusal ground.

But: States can deviate from this rule by declaring that they limit the political offence exception only to specific offences as defined in Art. 9(2). → Corresponding declaration was made by Denmark!

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MUTUAL LEGAL ASSISTANCE ON EUROPEAN UNION BASIS (IV)

Specific requirements for surveillance of telecommunications

→ Art. 18 EU MLA Conv. 2000:

- Additional requirements for the contents of the request (Art. 18(3) supplementing Art. 14 CoE MLA Conv. 1959)
- Two different types of surveillance: (1) real time transmissions; (2) submission of records
- Three different scenarios of surveillance depending where the subject is present.
 - If subject is in the requested State and his/her communication can be intercepted there, refusal possible under the condition that requested measure could not be taken in a **“similar national case”**
 - **Principle of “double legality”**
 - Execution may be made dependent on any conditions which would have to be observed in a similar national case.

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ADMISSIBILITY OF EVIDENCE



Conventional MLA Regime

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ADMISSIBILITY OF EVIDENCE (CONVENTIONAL MLA)

Conventions are generally silent as regards questions of admissibility of evidence

→ Explicit limitation: conditions (→ speciality rule)

→ Admissibility of evidence collected abroad depends on national legislation or national case law

→ In order to increase the chances of having admissible, reliable evidence collected, modern MLA provisions provide for the „forum regit actum principle“ as exception from the „locus regit actum principle“

“...the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State.”

Art. 4(1) EU MLA Conv. 2000;

Art. 8 CoE AP 2001

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THE EUROPEAN INVESTIGATION ORDER (EIO) AND ITS EFFECTIVENESS IN COLLECTING EVIDENCE LOCATED ABROAD

ERA-Seminar Procedural Rights in the Context of Evidence-Gathering, 15 April 2021



Co-funded by the Justice Programme of the European Union 2014-2020

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TRICKY SURVEILLANCE



- **Case Study:**
- German prosecutor P is investigating against X who is allegedly part of a gang that is specialised in deriving unwarranted Value Added Tax. X stays conspicuously often in France. German prosecutor P would like to intercept X's telephone during his travels, but needs the technical assistance of French authorities to do so.
- Which legal bases enable P to request the surveillance of telecommunications?
- Would evidence collected in France be admissible in Germany?

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APPLICATION: EUROPEAN UNION



Mutual Recognition Regime Based on EIO

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MUTUAL LEGAL ASSISTANCE ON EIO BASIS



- Form and contents of a request
→ prescribed in Art. 5 EIO Directive → **Annex A**.

- Type of the requesting authority



- Is the **German public prosecutor** (who is subordinated to individual instructions from the executive) an “issuing **judicial authority**” in the sense of Art. 1(1), 2(c) EIO Directive?

→ CJEU, C-584/19, *Staatsanwaltschaft Wien v A*, Judgment of 8 December 2020 = [eucrim 4/2020, 294](#)

Note: **Validation procedure** for EIOs from “other competent authorities” acting as investigating authorities



- Is the **German tax authority**, authorised by German law to exercise the rights and responsibilities of a public prosecutor's office in connection with tax offences, an **issuing judicial authority**?

→ AG, C-66/20, *XK v Steuerfahndung Münster*, Opinion of 11 March 2021 = [eucrim 25 March 2021](#)

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MUTUAL LEGAL ASSISTANCE ON EIO BASIS (II)

- Channels for transmission

Rule: direct transmission from issuing to executing authority. Central authorities as support possible. If problems in finding competent executing authority, EIJ contact points should be used (Art. 7 EIO Directive).

- Time limits

Rule: 30 days for decision on request (prolongation for another 30 days possible), 90 days for execution (after decision). Indicated shorter time limits or specific dates of execution must be taken in full account by executing authority (Art. 12 EIO Directive).

- Language regime

Each Member State notifies the language(s) it accepts (Art. 5(2) EIO Directive). → Notification France of 5 May 2017: only French!

- Authentication: “transmission means must capable of producing a written record under conditions allowing the executing State to establish authenticity.” (Art. 7(1) EIO Directive)
- Costs: Art. 21 and Art. 30(8) EIO Directive

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MUTUAL LEGAL ASSISTANCE ON EIO BASIS (III)

- **General refusal grounds**

→ **Rule:** Refusal only on the basis of the grounds listed in the EIO Directive – strict interpretation of refusal grounds (CJEU case law on European Arrest Warrant)

- Immunities and privileges / freedoms of press and media (Art. 11(1)(a))
- National security interests (Art. 11(1)(b))
- EIO was issued in proceedings against regulatory offence and measure is not available in similar domestic case in executing State (Art. 11(1)(c))
- (Transnational) ne bis in idem (Art. 11(1)(d))
- Extraterritoriality clause / double jurisdiction (Art. 11(1)(e))
- European ordre public / human rights clause (Art. 11(1)(f))
- Double criminality - except for the list of offences in Annex D (Art. 11(1)(g))
- Use of the investigative measure restricted to certain offences (Art. 11(1)(h))

The fiscal offence is no refusal ground anymore, Art. 11(3) = Art. 8(1) Protocol EU MLA Conv 2001

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MUTUAL LEGAL ASSISTANCE ON EIO BASIS (IV)

- **Additional general requirement:**
 - Proportionality tests (Art. 6 and 10 EIO Directive)
 - Executing authority can consult the issuing authority if it is of the view that the EIO a) is not necessary and proportionate for the purpose of the proceedings or b) could not have been ordered under the same conditions in a similar domestic case (Art. 6 (3)) → possible withdrawal of EIO
 - The executing authority can make recourse to a different type of investigative measure if:
 - The investigative measure as indicated in the request does not exist under the law of the executing State Art. 10(1)(a);
 - The investigative measure as indicated in the request would not be available in a similar domestic case (in the executing State) (Art. 10(1)(b)) ;
 - The same result is achievable by less intrusive means. (Art. 10 (3))
 - Exceptions for “**positive list**” of investigative measures (Art. 10(2) in connection with Art. 10(1) (a) and (b) + Art. 11(2)) → **principle of availability**

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MUTUAL LEGAL ASSISTANCE ON EIO BASIS (V)

Specific requirements for surveillance of telecommunications

→ Art. 30 EIO Directive:

- Additional requirements for the contents of the request (Art. 30(3), (4) + Section H7 of the form in Annex A);
- Two different types of surveillance: (1) real time transmissions; (2) submission of records
- In addition to refusal grounds of Art. 11, EIO can be refused if requested measure would not have been authorized in a “**similar national case**”
 - **Principle of “double legality”**
- Execution may be made dependent on any conditions which would have to be observed in a similar national case.

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8



ADMISSIBILITY OF EVIDENCE



Mutual Recognition Regime Based on EIO

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ADMISSIBILITY OF EVIDENCE (EIO)



→ Explicit limitations: conditions (→ speciality rule)

→ „Forum regit actum principle“ as exception from the „locus regit actum principle“ taken over from conventional MLA

“The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.”

Art. 9(2) EIO Directive

Admissibility of evidence question mentioned apodictically

→ Admissibility of evidence collected abroad depends on national legislation or national case law

“The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.”

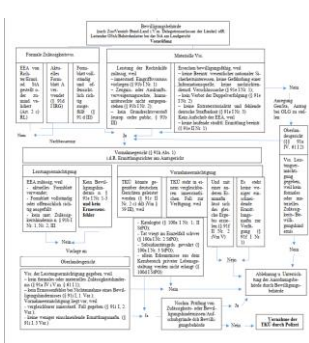
Art. 14(7) EIO Directive

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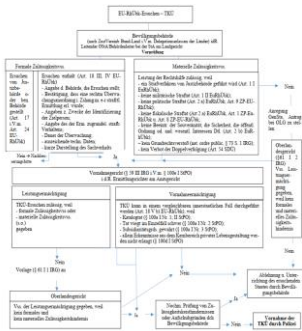
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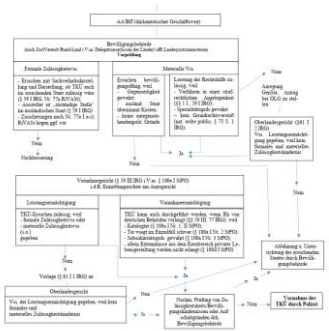
CONCLUSIONS



• GRAPH 1



• GRAPH 2



• GRAPH 3

THANK YOU FOR YOUR ATTENTION

Please address any questions to:

**Max Planck Institute for the Study of
Crime, Security and Law**

Thomas Wahl
Günterstalstr. 73, 79100 Freiburg

E-Mail: t.wahl@csf.mpg.de
Internet: <https://csf.mpg.de>



Electronic Evidence

Seminar at the European Academy of Law

15 April 2021



Co-funded by the Justice Programme
of the European Union 2014-2020

Klaus Hoffmann, Senior Prosecutor, Freiburg

1

Electronic Evidence



Procedural Rights
in the Context of
Evidence-Gathering

Klaus Hoffmann, Senior Prosecutor, Freiburg

2

3

Online investigations and the challenges of dealing with electronic evidence in criminal proceedings

- ▶ Principles of dealing with electronic evidence
- ▶ Common procedures for recognizing and handling evidence on digital devices in Germany
- ▶ International investigations (search and seizure – obtaining evidence from the Internet, admissibility)
- ▶ challenges and possible solutions

3

quick introduction

4

- ▶ different kinds of electronic evidence - examples

→ Think of digital devices in your daily life

incl. :

- many SIM cards in modern cars,
- smart home devices,
- smart phones,
- smart refrigerators,
- washing machine and other electronic / smart devices



4

Principles of dealing with electronic evidence 5

- no specific regulations in the (German) Criminal Procedure Code
- various (soft) regulations within different authorities (e.g. police, federal authorities like the German Federal Office for Information Security (BSI))
- best practices and efforts to certificate certain IT forensic software
- general principles of dealing with analogue evidence also apply to digital / electronic evidence

5

Principles of dealing with electronic evidence 6

key aspect:

- ▶ ensuring authenticity of digital data
- ▶ chain of custody
- proper and detailed documentation of access to data, its storage, copying and analysis
- analysis and further work with digital data is only done with a copy, not the original set of data
- proper documentation of the police staff that is involved and the IT forensic software that is being used

6

How is digital evidence handled in court??

7

limited categories of evidence

- witness testimony
- expert testimony
- documentary evidence
- evidence by inspection (e.g. photos, videos, tangible objects like a gun)

► Digital evidence has to be presented in one of those categories.

7

How is digital evidence handled in court??

8

- case examples (WhatsApp messages, child porn files, telecommunication data)
- extra note on IT expert witnesses
- analysis of Bitcoin evidence - extra group of Landeskriminalamt (state police) to collect and analyse bitcoin evidence across many cases

8

Procedural rights (1)

9

- ▶ challenging the gathering of evidence
- ▶ Challenging authenticity of e-evidence
- ▶ motion to call extra (expert) witness
- ▶ cross-examination
- ▶ motion not to admit certain evidence

9

International investigations

10

▶ **Increased relevance of electronic evidence in criminal investigations**

- increased volume of cross-border requests submitted by EU authorities to OSPs in 2019 with a large majority of them issued by Germany (37.7% of requests), France (17.9%) and the UK (16.4%)
- requests to access electronic data doubled in Poland and nearly tripled in Finland. Furthermore, emergency disclosure requests increased by nearly half in one year.

10

International investigations (search and seizure – obtaining evidence from the Internet, admissibility)

11

- ▶ case: Online webshop for selling drugs
- European Investigation Order to seize data in The Netherlands
- here: especially bank data or records of orders of the webshop
- first step: seizure of data according to national law
- second step: transfer – how? digital - by which means or analogue: print out?

11

International investigations / admissibility

12

- case law by the German Federal Court: based on the idea of mutual trust – evidence obtained by means of MLA / EIO is in general admissible
- if requirements under German procedural law are fulfilled
- and international cooperation according to law on mutual cooperation has been applied
- how about direct access to online data? →

12

Proposed EU order

13

European production and preservation order (EPO)

- relates to specific telecommunication data and social media files
- doesn't address the regular access to electronic evidence in other countries
- example: access to digital data seized from a webserver in France or Spain
- controversy discussion at the European Parliament; see e.g.: [*review of Stanislaw Tosza in Eucrim 4/2018*](#)

13

another example: access to Facebook data

14

- *access to an open account*
 - *access to a closed account of a suspect*
 - ❖ *invitation to any other user (e.g. "Micky Mouse")?*
 - ❖ *restricted access – undercover agent needed?*
 - *suspect/ witness opens his account to be used by police*
- *for more details see: Eucrim 3/2012 (p. 137 et seq.)*

14

Challenges and solutions

15

► challenges in retrieving relevant data from abroad

- length of relevant procedures in place
- language barrier
- different legal procedures and competences
- very limited time that data is stored
- different standards on cooperation by private companies
- encrypted communication
- sophisticated means of communication

15

Challenges and solutions

16

► Training, knowledge exchange and a centralised approach

- technical training of judges / lawyers
- hiring more and better trained staff at the police (and in judiciary)
- technical equipment in court
- special point of contacts with private companies
- GPEN – network of the IAP
- SIRIUS – exchange platform of Europol

16

Challenges and solutions

17

► issues at domestic level

- similar issues as before
- technical equipment in court
- technical training of judicial staff
- massive volume of data
- new legal tools to deal with encryption?
- despite specific rules on electronic evidence – its presentation and admission is mostly not a problem

17

Procedural rights (2)

18

- limited challenges to cross-border gathering
- motion not to admit certain (internationally gathered) evidence
- in theory possible: motion to gather additional / exculpatory evidence across borders

18



Questions / Comments?

19

- For any comments or questions, please feel free to contact me:

Klaus Hoffmann
Staatsanwaltschaft Freiburg
Berliner Allee 1, D-79104 Freiburg
email: klaus.hoffmann@stafreiburg.justiz.bwl.de

Discussion

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What to expect from the proposed European Production and Preservation Orders?

Frank Verbruggen



Co-funded by the Justice Programme of the European Union 2014-2020

1

Not so much?

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- NEW POST -

HOW
EXPECTATIONS
CAN **RUIN** YOUR
RELATIONSHIP?



mentalandbodycare.com

2

Frank VERBRUGGEN

KATHOLIEKE UNIVERSITEIT
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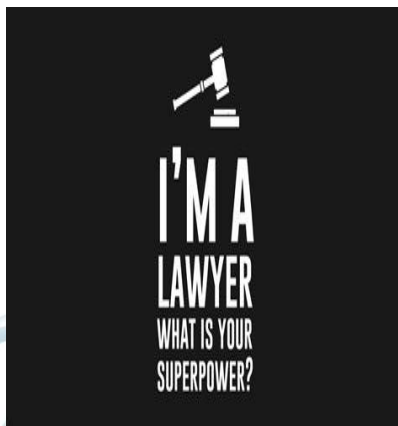


- Professor (European) Criminal Law
- University of Leuven, Flanders, Belgium
- Institute of Criminal Law
 - (Past) Belgian Cybercrime-Centre
 - => Lux & Dutch Presidency jurisdiction and coop cyberspace
 - Panel Commission e-evidence
 - Project ULiège: LEA cooperation with Private IT-industry
 - Discussion CEPS
 - Promotor criminal law and procedure PhD research on e-searches, e-seizures, e-evidence cooperation with Africa, hacking by law enforcement, (DP as a tool for Fair Algorithmic Policing)

3

Attorney + concerned about individual rights and privacy

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teepublic.com



• pinterest.com

4

Mechelen, Belgium



fr.tripadvisor.be

5

Children of the renaissance



<https://www.hofvanbusleyden.be>

- 15th and 16th Century
- Burgundy, Habsburgs
- **Uniting Europe by marriage**
- Painting = late medieval dating app

6

Erasmus: uniting Europe by marriage

erasmus



Since 1987

Erasmus+ opens up your mind



97 % say they get along better with people from other cultures

EUROPEAN VOLUNTARY SERVICE



93 % say they appreciate the value of other cultures more

HIGHER EDUCATION



80 % say they improved their intercultural awareness

ADULT EDUCATION



33 % of Erasmus+ alumni have a life partner with a different nationality

HIGHER EDUCATION

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euroskop.cz

7

Adult dates in the 21st Century



It's a Match!

You and Allison have liked each other.



Send a Message

Keep Swiping

All Matches



Sarah

"Hey, how are you?"



Allison

Matched on 8/26/13



Allyssa

"Do you want to meet up..."



Alexa

"Yeah, Sounds good."



Sarah

"I love that!"



Rachel

"Nice!"

8

4

EPO debate



capovelo.com

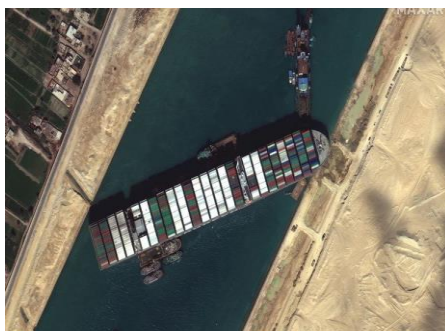
- European (Data) Preservation Order
- European (Data) Production Order
- Not EPPO

9

Discussion

- Controversial Proposal Commission and Council
- At the moment 'Stuck?' in European Parliament
- Relevance/ importance somewhat diminished in view of even more controversial issue: the uncertainty following the illegality of Data retention

- Bored?
- <https://t.co/Cmm5Z2OmNgpic.twitter.com/ZevoBSFaEg>



Source: news.sky.com

10

Previous speakers: Electronic evidence

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- Used to be niche for specialized investigators, especially related to cybercrime
- But that was before the whole of society and daily life were digitized
- Crime scenes: digitalized (photo, film, 3D,...)
- Extra boost during the pandemic



11

After the lockdown: finally back to the bars and terraces!!

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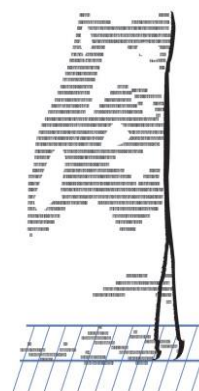
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[dailymail.co.uk](https://www.dailymail.co.uk)

12

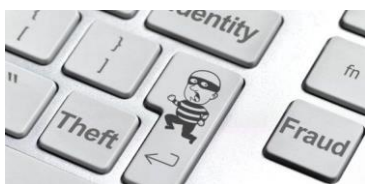
Everywhere, every day

- Growing societal importance social media, webmail, messaging services and apps to communicate, work, socialize and obtain information.
- New technological developments also used to commit cybercrimes or 'ordinary' crimes e.g. WhatsApp group of terrorists, students in date rape case, online bullying, racism,...
- + evidence everyday crimes: parking or bus ticket & location as alibi, fitbit murder victim (location, time)
- = Need to recover traces: digitization Law Enforcement
- Commission 2016: **more than half of all criminal investigations** today include a cross-border request to access electronic evidence such as texts, e-mails or messaging apps



13

How to get hold of such data for criminal investigations?



- Cfr previous speakers
- **Taking** it yourself (openly or covertly)
 - Sky ECC
- Getting it through the access which **target** of investigation has **or related individuals**
- Getting it from private persons or corporations with privileged access to the data (SPs):
 - **Request (voluntary cooperation)**
 - **Order**

14

Metadata: data about data

- What?
- When?
- By whom?
- To whom?
- How?
- Where?



15

= important digital traces



- LEA interested in
- **WHO** talks to/ has contact with/ knows **WHOM**?
- How **OFTEN** do they communicate?
- **WHERE** are they **WHEN**?
- **SEPARATE (!?!):** what do they say about what (**CONTENT** of communication)



descriptionebooks.com

16

// your jealous partner
// (big and small) data corporations



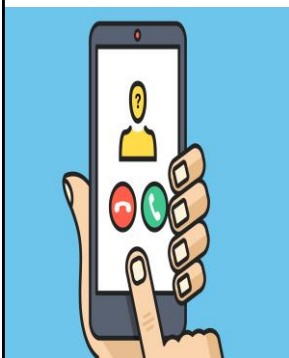
visihow.com



scoopwhoop.com

17

Subscriber data



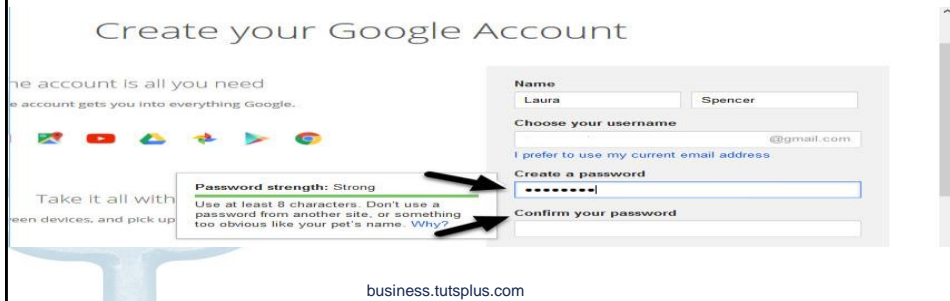
www.lifewire.com

- Any data pertaining to:
- (a) **identity** subscriber or customer such as provided name, date of birth, postal or geographic address, billing and payment data, telephone, or email;
- (b) **type of service** and its duration including technical data and data identifying related technical measures or interfaces used by or provided to subscriber or customer, and data related to validation of use of service,
- **excluding passwords or other authentication means used in lieu of a password that are provided by a user, or created at the request of a user**

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Access data

- Related to commencement and termination of user access session to a service, which is strictly **necessary for sole purpose of identifying** user of service,
 - such as date and time of use, or log-in to and log-off from service, together with IP address allocated by internet access service provider to user of a service, data identifying interface used and user ID
 - includes electronic communications metadata



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Transactional data



- Related to provision service offered by service provider
- to provide context or additional information about such service and is generated or processed by an information system of SP,
 - such as source and destination of a message or another type of interaction,
 - data on location of the device, date, time, duration, size, route, format, protocol used and type of compression,
 - unless such data constitutes access data
 - includes electronic communications metadata

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Content data



emotioncard.com.br

- Any stored data in a digital format such as **text, voice, videos, images, and sound** other than subscriber, access or transactional data;

21

Everywhere every day: European Commission

- E-evidence in any form relevant in around **85%** of total (criminal) investigations
- In almost **two thirds** (65%) investigations where e-evidence relevant, request to service providers **across borders** (based in another jurisdiction) needed
- => **55%** total investigations include request to **cross-border access to e-evidence**
- Requests **non-content** data > requests content within EU and beyond.
- Non-content data from electronic **communications** most commonly requested.
- The **transparency reports ISPs**: idea **number** requests
- Number of requests to the above service providers has **increased by 70%** in 2013-2016

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SP or data storage outside jurisdiction

In other EU MS's or even in third countries (especially the USA)

→ Gathering electronic evidence = often cross-jurisdictional activity

→ How do MSs deal with this now?



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Current framework

- European Investigation Order (EIO)
- Bilateral and multi-lateral mutual legal assistance (MLA) instruments
- Budapest Convention on Cybercrime CoE
- National regimes of Member States and third countries.
- Three ways to obtain cross-border e-evidence
 - 1) formal cooperation between relevant authorities of two countries (MLA/EIO) or police-to-police cooperation;
 - 2) direct access to (device containing the) data (under national law)
 - 3) (voluntary or mandatory) cooperation between law enforcement authorities of one country and foreign service providers



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Why problematic?



- MLA (even if use EIO) too **burdensome** and (!! too **slow** for type of evidence concerned
- **Voluntary** cooperation SP with LEA (from other state), allowed by US law:
 - LEA **depend** on their choice to cooperate or not
 - **Different** Policies by Different SPs
 - **EU SPs not allowed** to ? (conflicting obligations SP)
 - Legal **uncertainty**: SPs and people prosecuted
- **Confidentiality**/ Warning Users: depends on policy SP
- For US SPs: voluntary cooperation not possible for **content** (*probable cause* needed)

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Requests fulfilled? (around 50%)

Table 3: percentage of requests to service providers that are fulfilled (survey data)

		Within the EU		With non-EU countries	
		Judicial	Direct	Judicial	Direct
Non-content data	Subscriber data	75%	55%	45%	45%
	Metadata	60%	45%	35%	35%
Content data		55%	N/A ²²	30%	N/A ²³

Source: Impact assessment Commission p.16

26

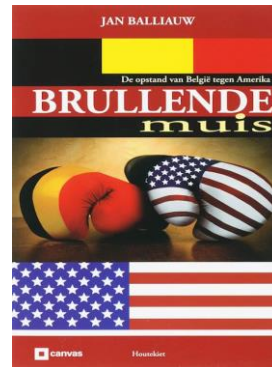
Brave Little Belgium of Roaring Mouse (revisited)?

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17 Brave Little Belgium | Heerkring Karel Van de Poele,

Lichtervelde |



Bol.com

27

Belgium small country with long arms:

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movieworld.ws

Belgian investigation into online orders paid with stolen credit cards.

Belgian prosecutor ordered Yahoo to release identification details behind couple of email addresses

Relied on art. 46bis Belgian CCrim Proced which allows to **demand such domestic order execution within Belgium**

Yahoo Inc., however, is **established in USA** + no physical presence in Belgium => Yahoo disputed competence of Belgian authorities and refused to cooperate without US order (Be MLA with US)

Belgian courts: Yahoo = economically present in Belgium => 'judicially present' in Belgium

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Belgium small country with long arms: Yahoo-case

- Yahoo, as provider of webmail services territorially present in Belgium => **voluntary subjects itself** to Belgian law enforcement cooperation laws
- Why? actively participates in Belgian economic life (using domain name 'www.yahoo.be', local language, showing advertisements based on location users, accessibility in Belgium for users with complaints and problems (e.g. helpdesk))
- **Criminal conviction** failure to abide by Belgian domestic order
- Principle **codified** in subsequent Belgian CodeCrProc
- Similar case against **Skype** (Luxemburg): Criminal conviction for failure **obligation to help interception without MLA**
- Quid if conflict with local law SP?
- // Microsoft-case on whether US LEA could order production in US of data stored in Ireland



29

Since 2015 high on agenda

- *Consultations, questionnaires, research projects, conferences, workshops*
- *Also parallel CoE Cybercrime negotiations*



studyabroad.careers360.com

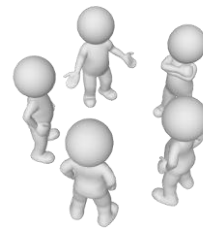
30

Consultation

From July 2016 until June 2017

Meetings with MS's, stakeholders, experts

Questionnaire amongst MS's 2017:
divergence visions & practices MS



31

Results June 2017 (non-paper Commission services)

- **Practical measures** to improve cross-border access to e-evidence (e.g. electronic user-friendly version EIO-form, platforms for exchange digital evidence)
- But also **legislative measures** suggested:
 - **Direct access** → possibility common conditions and minimum safeguards in potential **cross-border** situations at EU level + mitigating measures (e.g. notifications to possibly affected countries)
 - EU legal framework for investigative measures addressed to SP enabling authorities to request ("production request") or **compel** ("production order") **SP in another MS to disclose** information about a user
 - EU level bilateral agreements with **key partner countries** (USA!)

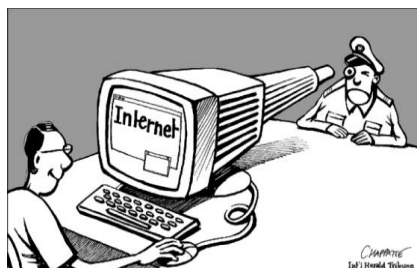
32

Results June 2017 (non-paper from the Commission services)

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- New legislation should also take protection of individuals' rights into consideration
- especially in criminal proceedings
- + fundamental rights of data protection and privacy.

Privacy?

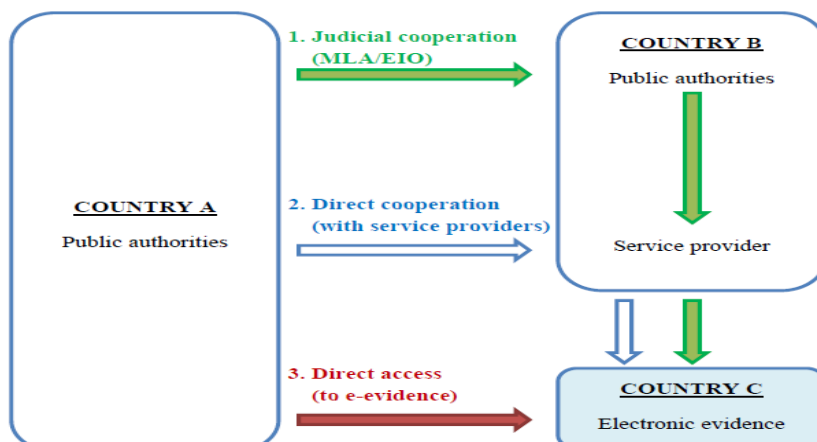


33

Debates: which shortcuts possible?

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Figure 1: the main parties and the three channels for cross-border access to e-evidence



Source: Impact assessment Commission p.10

34

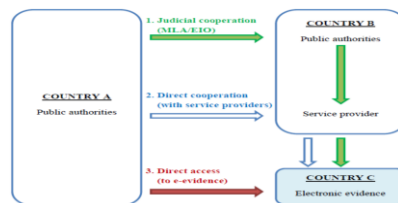
No proposal yet : direct LEA cross-border access

- Still too sensitive – but happening every day!!
- Negotiations 2nd add.protocol to Cybercrime Convention CoE
 - **Commission** received mandate to negotiate on **behalf EU**

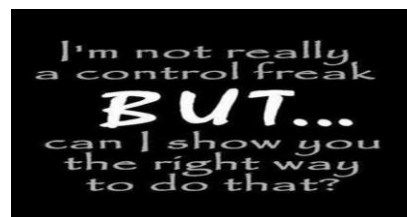
NB: Leuven proposal localization searches (Digital present => Law enforcement jurisdiction state where individual is, Digital past, digital home => state of residence has jurisdiction)

- Using phone: call from Morocco to friend in Belgium
- Past communications, photos stored,...: protected by Belgian law (Morocco needs MLA from Belgium which decides conditions for and rules on searches)

Figure 1: the main parties and the three channels for cross-border access to e-evidence



Source: Impact assessment Commission p.10



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Proposal Directive 2018: if offering digital services in EU

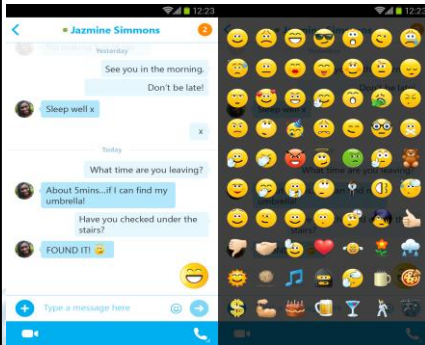


Source: Impact assessment Commission p.55

- SP should have **legal representative in EU for compliance** with e-evidence orders under EU-law => US based corporation without establishment in EU must have representative in EU
- EU treated as single market: it is enough to be in 1 MS, no need to have 27 representations confronted with 27 production orders
- Problem: Denmark
- Ireland opted in

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Software or e-communication service?



- // taxi-construction or taxi-service?
- // Uber and AirBnB > software?
- Belgian law very broad: Skype-case
- Proposal too
- SME's up to it? Outsource it?

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Service provider

- (a) electronic **communications** services
- (b) information society services for which **storage of data is defining component of service provided** to the user, including social networks, online marketplaces facilitating transactions between their users, and other hosting service providers
- (c) **internet domain name and IP numbering** services such as IP address providers, domain name registries, domain name registrars and related privacy and proxy services

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Offering services in EU =?

- enabling legal or natural persons in one or more EU MS(s) to use services
- and
- having a **substantial connection** to those MS(s):
 - **establishment** in one or more MS, or
 - **significant number of users** in MS, or
 - **targeting of activities towards** MS, determined on all relevant circumstances: use of a **language** or a **currency** generally used in MS, availability of an app in the relevant **national app store**, providing **local advertising** or advertising in language used in MS, from making **use of any information originating from persons in MS** in course activities, or from handling of **customer relations** such as by providing customer service in language generally used in MS

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2018 Proposal Regulation on E.Production + E.Preservation Order



clientinsight.ca

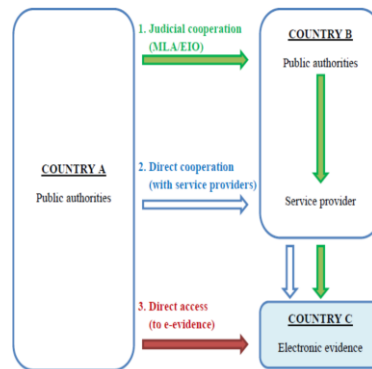
- **(for –some- E-evidence)**
- **Regulation:** directly applicable in all (but 2) MS
- standardized (preservation &) production orders + certificate issued by **national authority 1 MS directly to ISP in any EU MS**

40

Cut out LEA other MS as go-between: EU-wide Production Order directly to SPs

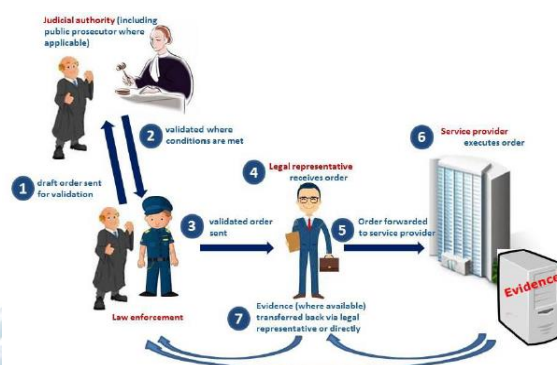
- **Massive amount** of data and requests
 - Will only increase with Internet of Things
- MLA-procedure too burdensome and slow
- EIO too burdensome and slow
- **Contribution and Control possibilities authorities requested MS limited: waste time, money and energy (not much added value)**

Figure 1: the main parties and the three channels for cross-border access to e-evidence



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Proposal Regulation on Eur. Production Order



Source: Impact assessment Commission p.56

- Only for **data pertaining to services offered in the EU**

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Safeguards

- Approved by judicial authority
- Transactional and content data EPO limited to serious crimes
- Individuals will be notified that their data was requested
- Individuals will be notified of their rights
- Criminal law procedural rights apply



keepcalm-o-matic.co.uk

43

Approved by judicial authority

- EPO subscriber and access data may be issued by:
- (a) **judge, court, investigating judge or prosecutor** competent in case concerned
- or
- (b) any other competent authority acting as an investigating authority in criminal proceedings with competence to order gathering evidence. Such EPO shall be **validated**, by judge, court, investigating judge or a prosecutor in issuing State
- (Authority may be regarded as issuing authority for purposes of transmission)



nieuwsblad.be

44

Thresholds

- EPO shall be necessary and proportionate for purpose proceedings and **only if a similar measure available** for same criminal offence in comparable **domestic** situation issuing State
- EPO for **subscriber** or **access** data: for **all** criminal **offences**
- EPO for **transactional** or **content** data: **only**
 - (a) for criminal offences punishable in the issuing State by a custodial sentence of a maximum of **at least 3 years, or**
 - (b) if they are wholly or partly **committed** by **means of an information system**, for :
 - fraud and counterfeiting of non-cash means of payment
 - sexual abuse and sexual exploitation of children and child pornography
 - attacks against information systems
 - (c) **terrorism**

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Corporate data



reference.com

- Data sought is stored or processed as part of **infrastructure provided by SP to a company** or another entity other than natural persons,
- EPO **only** be addressed to **service provider** where investigatory measures addressed to company or the entity are not appropriate, in particular because they might **jeopardize investigation**

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Privileged data (transactional or content)

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FACULTY OF LAW
INSTITUTE FOR
LEGAL STUDIES



peopleculture.com.au

- Issuing authority reasons to believe data requested is protected by **immunities** and **privileges** law MS SP
- Or disclosure may impact fundamental interests of that MS such as **national security** and defence
- => seek **clarification before** issuing, consulting competent authorities MS concerned (directly, via Eurojust or EJN)
- If protected, no EPO

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Speed (<-> EIO)

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LEGAL STUDIES

- SP transmits data directly to issuing authority or LEA indicated in EPOC **at the latest within 10 days** upon receipt of the EPOC, **unless** issuing authority indicates **reasons for earlier** disclosure ,
- **Emergency** cases: imminent threat to life or physical integrity person or to critical infrastructure: **6 hours** max
- Cannot comply because **incomplete**: contact without delay (issuing must react within 5 days)
- **Force majeure** or de facto impossibility: inform without delay + reasons (standard form)



capovelo.com



ei.co.uk

48

Can/must ISP refuse to execute?

- No: same rules for everyone
- **Except** limited number situations
- **Manifestly violates the Charter FREU or manifestly abusive** (f.i. clearly disproportionate or singling out people based on sexual preference without reason,...)
- Send Form to competent **enforcement authority in MS addressee**. => may seek clarifications from issuing authority (directly, via Eurojust or EJV)
 - ? Removed by Council (because of criticism 'privatization' law enforcement and 'privatization fundamental rights protection'?)
 - I hope European Parliament brings it back
- **Preserve** data requested, not produced immediately, unless cannot identify data requested => seek clarification
- Preservation until data produced, on clarified EPO or through other channels, MLA. (issuing informs if no longer necessary) preservation is no longer necessary, the issuing authority shall inform addressee

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Rule for ISPs when EPO conflicts with laws other state

- Applicable **laws third country prohibiting disclosure** data concerned
- **Reasoned objection**
- If Issuing MS intends to uphold EPO, it shall request a **review** by its **Courts**
- Execution EPO suspended pending procedure



archive.iam.uic.edu

50

Court decides on conflict of laws, factors:

- (a) **interest** protected law **third** country, + third country's interest in preventing disclosure
- (b) degree **connection criminal case to either of 2 jurisdictions**, indicated inter alia by:
 - location, nationality and residence of person whose data is being sought and/or victim(s),
 - place where offence committed;
- (c) degree **connection SP-third country**; data storage location by itself does not suffice for substantial degree of connection;
- (d) **interests** investigating **MS in obtaining** evidence concerned, based on seriousness offence and importance of obtaining evidence in expeditious manner;
- (e) possible **consequences** for addressee or **SP of complying** with EPO, including sanctions that may be incurred.



pixcove.com

51

Confidentiality and user information



gifimage.net

- Addressees takes necessary measures to ensure confidentiality EPO + data produced or preserved
- + where **requested** by issuing authority, **refrain from informing person** whose data is sought not to obstruct criminal proceedings
- => **Issuing authority shall inform person** whose data is being sought **without undue delay** about data production: may delay as long as necessary and proportionate to avoid obstructing relevant criminal proceedings + include information about any available remedies

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Procedure for enforcement

- Not complied within deadline without providing reasons: EPO to authorities
MS SP: recognizes it within 5 days + enforces it unless ground refusal (with deadlines)
- Addressee **only oppose** if:
 - (a) not issued or validated right authority;
 - (b) not an offence provided for by art. 5(4);
 - (c) could not comply, de facto impossibility, force majeure, manifest errors in EPOC;
 - (d) does not concern data stored by or on behalf SP at time receipt EPOC;
 - (e) service is not covered by Regulation;
 - (f) based on sole information contained in EPOC, apparent that manifestly violates Charter FR or manifestly abusive



thethings.com

53

Reimbursement costs

- SP may claim reimbursement of their costs, **if provided by law issuing** State for domestic orders in similar situations



youtube.com

54

Sanctions

- MS shall lay down rules on **pecuniary sanctions** applicable to infringements of the obligations
- Effective, proportionate and dissuasive



45cat.com

55

Effective remedies data subjects



nieuws.vtm.be



marketingdonut.co.uk

- Remedies available under LEA data processing Directive and GDPR +
- **Suspects** and accused persons whose data obtained via EPO right to effective remedies against EPO during criminal proceedings for which order was issued
- Person whose data obtained **not suspect or accused** person effective remedy before court issuing MS in accordance with its national law and possibility to **challenge legality of the measure, including its necessity and proportionality**

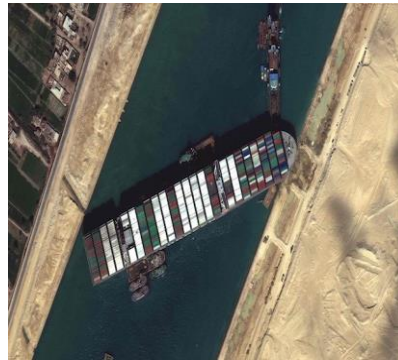
56

Objections in European Parliament

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multimedia.europarl.europa.eu



pmnewsnigeria.com

57

Criticism against Proposal

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- **Privatization** Law Enforcement, cutting out MS?
 - *Judicial authority issues/ ultimately decides*
 - *Legal certainty: orders*
 - *Already domestic => EU as **Area** FSJ, intra-EU ≠ foreign*
- Burden **small SP?**
- No **legal base treaty** because not based on mutual recognition? MR would require explicit recognition by judicial authority other MS (cut out)?
 - *Superior form of MR: recognition by law (// internal market, // documents issued by other MS) of standards/ decisions authorities*
 - *Legal service Commission agrees*



marketingdonut.co.uk

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Criticism against Proposal

- **EIO** sufficient, not given enough time?
 - already clear not practical for every data request (massive)?
 - added value of intervention 'mailservice states'?
- Dropping **double criminality**?
 - excessive control, burden, mini-trial at execution stage, law of that MS relevant: most = **communication between users in issuing MS**
- Some **MS** cannot be trusted?
 - Data requests not the worst area?
 - Judicial authorities issue EPO

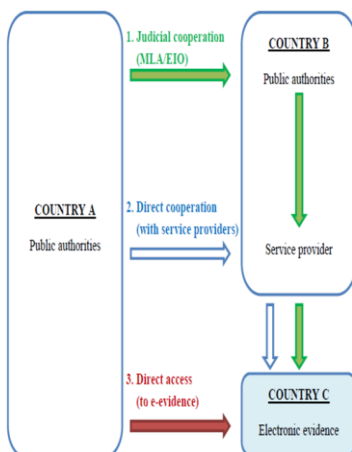


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Who should be notified? Who would get veto powers?

Figure 1: the main parties and the three channels for cross-border access to e-evidence



- Data subjects themselves => when? (+ how?)
- State ISP
- this conference call wState (all???) data subjects?
- Example: suppose data concerning could be requested
- 'Buried with information'
- <-> effect HR protection?
- => Spam??

60

Data held by SPs 3rd state or stored in 3rd state

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gardenprofessors.com

- Only partially solved by Directive
- US Cloud Act 2018
 - Allows for direct access US LEA to US based SP
 - **Option bilateral deal** with partner states for direct cross-border orders to SP's
 - Special status US citizens or residents: still MLA
- Commission Request to Council for Mandate to **Negotiate EU-wide deal with US**: bottom lines for deal already stated
- Rest o/t world? 2nd add. Protocol to CCConv or similar deals direct access

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Data Retention

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Eur. **Preservation** Order necessary to make sure the data will still be there when Eur. Production Order

Data loss

No compulsory retention

(Should)

I know what you did last summer

(?)



62

Metadata: data about data

- What?
- When?
- By whom?
- To whom?
- How?
- Where?
- Problem is not present and future, **problem = past**



63

CJEU: EU DR Directive violated Charter FR EU (disproportionate)



fortune.com



- CJEU Digital Rights Ireland (**Directive** annulled): blow
 - => national DR laws amended
 - Still DR but stricter rules access and use
- CJEU Tele2 and Watson (**MS national DR laws** violate EU law): final blow?
 - Stated that DR obligation is possible, but conditioned it to criteria that are impossible?

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Solution?



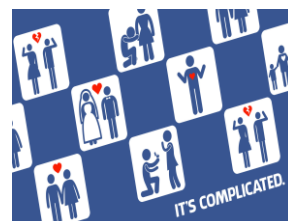
Foto: hindlinks4u.to

- 2018: Questions to CJEU (a.o.)
 - **Criteria** suggested in Tele2 Sweden **impossible** to apply for Belgian lawmakers?
 - **ECHR obligation** to give certain HR (punishment violation sexual integrity children) precedence over others (privacy internet users): Belgium caught between rock & hard place?
- Hope: CJEU brings extra nuance (blanket DR possible, if strict access conditions and control mechanisms, limited period) to adjust human rights protection EU and ECtHR
- ECtHR is less opposed to DR

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CJEU Does (Not?) Move

- CJEU joint cases Quadrature du Net a.o.
- 6 October 2020
 - Blanket DR remains illegal
 - Very limited DR possible and **ONLY** for very serious crime and Terrorism
 - No time-limitations, no 'regularisation' past illegality by national court
 - But consequence illegality for criminal procedure is matter of MS national law
 - No obligation to exclude the illegal evidence and its fruits, other ways to render HR protection effective: weighing evidence and sentencing
 - Except: compulsory exclusion if impossible for defence to verify reliability/ source
 - Identification and IP data less sensitive, if not communication and location
 - (= subscriber + access data)?



eastlakechurch.com

66

CJEU Prokuratuur 2 March 2021

Access to retained data

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LEUVEN

- Access, for purposes in criminal field, to a **set of traffic or location data in respect of electronic communications, allowing precise conclusions to be drawn concerning a person's private life**, is permitted **only** in order to combat **serious crime** or prevent serious threats to public security
 - E-evidence: judge procedure in which use is made best placed to evaluate (fragments together in mosaic)
- Access competent national **authorities subject to a prior review carried out either by a court or by an independent administrative body, and that the decision of that court or body be made following a reasoned request** by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime. In cases of duly justified urgency, the review must take place within a short time



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CJEU Prokuratuur 2 March 2021

Access to retained data

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- EPO issued or validated by judge, court, **investigating judge (??) or prosecutor (??)** competent in case concerned BECAUSE Not independent enough?
- Requirement independence authority prior review must
 - have all powers and provide all guarantees necessary to reconcile various interests and rights at issue
 - **be third party in relation to authority which requests access to the data, to be able to carry out review objectively and impartially and free from any external influence.** In particular, in criminal field => authority prior review must **not be involved in conduct of criminal investigation in question + has a neutral stance vis-à-vis the parties to the criminal proceedings.**



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EPO + EPO



dedennnen.be



- Since no/ more difficult DR
- Need first shot (Preservation) asap
- Second shot (Production) later after more burdensome procedure
- Boomer-law?

69

Victory for HR and Privacy?

Many practical questions impact case law CJEU on e-evidence in general and day to day LEA investigative practice
More procedures and (unnecessary) bureaucracy?

Confusion about data regimes for different types of data: access data/ transactional data, location data (not always easy to separate in practice)?

More covert LEA data gathering?

Quid voluntary cooperation?

Quid unilateral applications national law?

Quid impact data cooperation with rest of the world?



<https://www.hofvanbusleyden.be>



droid-life.com

70



ERA - Procedural Rights in the Context of Evidence-Gathering

15 April 2021

**Cristian Nicolau –Head of Unit, e-Justice, DG Justice,
European Commission**

just-e-evidence@ec.europa.eu



Co-funded by the Justice Programme of the European Union 2014-2020

1



e-Evidence Digital Exchange System

eEDES User



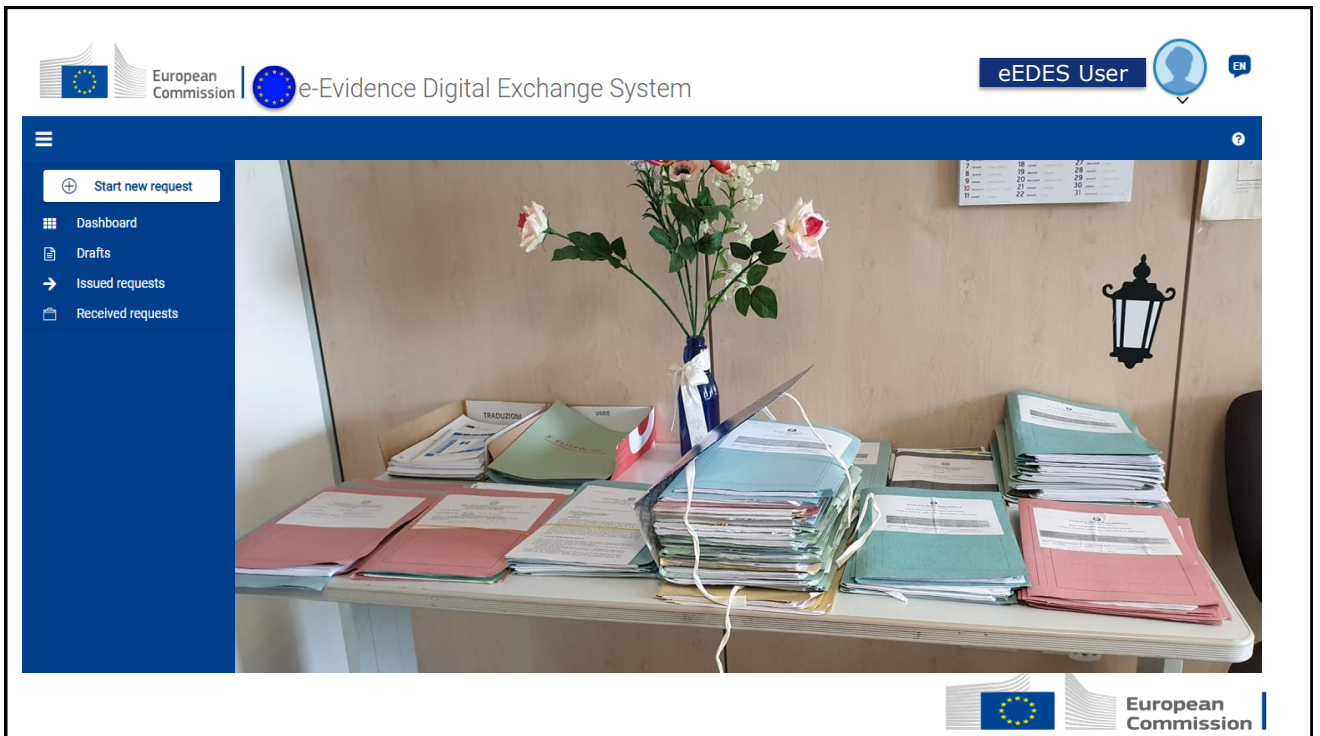
- [Council Conclusion June 9, 2016;](#)
- EIO instruments (Directive 2014/41/EU);
- MLA instruments;
- Secure online portal for electronic requests and responses in judicial cooperation including transfer of e-Evidence.
- Extend to other legal instruments, ISP's and third Countries (future evolutions)



2



3



4



European
Commission



e-Evidence Digital Exchange System

eEDES User



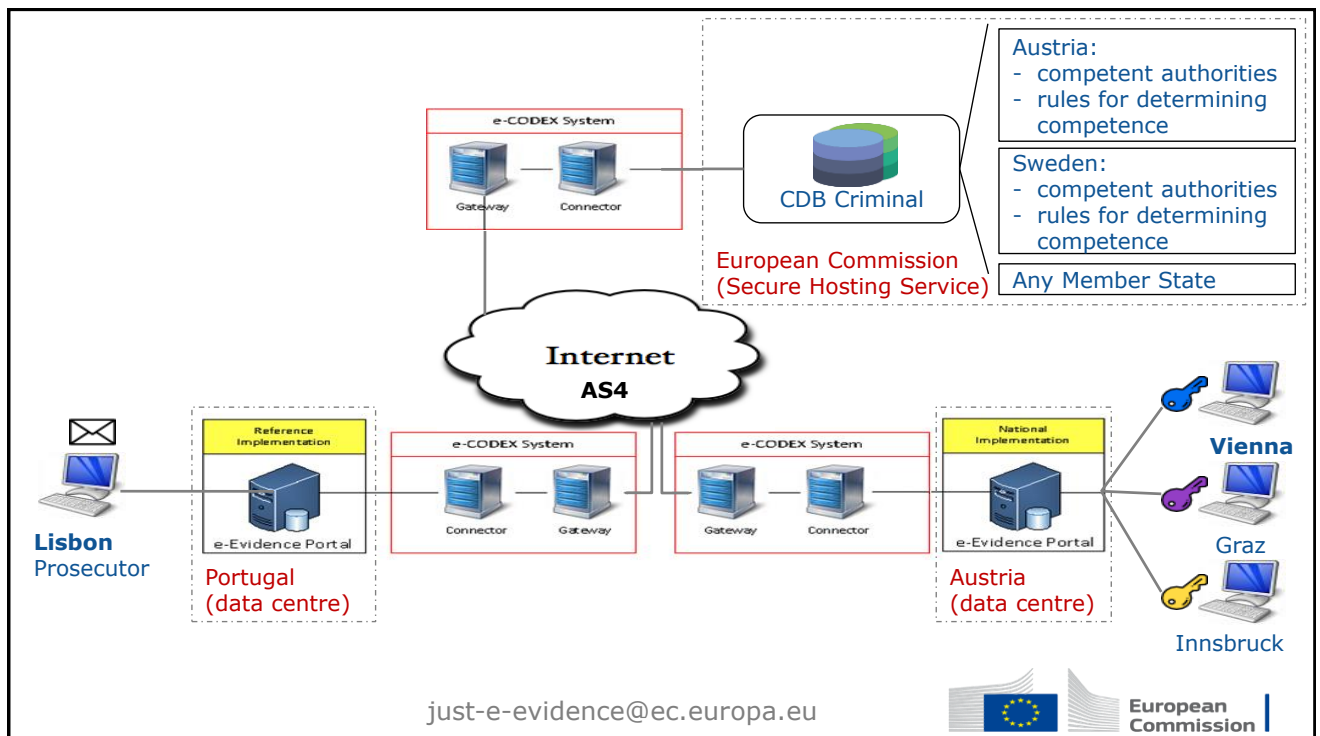
EN

How Does it work?



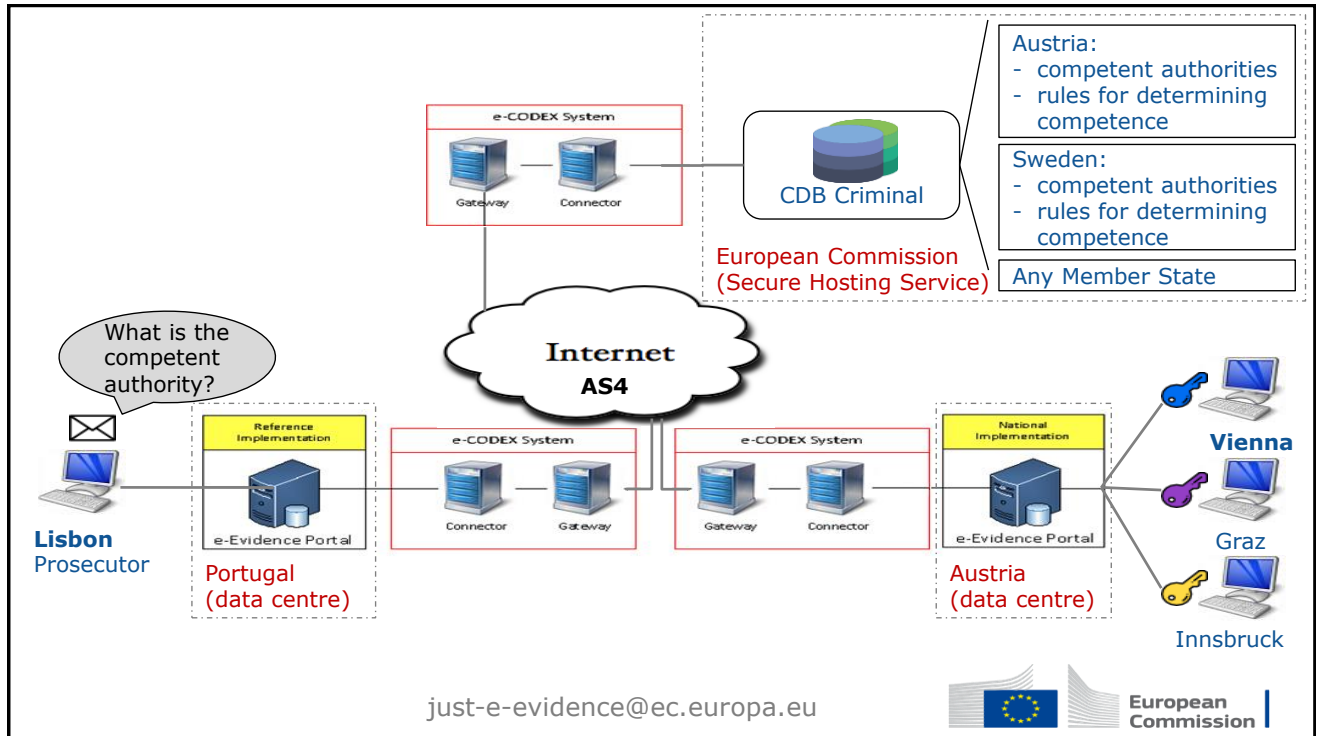
European
Commission

5

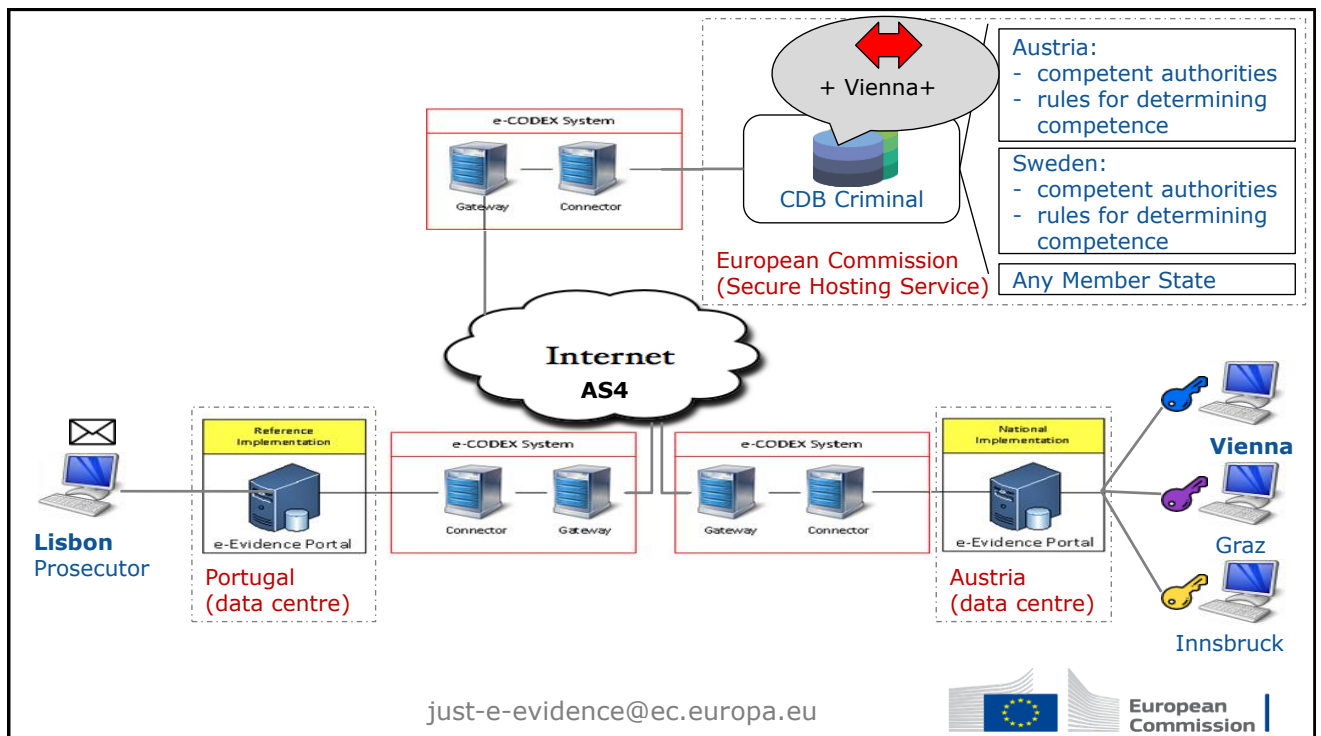


European
Commission

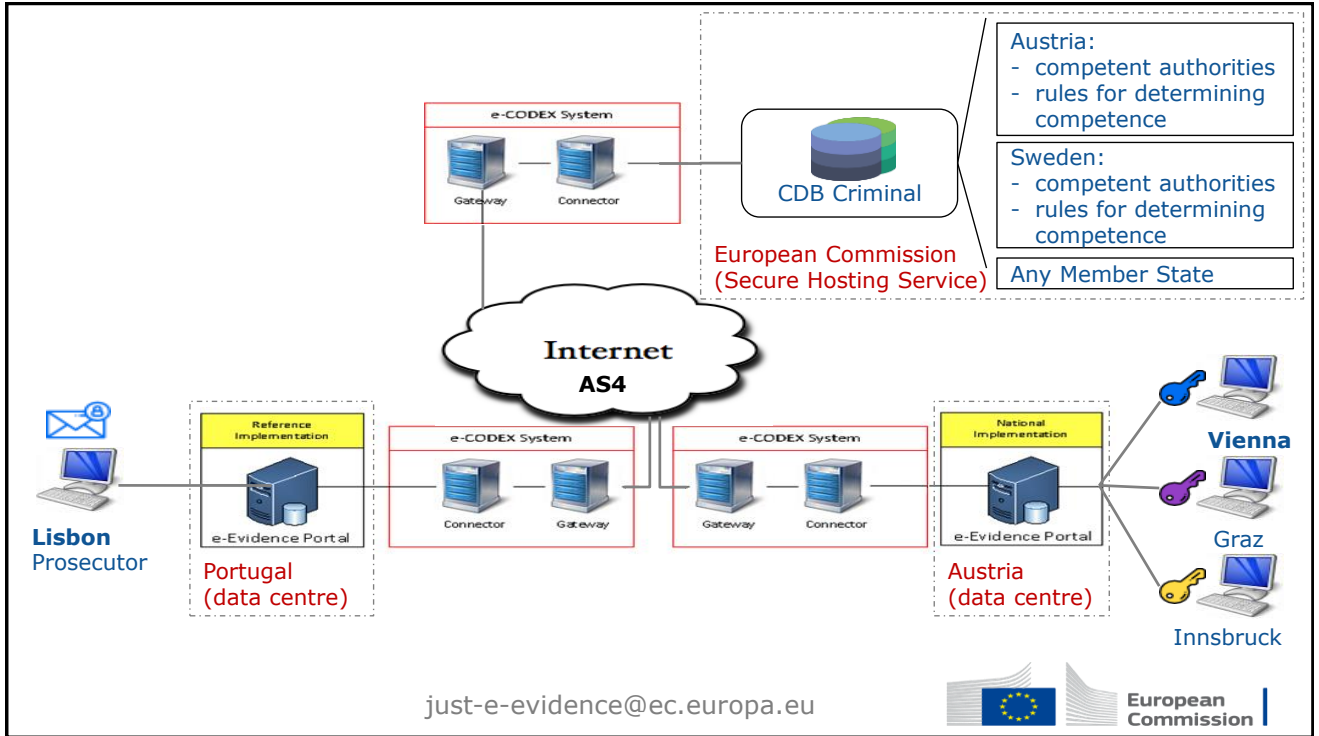
6



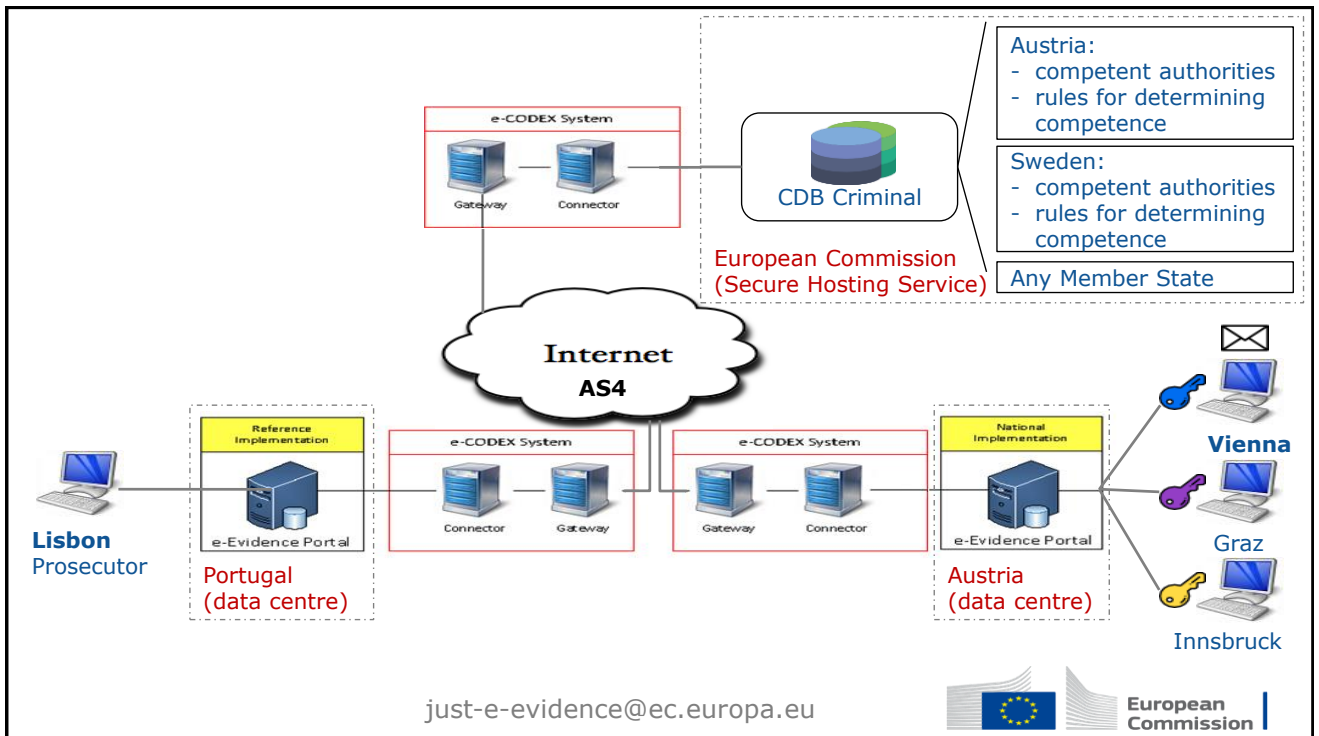
7



8



9



10

What it looks like on your PC:

just-e-evidence@ec.europa.eu



11

e-Evidence

pl.demo.eev.fsc.atos-services.net

European Commission | e-Evidence Digital Exchange System

Filip Wszystkowy

Field translation

Start new request

Dashboard

Issued requests

Received requests

Drafts

My Dashboard

Last edited cases

Issued requests	Received requests	Drafts
3	2	7

Date	Case ID	Case Name	Country	Type	Status
12/06/2020	MLA-PL-HU-2020-06-12-0001-1	Tom MLA 12.06.2020	HU	MLA	Issued
12/06/2020	ITN-PL-HU-2020-06-12-0001-1	Tom ITN 12.06.2020	HU	ITN	Issued
07/06/2020	EIO-PL-CZ-2020-06-07-0001-1	Fusce venenatis sagittis fermentum	CZ	EIO	Issued

My tasks

- EIO 07/06/2020 00:33 Complete
- EIO 08/06/2020 15:05 Complete
- EIO 08/06/2020 15:40 Complete
- ITN 09/06/2020 13:48 Sign
- MLA 15/06/2020 15:36 Complete
- ITN 15/06/2020 15:50 Complete

DGJUST-e-Evidence-ServiceDesk@atos.net

e-Evidence 1.3.0

eUI 7.16.2

12

European Commission

e-Evidence Digital Exchange System

Start new request

Dashboard

Issued requests

Received requests

Drafts

DGJUST-e-Evidence-ServiceDesk@atos.net

e-Evidence 1.3.0

eUI 7.16.2

My Dashboard

Last edited cases

Issued requests 3

Received requests 2

Drafts 8

07/06/2020	EIO-PL-CZ-2020-06-07-0001-1	Fusce venenatis sagittis fermentum	CZ	EIO
12/06/2020	MLA-PL-HU-2020-06-12-0001-1	Tom MLA 12.06.2020	HU	MLA
12/06/2020	ITN-PL-HU-2020-06-12-0001-1	Tom ITN 12.06.2020	HU	ITN

Notifications

Mark all as read

Close

11:03 15/06/2020	KI 15.06-01 A new request has been received	✕
09:13 15/06/2020	deadline screens A new request has been received	✕
19:12 12/06/2020	Tom MLA 12.06.2020 A new request has been received	✕
19:12 12/06/2020	Tom MLA 12.06.2020 A new request has been received	✕
19:11 12/06/2020	Tom MLA 12.06.2020 Unable to send a message. Please try resending it.	✕
18:47 12/06/2020	Tom ITN 12.06.2020 A new request has been received	✕
15:39 08/06/2020	Fusce venenatis sagittis fermentum A new request has been received	✕
15:38 08/06/2020	Fusce venenatis sagittis fermentum A new request has been received	✕
15:07 08/06/2020	Fusce venenatis sagittis fermentum A new request has been received	✕

Settings

Clear notifications

13

European Commission

e-Evidence Digital Exchange System

Start new request

Dashboard

Issued requests

Received requests

Drafts

DGJUST-e-Evidence-ServiceDesk@atos.net

e-Evidence 1.3.0

eUI 7.16.2

My tasks

EIO 07/06/2020 00:33	Complete
EIO 08/06/2020 15:05	Complete
EIO 08/06/2020 15:40	Complete
ITN 09/06/2020 13:48	Sign
MLA 15/06/2020 15:36	Complete
ITN 15/06/2020 15:50	Complete

Prepare request

Start a new request

Type of Request*

EIO European Investigation Order Request

MLA Mutual Legal Assistance Request

EAW European Arrest Warrant

ITN Interception of Telecommunication Notification

System Case Number is auto-generated when the request is sent.

Date of Request is auto-generated when the request is sent.

Continue

14

e-Evidence

pl.demo.eev.fsc.atos-services.net/drafts/case/2a906b69-73e2-4746-a8a4-c40170de315b/eio/annex_a

European Commission

e-Evidence Digital Exchange System

Filip Wszyszkowy

Start new request

Dashboard

Issued requests

Received requests

Drafts

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COMPUTER FORENSICS IN LEGAL PROCEEDINGS

Save Cancel

EIO

Copy Case Delete Case Comment Workflow

Overview Annex A Event & Message Timeline

Get PDF / Print Attach Document Validation check Form Translation

Request Data

SECTION A

SECTION B Urgency

SECTION C Investigative measure(s) to be carried out

Request Data

EUROPEAN INVESTIGATION ORDER (EIO)

This EIO has been issued by a competent authority. The issuing authority certifies that the issuing of this EIO is necessary and proportionate for the purpose of the proceedings specified within it taking into account rights of the suspected or accused person and that the investigative measures requested could have been ordered under the same conditions in a similar domestic case. I requested that the investigative measure or measured

Reset Section

Auto save

Save

DGJUST-eEvidence-ServiceDesk@atos.net
e-Evidence 1.3.0
eUI 7.16.2

15

e-Evidence

pl.demo.eev.fsc.atos-services.net/drafts/case/2a906b69-73e2-4746-a8a4-c40170de315b/eio/annex_a

European Commission

e-Evidence Digital Exchange System

Filip Wszyszkowy

Start new request

Dashboard

Issued requests

Received requests

Drafts

EIO

Copy Case Delete Case Comment Workflow

Overview Annex A Event & Message Timeline

Get PDF / Print Attach Document Validation check Form Translation

Request Data

SECTION A

SECTION B Urgency

SECTION C Investigative measure(s) to be carried out

SECTION D Related to an earlier EIO

SECTION E Identity of the person concerned

SECTION F Type of proceedings for which the EIO is issued

SECTION B | Urgency

Please indicate if there is any urgency due to

☐ Evidence being concealed or destroyed
 ☐ Imminent trial date
 ☐ Any other reason

Please specify below: Time limits for execution of the EIO are laid down in Directive 2014/41/EU. However, if a shorter or specific time limit is necessary, please provide the date and explain the reason for this:

Date:

Time (with Time Zone):

Reset Section

Auto save

Save

16

1718

The screenshot shows the e-Evidence web application interface. The browser address bar displays the URL: `pl.demo.eev.fsc.atos-services.net/received/case/c0fa48d8-aaf6-4519-b0f7-76e15572a214/eio/annex_a`. The interface includes a sidebar with navigation options: "Start new request", "Dashboard", "Issued requests", "Received requests", and "Drafts". The main content area is titled "deadline screens" and shows details for a specific EIO (EIO-CZ-PL-2020-06-15-0001-1). The "Request Data" section is expanded, showing "SECTION A" through "SECTION D". A dropdown menu is open, displaying actions such as "Acknowledge receipt", "Reject EIO", "Return EIO", "Create outcome", "Notification", "Request for additional Inf...", "Send other information", "Forward", and "Close a case". The bottom of the interface shows "Auto save" and "Save" buttons.

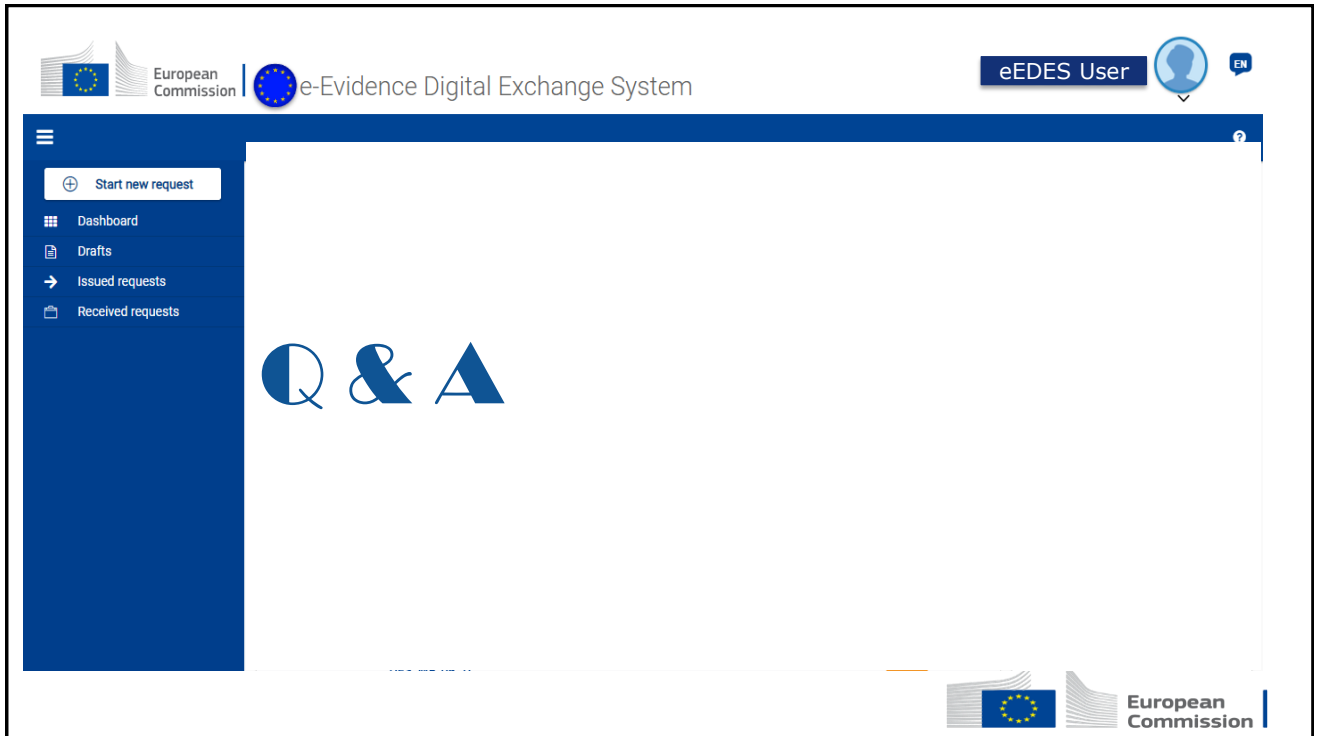
19

The screenshot shows a slide from the e-Evidence Digital Exchange System. The header includes the European Commission logo and the text "e-Evidence Digital Exchange System". The user is identified as "eEDES User". The slide features a "Timeline" section with the following bullet points:

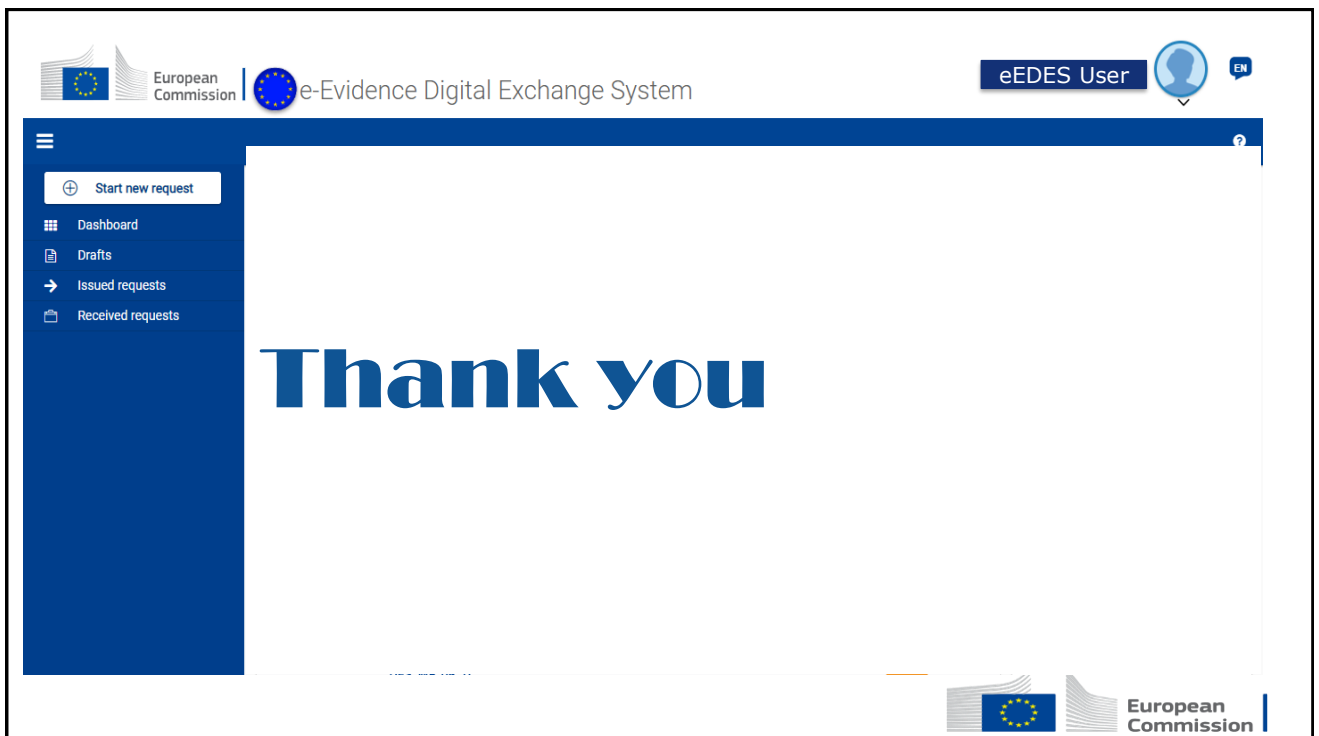
- Released 23 October 2020
- Deployment and testing activities to start with Member States
- GO Live mid-2021

The slide also includes a sidebar with navigation options: "Start new request", "Dashboard", "Drafts", "Issued requests", and "Received requests". The European Commission logo is visible in the bottom right corner.

20




21



22





Co-funded by the Justice Programme of the European Union 2014-2020

The admissibility of (electronic) evidence in the EU


ERA
*Procedural Rights in
the Context of
Evidence-Gathering*
15 April 2021

GIULIA LASAGNI
Junior Assistant Professor in Criminal Procedure
University of Bologna



1

SUMMARY




01. DIGITAL EVIDENCE

03. CONSEQUENCES

02. (THE LACK OF) EU
ADMISSIBILITY RULES

04. WHICH WAY FORWARD?



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2



01.

DIGITAL EVIDENCE


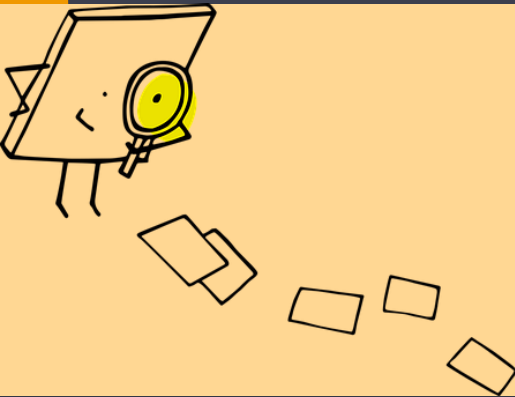


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DIGITAL EVIDENCE

- What is digital evidence?
- Does the «medium» become more relevant than the content?



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5

(THE LACK OF) EU ADMISSIBILITY RULES

- In general
- With specific regard to evidence also at the national level in many instances



➤ *Lack of legal basis is only part of the problem*

Art.
82(2)(a)
TFEU

➤ *“The EU legislator should accept its responsibility”...*



6

(THE LACK OF) EU ADMISSIBILITY RULES/2

Focus on Digital Evidence

... does it make sense to look for specific admissibility rules for digital evidence?



Compared to all other types of evidence/compared to other forensic evidence

A very (very) common piece of evidence...

Data fundamentalism

➤ *Relevance of training*



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(THE LACK OF) EU ADMISSIBILITY RULES/3

Digital Forensics Standards



- ISO IEC technical standards (2012 - 2015)
- Guidelines on Digital Forensic Procedures for OLAF Staff
https://ec.europa.eu/antifraud/sites/antifraud/files/guidelines_en.pdf

Repeatability - Chain of Custody
Completeness vs privacy



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8



03.

CONSEQUENCES



9

CONSEQUENCES

Defence rights

Which violations Which remedies?

Unsuccessful investigation

Miscarriages of Justice?

Difficult transnational cooperation




10



04.

WHICH WAY FORWARD?



11







WHICH WAY FORWARD?

Admissibility linked with compliance with technical standards?


Or at least to the chain of custody...?

Corroboration duties

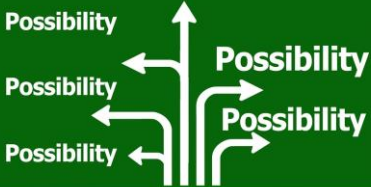
12

WHICH WAY FORWARD?/2



Solutions to involve the defendant since the beginning....

Possibilities



- Letrado de la Administración de Justicia
- Possibility to access to First Responders' expertise
- Incidente probatorio
- Participated procedure pre-agreed in writing
- Video-recording?
- ...

...what in case of violation?

- *Exclusionary rules...*
- *Court's discretion*

13



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Thank you for your
attention!

giulia.lasagni6@unibo.it



DEVICES
Digital forensic EVIDence: towards Common European Standards in antifraud administrative and criminal investigations

<https://site.unibo.it/devices/en>

14

Rights ahead: Access to a lawyer and legal aid in criminal proceedings throughout the EU: where are we?



16 April 2021



Gwen Jansen and Vânia Costa Ramos

gwen@jansenadvocatuur.nl / vaniacostaramos@carlospintodeabreu.com



With the support of the Justice Programme 2014-2020 of the
European Union



1

Case 1 – part 1 access to a lawyer:

The prosecutor in Portugal starts an investigation for creditcard fraud. One of the suspects, Jan, is a Dutch citizen, living in Amsterdam. The Portuguese authorities issued an EIO to the Netherlands and asks the police to hear Jan as a suspect. Jan receives an invitation to be questioned by the Dutch police. This is the first time he gets aware of the investigation.

Jan contacts a Dutch lawyer - Gwen - to represent him during the police questioning. Gwen contacts a Portuguese lawyer, Vania, to get more information about the case and the Portuguese procedures.

Some time after the statement in the Netherlands, Jan is invited to attend an Oslo confrontation in Portugal. Jan flies over to attend.

During that stay in Portugal, the holiday house of Jan in Portugal, is searched by the police.

2

EU – LEGISLATION

► Directive 2013/48/EU

of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

► REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

► Directive (EU) 2016/1919:

of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

► Implementation report due: 25-05-2022

3

Directive 2013/48/EU – access to a lawyer

Article 2 - Scope

1. This Directive applies to suspects or accused persons in criminal proceedings **from the time when they are made aware by the competent authorities** of a Member State, **by official notification or otherwise**, that they are suspected or accused of having committed a criminal offence, and **irrespective of whether they are deprived of liberty**. [...]

4

Implementation report:

3.2.1. Scope of application – Article 2(1) and (2)

In respect of Article 2(1) of the Directive, most Member States do not specifically address the moment at which a suspect or accused person is 'made aware' of the suspicion or accusation [...]

In four Member States, rights under the Directive are made dependent on a formal act. This formal act is often also the condition for acquiring the status of suspect or accused. In a small number of Member States, the legislation lacks clarity on persons who are not deprived of liberty.

5

Directive 2013/48/EU – access to a lawyer

Article 3 - The right of access to a lawyer in criminal proceedings

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

- (a) before they are questioned by the police or by another law enforcement or judicial authority;
- (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph
- (c) without undue delay after deprivation of liberty;

6

Directive 2013/48/EU – access to a lawyer

3. The right of access to a lawyer shall entail the following:

- (a) Member States shall ensure that suspects or accused persons have the **right to meet in private** and communicate with the lawyer representing them, **including prior to questioning** by the police or by another law enforcement or judicial authority;
- (b) Member States shall ensure that suspects or accused persons have the right for their **lawyer to be present** and **participate effectively** when questioned. [...]
- (c) Member States shall ensure that suspects or accused persons shall have, **as a minimum**, the right for their lawyer to attend the following investigative or evidence-gathering acts where (1) **those acts are provided for under national law** and (2) **if the suspect or accused person is required or permitted to attend the act concerned**:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.

7

Directive 2013/48/EU – access to a lawyer

- ▶ **Identity parades:** at which the suspect or accused person figures among other persons in order to be identified by a victim or witness.
- ▶ **Confrontations:** where a suspect or accused person is brought together with one or more witnesses or victims where there is disagreement between them on important facts or issues;
- ▶ **Reconstructions:** of the scene of a crime in the **presence of the suspect or accused** person, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person (par. 26).

Member States may make **practical arrangements concerning the presence of a lawyer** during investigative or evidence-gathering acts. Such practical arrangements **should not prejudice the effective exercise and essence of the rights concerned**.

8

Implementation report:

3.3.1.2. Right of access to a lawyer when an investigative or other evidence-gathering act is carried out in accordance with Article 3(3)(c) – Article 3(2)(b)

For a small number of Member States the reasons which led to partial transposition of Article 2(1) of the Directive also affected the transposition of Article 3(2)(b) of the Directive.

- ▶ The rights under the Directive are made dependent on a formal act.
- ▶ The legislation lacks clarity on persons who are not deprived of liberty.

9

Implementation report:

3.3.2.3. Presence of the lawyer during investigative or evidence-gathering acts – Article 3(3)(c)

Whenever such an evidence-gathering act does not exist under national law, the Directive does not require the respective Member State to create it. At the same time, the three acts are set out as a minimum list, and Member States may provide for further evidence-gathering acts, during which the lawyer has the right to attend.

In a few Member States, **no right of access to a lawyer is granted as regards relevant investigative acts, even though these investigative acts actually exist in those countries' national law or practice.** In the legislation of a couple of other Member States, some evidence-gathering acts are not provided for, which means that non- transposition in this respect has no effect on completeness.

10

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

(9) A similar right to the presence of a lawyer should be granted every time that national law expressly **allows or demands the presence of the suspected or accused person** at a procedural step or evidence gathering such as a **search**; in these cases, in fact, the presence of the lawyer can strengthen the rights of the defence without affecting the need to preserve the confidentiality of certain investigative acts, since the presence of the person excludes the confidential nature of the acts in question; **this right should be without prejudice to the need to secure evidence which by its very nature is liable to be altered, removed or destroyed if the competent authority was to wait until the arrival of a lawyer**;

(10) To be effective, access to a lawyer should entail the possibility for the lawyer to carry out all the wide range of activities which pertain to legal counselling, as the European Court of Human Rights has held. This should include [...] the search for exculpatory evidence [...].

11

Case 1 – part 2 legal aid:

The prosecutor in Portugal starts an investigation for creditcard fraud. One of the suspects, Jan, is a Dutch citizen, living in Amsterdam. The Portuguese authorities issued an EIO to the Netherlands and asks the police to hear Jan as a suspect. Jan receives an invitation to be questioned by the Dutch police. This is the first time he gets aware of the investigation.

Jan contacts a Dutch lawyer - Gwen - to represent him during the police questioning. Gwen contacts a Portuguese lawyer, Vania, to get more information about the case and the Portuguese procedures.

Some time after the statement in the Netherlands, Jan is invited to attend an Oslo confrontation in Portugal. Jan flies over to attend.

During that stay in Portugal, the holiday house of Jan in Portugal, is searched by the police.

12

Directive (EU) 2016/1919 – legal aid:

Article 2 - Scope

1. This Directive applies to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU **and** who are:

- (a) deprived of liberty;
- (b) required to be assisted by a lawyer in accordance with Union or national law; or
- (c) required or permitted to attend an investigative or evidence-gathering act, **including as a minimum** the following:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.

13

Directive (EU) 2016/1919 – legal aid:

Article 4 - Legal aid in criminal proceedings

1. Member States shall ensure that suspects and accused persons **who lack sufficient resources** to pay for the assistance of a lawyer have the right to legal aid **when the interests of justice so require**.

4. Where a Member State **applies a merits test**, it shall take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:

- (a) where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
- (b) during detention.

5. Member States shall ensure that legal aid is granted **without undue delay**, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering acts referred to in point (c) of Article 2(1) are carried out.

14

Directive (EU) 2016/1919 – legal aid:

The following situations **do not constitute a deprivation of liberty** within the meaning of this Directive (par. 15):

- i) identifying the suspect or accused person;
- ii) determining whether an investigation should be started;
- iii) verifying the possession of weapons or other similar safety issues;
- iv) **carrying out investigative or evidence-gathering acts other than those specifically referred to in this Directive, such as**
 - i) **body checks,**
 - ii) **physical examinations,**
 - iii) **blood, alcohol or similar tests,**
 - iv) **or the taking of photographs or fingerprints;**
- v) bringing the suspect or accused person to appear before a competent authority, in accordance with national law.

This Directive lays down minimum rules. **Member States should be able to grant legal aid in situations which are not covered by this Directive, for example when investigative or evidence-gathering acts other than those specifically referred to in this Directive are carried out (par 16).**

15

Case 2 **the interrogation / derogations:**

The investigation in Portugal did not result in a criminal case in Portugal.

However the Dutch authorities started another investigation in the Netherlands based on some information they got from Portugal. Jan is arrested at 7 AM. On his request, Gwen is appointed (at 8 AM) as his (legal aid) lawyer and Jan wishes to be represented by her during the police interrogations.

Due to other obligations Gwen is only able to attend the interrogations from 1PM.

After the police interrogations, the investigating judge decides to put Jan in PTD.

Gwen thinks it is necessary to do more research in Lisbon. She asked for a search in the company where Jan works.

16

Directive 2013/48/EU – access to a lawyer

Article 3 - The right of access to a lawyer in criminal proceedings

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate [after deprivation of liberty] where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of [the right to private communication, effective defence during questioning and attendance of the evidence gathering] to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

- (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

17

Directive 2013/48/EU – access to a lawyer

Article 8 - General conditions for applying temporary derogations

1. Any temporary derogation under Article 3(5) or (6) shall

- (a) be proportionate and not go beyond what is necessary;
- (b) be strictly limited in time;
- (c) not be based exclusively on the type or the seriousness of the alleged offence; and
- (d) not prejudice the overall fairness of the proceedings.

2. Temporary derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by- case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. [...]

18

Implementation report:

3.3.4.1. Temporary derogations based on geographical remoteness – Article 3(5)

In three Member States, the legislation allows for the questioning of the person, which is not in conformity with the Directive.

Certain other elements also raise concerns.

- 1) Firstly, the possibility to derogate might **not be restricted to the pre-trial stage** as provided for by the Directive;
- 2) Secondly, the **exceptional and temporary nature of derogations might be doubtful**;
- 3) Thirdly, some of the relevant laws allow **persons who are not lawyers** under national law to assist the suspect or accused person.

19

Implementation report:

3.3.4.2. Temporary derogations based on risks for persons or investigation needs – Article 3(6)

Some national legislation might not clearly state that all the derogations should be applied **only in exceptional circumstances** and to **the extent justified in the light of the particular circumstances of the case**.

Another concern is that the possibility to derogate **may go beyond the pre-trial stage** of the proceedings. In the rules of a couple of Member States, the criteria of **'urgency'** and/or **'serious adverse consequences'** are doubtful.

Such rules allowing for derogations refer, for example, to general risks of **'impairing the evidence'**, **'making the investigation more difficult'** or **'hampering the interest and success of the investigation'**.

20

Implementation report:

3.3.4.2. Temporary derogations based on risks for persons or investigation needs — Article 3(6)

This creates a risk that suspects and accused persons might be left in limbo, with no guarantee that questioning or evidence gathering would take place in the absence of a lawyer only, if the person has waived that right.

We find references in national legislation to, for example, an 'unreasonable extension of the detention period', to cases of 'force majeure', to it being 'unsafe' to delay investigative acts, to the presence of a lawyer during questioning 'which may have already begun', and to rather vague conditions such as 'justified grounds'.

Laws in different Member States state that the absence of the lawyer during investigation **does not impede the performance of procedural acts if there is proof that the lawyer was informed about the date and hour of that act**. Other examples include provisions that a lawyer might not be able to be present during investigative acts where the **'act cannot be postponed'** and **'notification thereof cannot be provided'**.

Lastly, some Member States have **fixed time limits for the lawyer to appear**, with the legislation in those countries enabling questioning or evidence gathering to take place without the lawyer or without the presence of a clear waiver. In a few legislations, such time limits are as short as **2 hours**, or even 1 hour in the case of one Member State. This leaves substantial leeway to proceed with questioning or evidence gathering in the absence of a lawyer or of a clear waiver, thus resulting in a broad derogation not set out by the Directive. This affects conformity.

21

Implementation report:

3.8. General conditions for applying temporary derogations (Article 8)

In most of the Member States who provide for such derogations and who transposed Article 8(2) of the Directive, the decision on derogations may be taken by an **authority that is not a judicial authority**.

Conformity issues arise in several Member States, where often only part of the provisions allowing for derogations set out the required guarantees. This is mainly due to the absence of clear rules on the recording of decisions, but also to the **absence of rules providing for a judicial review if decisions are taken by bodies that are not judicial authorities** and, to a lesser extent, to a **lack of provisions on the reasoned nature of the decision**.

22

CASE OF SOYTEMİZ v. TURKEY

(Application no. [57837/09](#)) 27 November 2018

44. Therefore, the right to be assisted by a lawyer requires not only that the lawyer is **permitted to be present**, but also that he is **allowed to actively assist** the suspect during, inter alia, the questioning by the police and to **intervene to ensure respect for the suspect's rights** (see *Brusco v. France*, no. [1466/07](#), § 54 in fine, 14 October 2010; *Aras v. Turkey* (no. 2), no. [15065/07](#), §§ 39-42, 18 November 2014; and *A.T.v. Luxembourg*, no. [30460/13](#), § 87, 9 April 2015) as a person charged with a criminal offence should be able to obtain **the whole range of services** specifically associated with legal assistance, not only in the course of trial but also during the pre-trial stage given its particular importance for the preparation of the criminal proceedings (see *Dvorski v. Croatia* [GC], no. [25703/11](#), § 78, ECHR 2015).(...)

45. Moreover, the right to be assisted by a lawyer applies **throughout and until the end of the questioning** by the police, **including when the statements taken are read out and the suspect is asked to confirm and sign them**, as assistance of a lawyer is equally important at this moment of the questioning. The lawyer's presence and active assistance during questioning by police is an important procedural safeguard aimed at, among other things, preventing the collection of evidence through methods of coercion or oppression in defiance of the will of the suspect and protecting the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police."

46. The Court also recalls that **the police are, in principle, under an obligation to refrain from or adjourn questioning in the event that a suspect has invoked the right to be assisted by a lawyer during the interrogation until a lawyer is present and is able to assist the suspect**. The same considerations also hold true in case the lawyer **has to - or is requested to - leave before the end of the questioning of the police and before the reading out and the signing of the statements taken** (see *Pishchalnikov v. Russia*, no. [7025/04](#), §§ 74 and 79, 24 September 2009, and *Kulik v. Ukraine* [Committee], no. [34515/04](#), §§ 186-87, 2 February 2017).

23

Directive 2013/48/EU – access to a lawyer

Article 9 - Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Art 3:

- (a) the suspect or accused person **has been provided**, orally or in writing, with **clear and sufficient information** in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
- (b) the waiver is given **voluntarily and unequivocally**.

2. The **waiver**, which can be made in writing or orally, **shall be noted**, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.

3. Member States shall ensure that suspects or accused persons **may revoke a waiver** subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.

24

Directive 2013/48/EU – access to a lawyer

Article 12 - Remedies

2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

25

Directive 2013/48/EU – access to a lawyer

Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer, or in cases where a derogation from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (par. 50).

26

CASE OF BEUZE v. BELGIUM

(Application no. 71409/10), 9 November 2018

137. The principle that, as a rule, any suspect has a right of access to a lawyer from the time of his or her first police interview was set out in the *Salduz* judgment (cited above, § 55) as follows:

“... in order for the right to a fair trial to remain sufficiently ‘practical and effective’ ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”

144. In *Ibrahim and Others* the Court also confirmed that the absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole (see *Ibrahim and Others*, cited above, § 262).

145. Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. [...] The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction on access to a lawyer (see *Ibrahim and Others*, cited above, § 265).

27

CASE OF BEUZE v. BELGIUM

150. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account (see *Ibrahim and Others*, cited above, § 274, and *Simeonovi*, cited above, § 120):

- (a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;
- (b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with - where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
- (c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;
- (d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
- (e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
- (f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
- (g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
- (h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;
- (i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and
- (j) other relevant procedural safeguards afforded by domestic law and practice.

28



Thank you !
Dank je wel!
Obrigada!

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The rights to interpretation and translation and information: status quo

Procedural Rights in the Context of Evidence Gathering

Academy of European Law, 16 April 2021

Dr. Sławomir Buczma



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1

The rights to information, interpretation and translation



- Charter of Fundamental Rights of the EU
 - Article 47 right to a fair trial and Article 48(2) the right of defence
- Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings
- Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings
 - Directives 2010/64 and 2012/13 set minimum rules -higher level of protection possible also in situations not explicitly dealt with by these Directives
 - Article 82.2 of TFEU - to the extent necessary to facilitate mutual recognition of judgments, minimum rules may be established with respect to [the rights of individuals in criminal procedure](#)

2

Relation to the Council of Europe's standards



- Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 – living instrument ([ECtHR Tyrer v. United Kingdom](#) (1978))
- The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the [ECtHR](#) or the CJEU (non-regression)
- The provisions of both Directives that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the case-law of the [ECtHR](#)

3

Right to a fair trial



- Article 6.1 of the ECHR: In the determination of civil rights and obligations or of any criminal charge against a defendant, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)

Rights to be granted in pre-trial stage, incl. police examination ([ECtHR Salduz v. Turkey; Foti and others v. Italy](#))

- Article 6.3 of the ECHR: Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(...)

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4

Right to a fair trial



- **Criminal proceedings** – three criteria to assess if the person is subject to a criminal charge (**ECtHR** *Engel v. Netherlands*); regulatory offences (*Öztürk v. Germany*, No. 8544/79, 21.02.1984), road-traffic offences (*Lutz v. Germany*)
- ‘*Criminal charge*’ (Directives refer to suspects in criminal proceedings)
 - the official notification given by competent authority to an individual of an allegation that he has committed criminal offence, regardless of any formal charges (**ECtHR** *Dewer v. Belgium*; *Eckle v. Germany*; *Brusco v. France*)

5

The rights to interpretation and translation

- **Directive 2010/64** applies in criminal proceedings and proceedings for the execution of a European arrest warrant (Article 1.1.)
- In general with respect to criminal offences but also to minor offences in the proceedings before the court following an appeal (if sanctions imposed by an authority other than a court having jurisdiction in criminal matters, which may be appealed to such a court)
- Directive 2010/64 seeks to ensure, for suspected or accused persons **who do not speak or understand the language of the proceedings**, the right to interpretation and translation by facilitating the application of that right with a view to ensuring that they have a fair trial.

6

The rights to interpretation and translation

- Directive 2010/64 applies **from the time** that the defendant was made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether he has committed the offence, including sentencing and the resolution of any appeal
- A **special procedure**, which has as its purpose the recognition of a final judicial decision handed down by a court of another Member State, takes place, by definition, after the final determination of whether the suspected or accused person committed the offence and, where applicable, after the sentencing of that person (*István Balogh*, C-25/15).

7

The right to interpretation



- Suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, **without delay**, with **interpretation** during criminal proceedings **before investigative and judicial authorities**, including during police questioning, all court hearings and any necessary interim hearings.
- Interpretation is available for communication between suspected or accused persons and their **legal counsel in direct connection** with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications, where necessary for the purpose of safeguarding the fairness of the proceedings.
- **Procedure or mechanism** to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.
- Suspected or accused persons have the **right to challenge a decision finding that there is no need for interpretation** and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

8

The right to translation



Determination of the term 'essential documents'

- Article 3(1) of Directive 2010/64 provides for the right of suspected or accused persons who do not understand the language of the criminal proceedings in question to obtain a written translation of all 'documents which are essential'
- Article 3(2) of Directive 2010/64 states that such documents are to include any decision depriving a person of his liberty, any charge or indictment, and any judgment.
- According to Article 3 of Directive 2010/64, an order provided for in national law for imposing sanctions in relation to minor offences and delivered by a judge following a simplified unilateral procedure, constitutes a 'document which is essential', of which a written translation must be provided to suspected or accused persons who do not understand the language of the proceedings in question, for the purposes of enabling them to exercise their rights of defence and thus of safeguarding the fairness of the proceedings (*Sleutjes*, C-278/16).

9

The right to translation of essential documents



- Compliance with the requirements relating to a fair trial merely ensures that the accused person knows what is being alleged against him and can defend himself, and does not necessitate a written translation of all items of written evidence or official documents in the procedure (ECtHR, *Kamasinski v. Austria*, 19.12.1989).
- Articles 1 to 3 of Directive 2010/64 - criminal proceedings that does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document (*Covaci*, C-216/14)

10

Transposition



- Directive 2010/64 transposition period by 27 October 2013 (DK not bound)
- REPORT from the Commission on the implementation of Directive 2010/64/EU of 18.12.2018
- The evaluation highlights that there are still difficulties on key provisions of the Directive in some Member States.
- This is particularly the case for communication between suspected or accused persons and their legal counsel, the translation of essential documents and the costs of interpretation and translation
- FRA Report on *Rights of suspected and accused persons across the EU: translation, interpretation and information* shows that certain safeguards are not fully granted
- Guidance on assessing whether interpretation and translation are necessary, and on the appropriate timeline for providing these services; • effective translation of essential documents; • safeguards to ensure that suspects and accused persons can effectively communicate with their legal counsel; • quality of interpretation and translation

11

Right to information



- Letter of Rights (Article 2- 4) in simple and accessible language
- Needs of vulnerable persons are to be taken into account (e.g. hearing and speech impediments, mentally disabled, learning disabilities, over 75, pregnant women, single parents raising minors, etc. - Commission's Recommendation of 2013 on procedural safeguards of vulnerable persons)
- The person accused must receive **detailed information on the charges** and have the opportunity to acquaint himself with the case materials **in due time, at a point in time that enables him to prepare his defence** effectively. Sending of incomplete information and the granting of partial access to the case materials are in that regard insufficient.
- The objective of Articles 6 and 7 is to allow for an effective exercise of the rights of the defence and to ensure the fairness of the proceedings (*Tranca and Others*, C-124/16, C-188/16 and C-213/16).
- The right to have adequate time and facilities for the preparation of defence (*ECtHR Dallos v. Hungary*, 29082/95)

12

Information about accusation



- Act of accusation (nature and legal classification & nature of participation)
- Rules of criminal proceedings that make it mandatory for an accused person not residing in that MS to [appoint a person authorised to accept service of a penalty order](#) concerning him do not violate Article 2, 3 and 6 of Directive 2012/13/EU, provided that that accused person does in fact have the benefit of the whole of the prescribed period for lodging an objection against that order (*Covaci*, C-216/14; UY C-615/18)
- Article 6 of Directive 2012/13 requires that when the penalty order is enforced, as soon as the person concerned has actually [become aware of the order](#), he should be placed in the same situation as if that order had been served on him personally and, in particular, that he have the whole of the prescribed period for lodging an objection, benefiting from having his position restored to the *status quo ante* (non-discrimination principle).

13

Information about accusation



- Right to information on the nature and cause of accusation to be interpreted in the light of the right to a fair trial ([ECtHR Sejdic v. Italy](#), 56581/00)
- Information about the cause of accusation (the material facts) as well as the nature of accusation (the legal qualification of the material facts) – [ECtHR Mattocia v. Italy](#)
- Information about changes of accusation
- Article 6(4) of Directive 2012/13/EU and Article 48 of the Charter must be interpreted as meaning that they do not preclude national legislation according to which the accused person can, during the trial proceedings, [request imposition of a negotiated penalty](#) where the acts on which the accusation is based have been modified, but not where the legal classification of the acts to which the accusation relates has been modified (*Moro*, C-646/17)

14

Information about the case-material



- Directive 2012/13 does not require [the point in time](#) when detailed information on the charges is disclosed and the point in time when access to the case materials is provided to be identical.
- [That point in time may](#), depending on the specific circumstances and the type of proceedings in question, be prior to or contemporaneous with the time when the court is seised, or even after that time. Disclosure should take place, and that the opportunity to have access to the case materials should be afforded, [no later than the point in time when the hearing of argument on the merits of the charges in fact](#) commences before the court that has jurisdiction to give a ruling on the merit (*Kolev and Others*, C-612/15)
- Article 6(3) of Directive 2012/13 must be interpreted as not precluding the disclosure of detailed information on the charges to the defence after the lodging before the court of the indictment that initiates the trial stage of proceedings, but [before the court begins to examine the merits of the charges](#) and before the commencement of hearing of argument before the court, and after the commencement of that hearing but before the stage of deliberation, where the information thus disclosed is the subject of subsequent amendments, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings (*Kolev and Others*, C-612/15)

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Access to essential documents for challenging the arrest or detention



- It is not excluded that part of the case materials could be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice ([ECtHR](#), 9.07.2009, *Mooren v. Germany*, n°11364/03).
- Such denial of access cannot be pursued at the expense of substantial restrictions on the rights of defence. Therefore, information which is essential for the assessment of the lawfulness of detention should be made available in an appropriate manner to the suspect's lawyer' ([ECtHR](#) 9.01.2003, *Shishkov v. Bulgaria*, No38822/97).
- In some cases reference is made to the presence of 'counterbalancing factors' which should ensure that the person or their lawyer have the possibility to effectively challenge the detention ([ECtHR](#) 20.02.2014, *Ovsjannikov v. Estonia*, n° 1346/12; 13.04.2017, *Podeschi v. San Marino*, n°66357/14).

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Access to materials of the case



- Article 7(2) and (3) of Directive 2012/13 - in the event the person accused or his lawyer has been summoned in order to obtain access, as requested, to those case materials during the pre-trial stage of the proceedings but where, for legitimate reasons or for reasons outside their control, they have not been able to attend on the day they are summoned to do so, respect for the rights of the defence and the fairness of proceedings, to which that provision is designed to give effect, **requires that the prosecuting or judicial authorities**, as appropriate, take the measures necessary to ensure that that person or his lawyer is given a further opportunity to become acquainted with the case materials.
- Deprivation of the right to access to case file may lead to a breach of the principle of equality of arms ([ECtHR: Kuopila v. Finland](#)), the same effect if a suspect has limited access to the case file on the grounds of public interests ([ECtHR: Matyjek v. Poland](#))

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Rights related to EAW



- Article 4 (in particular Article 4(3)), Article 6(2) and Article 7(1) of Directive 2012/13/EU must be interpreted as meaning that the rights referred to therein **do not apply to persons who are arrested** for the purposes of the execution of a European arrest warrant (*IR*, C-649/19)
- Right to be heard/ Right of the defence – Articles 47 and 48 Charter - EAW cannot be refused on the sole basis that the requested person was not heard in the issuing State (*Radu*, C-396/11)
- Right to an effective judicial remedy - Article 53 Charter - Member States' constitutions (*Melloni*, C-399/11)
- Right to be heard by an independent judicial authority (*LM*, C-216/18)
- The holding of the requested person in custody (*Lanigan*, C-237/15)

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Transposition

- Transposition period by 2 June 2014 (DK not bound)
- REPORT from the Commission on the implementation of Directive 2012/13/EU
- The evaluation highlights that there are still difficulties regarding key provisions of the Directive in some Member States.
- This is particularly the case as regards the Letter of Rights in criminal proceedings and European arrest warrant proceedings, the right to information about the accusation and the right to access to materials of the case
- FRA Report on *Rights of suspected and accused persons across the EU: translation, interpretation and information* shows that certain safeguards are not fully granted
- The main issues have been identified with respect to:
 - accessibility of information about the rights of suspected and accused persons, including those arrested or detained;
 - effective and practical access to materials of the case;
 - availability of effective remedies;
 - existence of effective measures to take into account particular needs of suspects and accused persons who are vulnerable.

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The way forward

- Training of practitioners
- Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings
- Council conclusions 'The European arrest warrant and extradition procedures - current challenges and the way forward' of 4 December 2020
- The Council calls for improvement in the transposition of both Directives
-

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Q & A



**State of play regarding the transposition of
Directive (EU) 2016/343 on presumption
of innocence and Directive (EU) 2016/800
on procedural safeguards for children**

Procedural Rights in the context of
Evidence-Gathering


15/16 April 2021



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**Directive (EU) 2016/343 on certain
aspects of the Presumption of
Innocence**

- Reference in the **2009 Stockholm Programme** (section 2.4)
- **Fourth Directive** adopted to strengthen the procedural rights of suspects and accused persons in criminal proceedings
- Adopted on **9 March 2016** - Transposition period ended on **1 April 2018**

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Main elements of the Directive (1)

- Scope of the Directive
- Content of the Directive
 - ✓ No public references to guilt before proved guilty (public statements made by public authorities and judicial decisions)
 - ✓ Presentation of suspects and accused persons: measures of physical restraint

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Main elements of the Directive (2)

- Content of the Directive
 - ✓ Burden of proof and *in dubio pro reo*
 - ✓ Right to remain silent and right not to incriminate oneself
 - ✓ Right to be present at the trial and right to a new trial
 - ✓ Remedies

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4

State of play regarding transposition

- **Notifications** to the Commission: complete transposition notified by all Member States.
- **Infringement proceedings** for non-communication: 11 Member States in 2018, 4 still open for partial communication (reasoned opinions), 3 Letters of Formal Notice sent in February 2021.
- **Completeness and conformity check** together with external contractor.

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Preliminary conclusions

Implementation report adopted by COM on 31 March

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0144&from=fr>

See also report published by FRA in parallel

The Directive is **not yet fully implemented** in all Member States.

The Directive is not only about the principle of presumption of innocence but about the rights deriving from the principle.

Issues arise with regard to the scope of the rights; public references to guilt; presentation of suspects and accused; right not to incriminate oneself; right to be present at the trial (*in absentia* judgments).

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Directive (EU) 2016/800 on procedural safeguards for children

- **Part of "Procedural rights package"**
- Adopted on **11 May 2016** - Transposition period ended on **11 June 2019**
- Based on **international standards** (UN CRC and the Guidelines of the Council of Europe on child-friendly justice)
- **Binding EU-wide (minimum) rules** on procedural rights for children

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Main elements of the Directive (1)

- **Scope** of the Directive
- **Effective participation of a child:**
 - ✓ Right to information: information of child and parent(s) or appropriate adult
 - ✓ Access to a lawyer/Assistance by a lawyer: mandatory assistance for children in detention or when a decision on detention is taken and in serious and complex cases
 - ✓ Legal Aid: to ensure the effective exercise of the assistance by a lawyer
 - ✓ Individual Assessment: specific needs of children to be taken into account

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Main elements of the Directive (2)

- **Safeguards related to deprivation of liberty:**
 - ✓ Deprivation of liberty as a measure of last resort
 - ✓ Alternative measures to detention where possible
 - ✓ Specific safeguards in case of deprivation of liberty
 - ✓ Right to medical examination

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Main elements of the Directive (3)

- **Other Safeguards**
 - ✓ Audio-visual recording of questioning by police
 - ✓ Protection of privacy
 - ✓ Presence at court hearings
 - ✓ Training of professionals

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State of play regarding transposition

- **Notifications** by Member States to the Commission: not all Member States have yet notified complete transposition
- **Infringement proceedings** for non-communication: 7 Member States in 2019, 2 Reasoned opinions in 2020
- **Completeness and conformity check** together with external contractor

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Preliminary conclusions

The Directive is **not yet fully implemented** in all Member States.

Several Member States have undertaken important changes to their juvenile justice systems as part of transposition efforts. Some Member States are still working on incorporating the directive into national law.

Compliance check ongoing but issues arise with regard to the scope, prompt and adequate information, assistance by a lawyer, deprivation of liberty,

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Thank you!

Dr. Ingrid Breit
Team-leader

DG Justice and Consumers
Unit B2
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Next Steps: The need for further procedural safeguards in the EU Procedural Rights in the Context of Evidence Gathering



16 April 2021



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Agenda 2020 ECBA – a New Roadmap on Procedural Rights

- ▶ Amsterdam Treaty /Tampere Council 1999 → principle of mutual recognition → Lisbon Treaty Art. 67, 82 TFEU.
- ▶ Mutual recognition requires mutual trust.
- ▶ 2009 Roadmap on procedural safeguards.
- ▶ Mission to achieve mutual trust has not been completed; partial distrust still exists (e.g. Measure F 2009 Roadmap - [Detention Green Paper](#) - no follow up)
- ▶ Need to monitor implementation of Procedural Rights' Directives and Directive (EU) 2016/343.
- ▶ Action should continue to be taken at the EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings and thus the principle of mutual recognition and its underlying mutual trust.
- ▶ ECBA Proposal - "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards"

Matt, Holger, 2017 - <https://eucrim.eu/articles/guest-editorial-eucrim-12017/>

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ECBA Agenda 2020

- ▶ Measure A: Pre-Trial-Detention, including the European Arrest Warrant
- ▶ Measure B: Certain Procedural Rights in Trials
- ▶ Measure C: Witnesses' Rights and Confiscatory Bans
- ▶ Measure D: Admissibility and Exclusion of Evidence and other Evidentiary Issues
- ▶ Measure E: Conflicts of Jurisdiction and *ne bis in idem*
- ▶ Measure F: Remedies and Appeal
- ▶ Measure G: Compensation

ECBA Agenda 2020 available at: <http://www.ecba.org/content/index.php/124-featured/751-ecba-roadmap-2020>;
<https://journals.sagepub.com/doi/pdf/10.1177/2032284418788760>

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Measure D of the ECBA Roadmap Agenda 2020 - Procedural rights in the context of evidence-gathering

- ▶ This area has not been regulated, without prejudice to some sparse provisions in the various instruments.
- ▶ For example:
 - ▶ the right of the lawyer to be present at questionings and some evidence gathering acts (Directive 2013/48);
 - ▶ the right to request an EIO (art. 1, no. 3 Directive 2014/41);
 - ▶ European Public Prosecutor's Office - art. 41, no. 3;
 - ▶ Exclusion of evidence / valuation - art. 14, no. 7, Directive 2014/41 and 37 European Public Prosecutor's Office Regulation;
 - ▶ Legal remedies / judicial review (art. 42 EPPO and art. 14 of Directive 2014/41)
- ▶ However, these are very limited and refer in most cases to national law.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

Problems:

- a) highly divergent interpretation of the various rights at domestic level, which creates relevant differences, for example in the role of legal assistance and access to the file at the pre-trial stage, which creates a very disparate situation between MS, calling into question the uniform guarantee of established rights.
- b) particularly serious situation in the area of cross-border evidence gathering, whether horizontal or in European Public Prosecutor's Office proceedings, as the accused will not have a sufficiently consistent and high minimum level of procedural rights at the investigation (or trial) stage. Even domestic protection and compensation mechanisms lose their effectiveness because of the cross-border combination of legal systems.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

- c) legal fragmentation which makes it very difficult to determine the applicable law and makes the rules of several countries incompatible in the field of measures of gathering evidence, something particularly relevant in the field of special investigative measures, or intrusive measures.
- d) lack of appropriate remedies, either procedural or substantive.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

What proposals are under discussion?

- a) monitoring, and assessing the need for additional legislative measures, defining the role of the lawyer, the rules of access to the file in relation to the different procedures for gathering evidence and exercising means of protection
- b) the establishment of specific cross-border rights, including assistance by a lawyer and special provisions guaranteeing the defendant's right to participate actively in the taking of evidence and the possibility of taking evidence.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

What proposals are under discussion? (2)

- c) harmonisation of procedural "guarantees" regarding the gathering of evidence, in particular intrusive measures.
- d) the establishment of European law remedies, access to the CJEU, and sanctions for violations in relation to the taking of evidence.

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Proposals in academic studies / others

ECBA (2020) - European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World.

- ▶ Proportionality - the use of video-link and other alternatives to EAW §§ 12-43.
 - ▶ ECBA urges the European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States, to take practical and, if needed, legislative steps to enhance the use of video-conferencing in cross-border cases, namely:
 - ▶ dating the existing data from previous studies and organizing a **comprehensive assessment of the reasons for the under-use of remote video-technology**;
 - ▶ Establishing explicitly the **right of the accused to participate by video-link**, at **least in the cases in which this is the most proportionate solution**, as referred to above;
 - ▶ Developing **appropriate and compatible legal standards for remote participation** where that is permitted and appropriate (see *Chapter B.4*);
 - ▶ **Promoting the development of appropriate and compatible technical infrastructures and solutions** (which allow for **true-to-life remote participation**, and **exercising of the procedural rights** in this context - see *Chapter D*).
 - ▶ Considering the issues relating to the **transparency and privacy** in the use of remote technology in criminal trials (see *Chapter E*)

<http://ecba.org/content/index.php/124-featured/783-ecba-statement-on-video-conferencing-in-criminal-cases>

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Proposals in academic studies / others (2)

AAVV, EuCRIM 3/2020 <https://eucrim.eu/issues/2020-03/>

Focus: The Future of EU Criminal Justice – Expert Perspectives

Garamvölgyi / Ligeti /
Ondrejová / von Galen

Admissibility of Evidence in Criminal Proceedings in the EU

- ▶ **Legislative option:**
 - ▶ Directive which could include:
 - ▶ “inclusionary rule”
 - ▶ “human rights” + “EU rights” rules of exclusion
 - ▶ Harmonisation of certain types of evidence (e.g. *digital evidence*)
 - ▶ Other aspects of evidence law (e.g. rules on defence rights to gather or request evidence)
- ▶ **Non-legislative option:**
 - ▶ A fresh academic study on admissibility of evidence

Costa Ramos / Luchtman / Munteanu

Improving Defence Rights

- ▶ **Legislative option:**
 - ▶ Cross-border procedures' minimum rules:
 - ▶ Issuing State (full legality and proportionality review, intrusive measures; ex ante court authorisation degree of suspicion, purpose limitation; remedies ex post; right to request investigation measures)
 - ▶ Executing State (A2F, procedural remedies in relation to execution or transfer; notification of violations to the issuing state);
 - ▶ Trial State (which authority / which law / horizontal preliminary ruling / procedural and substantive remedies)
 - ▶ Furthering “ABC” Directives (Directive /) - e.g. A2L in pre-trial stages; A2F; service of documents; right to participate at trial and appeal
 - ▶ EPPO procedural rights (Regulation)
 - ▶ Further rights with specific regulations for cross-border (or only cross-border) (Directive / Regulation)
 - ▶ Remedies
 - ▶ Minimum rules for judicial review (Directive)
 - ▶ Minimum rules for procedural sanctions for breaches of defence rights (Directive)
- ▶ **Non-legislative option:**
 - ▶ EPPO procedural rights - guidelines
 - ▶ Guidelines legal assistance in cross-border / supranational constellations
 - ▶ Funding of legal aid for cross-border, cross-jurisdictional
 - ▶ Handbooks, training, [...]
 - ▶ Remedies
 - ▶ Green Paper on remedies (procedural and substantive)
 - ▶ Focused on certain rights (information on rights, *nemo tenetur*, access to a lawyer, privacy in criminal investigations)
 - ▶ Development of case law

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www.ecba.org'." data-bbox="55 95 945 470"/>

Thank you !
Obrigada!
Dank je wel!

Check out www.ecba.org



Challenges ahead

Procedural Rights in the context of
Evidence-Gathering

15/16 April 2021



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1



Introduction

- **1999 Tampere Conclusions**
- **2009 Stockholm Programme and Roadmap**
- **Six Directives** adopted between 2010 and 2016 to strengthen the **procedural rights** of suspects and accused persons in criminal proceedings: right to interpretation and translation, right to information, right of access to a lawyer, presumption of innocence, legal aid and procedural safeguards for children

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Implementation of PR Directives

Considerable EU acquis – Strong focus on Implementation - key priority of the Commission!

- Correct implementation into national law
- Coherent application in practice
- Development of best practices

Infringement proceedings where necessary.

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3

Procedural rights - areas of activities

- Protection of vulnerable adults
- Pre-trial detention
- EAW
- Use of evidence in cross-border proceedings

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AI/Digitalisation

Artificial Intelligence (AI):

- COM White Paper (February 2020)
- Public consultation
- Impact Assessment
- Regulatory Proposal: spring 2021

Digitalisation:

- 2 Studies: digital criminal justice, use of innovative technologies in the justice field
- COM Communication on Digitalisation of justice (Dec.2021) + Follow up

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Importance of judicial training

- European Judicial training Strategy 2021-2024
- Publication of the Annual Report 2020 on European Judicial Training
- Launch of a new European Training Platform

Since 2011, 1,2 million justice professionals were training on EU law

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Thank you!

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