



THE GATHERING OF CROSS-BORDER EVIDENCE AND ITS ADMISSIBILITY

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



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TRICKY SURVEILLANCE

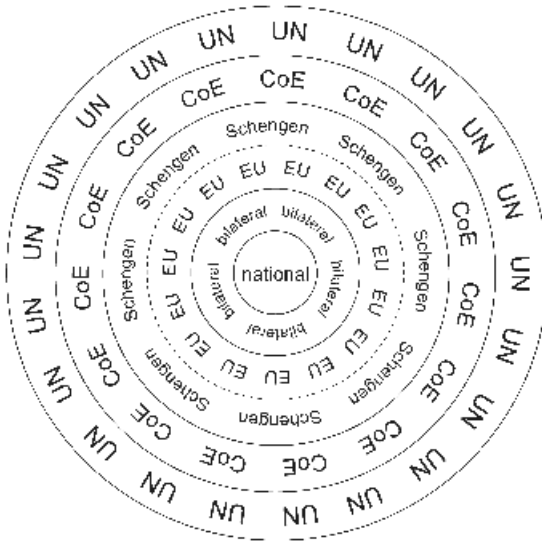
- **Case Study:**
- German prosecutor P is investigating against X who is allegedly part of a gang that is specialised in deriving unwarranted Value Added Tax. X stays conspicuously often in the United Kingdom, Denmark and France. German prosecutor P would like to intercept X's telephone during his travels, 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%3AQJ.L.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>

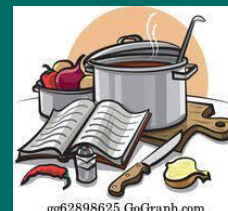
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BASIC GRID OF MLA SCHEMES



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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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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

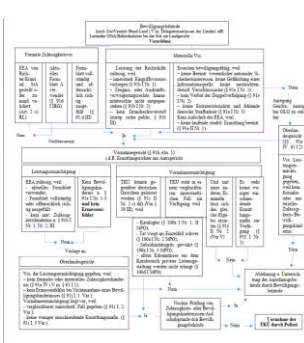
“The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence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

Art. 14(7) EIO Directive

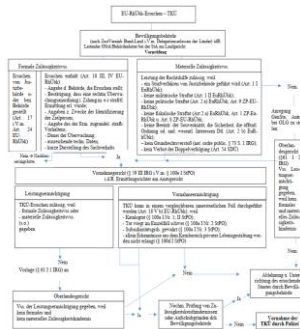
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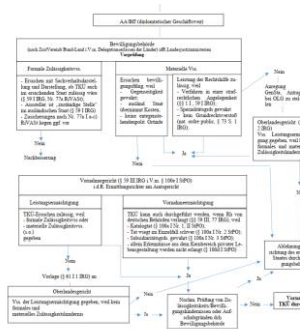
CONCLUSIONS



- GRAPH 1



- GRAPH 2



- GRAPH 3

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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@csl.mpg.de
Internet: <https://csl.mpg.de>

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