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Subject: Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters  
- Detailed Statement

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Delegations will find attached a Detailed Statement relating to the initiative by a group of Member States for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters.

*Accompanying document to the*

**Proposal for a**

**COUNCIL DIRECTIVE**

**regarding the European Investigation Order in criminal matters**

**DETAILED STATEMENT**

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## INTRODUCTION

The present detailed statement accompanies the proposal for a Council Directive regarding the European Investigation Order in criminal matters with a view to apply Article 5 of the Protocol on subsidiarity and proportionality which provides the following:

*“Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved”.*

## 1. EXECUTIVE SUMMARY

The general objective of this detailed statement is to assess the possibilities to improve the mechanisms of obtaining evidence across internal borders of the European Union. *Anno* 2010, the situation can be characterised as being unsatisfactory. The main problems are related to the fragmentation and complexity of the current legal framework for gathering evidence in criminal matters and the limited range of application of the principle of mutual recognition.

In the current situation, judicial authorities are obliged to make use of two different regimes in order to obtain evidence across internal EU-borders: on the one hand mutual legal assistance and on the other hand mutual recognition. This inconsistency is a result of the limited scope of both the Council Framework Decision 2003/577/JHA of July 2003 on Freezing orders and the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant. Although these instruments introduce the principle of mutual recognition (hereinafter “MR”) in the field of evidence, they are fully criticised because their restricted range of application actually complicates the international cooperation, instead of simplifying it. Moreover, the FD on the EEW has reintroduced certain grounds for refusal, such as the territoriality principle, which belonged to the extradition system and were no longer applicable under the mutual legal assistance regime for obtaining evidence.

The numerous instruments have created a fragmented approach making the task of the judicial authorities even more burdensome, which is exactly the opposite of what mutual recognition is supposed to achieve. The present detailed statement aspires to overcome this deadlock by setting the following objectives: accelerating the procedure, ensuring the admissibility of evidence, simplifying the procedure, maintaining a high level of protection of fundamental rights (especially procedural rights), reducing the financial costs, increasing mutual trust and cooperation between the member states and preserving the specificities of the national systems and their legal culture.

This document proposes a number of policy options and assesses them on the basis of their economic and social impact as well as their impact on the fundamental rights of the citizens.

- Policy option A: The European Union will not undertake any new action.

This option would not address the problem at issue and will not lead to a simplification of the procedures. The fragmentation will only be strengthened by the putting into practice of the FD on the EEW in 2011. Given the absence of the obligation to apply the instruments of mutual recognition, it is not unlikely that the practitioners will only make use of the MLA instruments. Moreover, this situation will further weaken the confidence of the citizens in the ability of their Member States as well as in the capacity of the European institutions to take appropriate measures to enhance their security.

- Policy option B: The EU will adopt non-legislative measures.

Although this option would raise awareness and would safeguard the proper implementation of the instruments, this option would maintain the current legal situation in which practitioners would have to make use of a variety of instruments on judicial cooperation.

- Policy option C: Abrogation of the FD on the EEW.

This policy option implies that the EU would abrogate the existing instruments of mutual recognition applicable in the field of gathering evidence and proposes to fully re-establish the mutual legal assistance regime. This *revival* of MLA would prevent that the procedures for obtaining evidence will be further complicated by the implementation of the FD on the EEW. However, the MLA regime holds a number of significant weaknesses and this evolution would be contrary to the reasoning of the Lisbon Treaty and the Stockholm Programme.

- Policy option D: The EU will take new legislative action based on the principle of MR.

Policy option D considers the ruling out of the principle of MR as being premature. The latter should be regarded as a solid solution, because it implies a complete judicialisation of the procedure, it limits the grounds for refusal to an exhaustive list and it provides obligations in terms of time limits. This policy option proposes two hypotheses:

- (1) A limited improvement of the EEW (EEW-II): The option aims to supplement the existing FD on the EEW and strives to include all types of evidence in its scope. Although the abovementioned framework decision constitutes a feasible starting point to incorporate the gathering of all types of evidence in one single legal regime based on mutual recognition, it has been the subject of a wave of criticism. In comparison to other instruments of mutual recognition, the FD on the EEW contains a few complex provisions and, moreover, there is a certain degree of regress compared to the MLA instruments. Furthermore, it is plausible that the Member States which have obtained arrangements or exceptions as regards to the EEW-I will try to extend these privileges to the wider scope of measures covered by the EEW-II.
- (2) The replacement of all existing instruments by a “European investigation order” covering all types of evidence:  
The European investigation order (EIO) would offer a single legal basis increasing the legal certainty of the overall system and making it less burdensome for the practitioners by drastically limiting the grounds for refusal and by introducing time-limits. The advantage of replacing all existing instruments by a new instrument is that Member States will no longer be bound by pre-existing arrangements or exceptions. It is however plausible that the negotiation process will not merely be a formality.

The assessment and comparison of the options leads to the conclusion that option D.2. is considered to be the best option given the objectives pursued.

The present detailed statement further emphasises the usefulness of a comprehensive mechanisms for monitoring and assessing the developments and identifies a number of indicators.

Finally, the legal basis of an EU action, its respect of the principles of subsidiarity and proportionality as well as the fundamental rights will be elucidated.



## 2. STATE OF PLAY

The existing international cooperation mechanisms to obtain evidence in another Member State are numerous and differ widely. First of all, such cooperation is governed by the instruments of the Council of Europe on mutual legal assistance, such as the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and its Protocols. Moreover, the European Union has adopted instruments which have further facilitated the cooperation between Member States, *i.e.* the 1990 Schengen Implementing Convention and the EU Convention of 29 May 2000 on Mutual Legal Assistance in Criminal Matters and its Protocol. Furthermore, there are more specific instruments based on the principle of mutual recognition: the Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence and the Council Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

### 2.1. The « traditional » mutual legal assistance

The 1959 European Convention on Mutual Legal Assistance in Criminal matters<sup>1</sup> (hereinafter referred to as the “*1959 MLA Convention*”) provides the basic framework for cooperation on obtaining evidence. It stipulates that the execution of requests for mutual assistance must be executed in compliance with the law of the requested State. This Convention has been supplemented by two additional protocols in 1978<sup>2</sup> and 2001<sup>3</sup>. Despite the progress generated by these instruments, the provided mechanisms remain characterized by the principle of national sovereignty. As a consequence, the processing of a requests for mutual assistance can be slow and inefficient.

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<sup>1</sup> Council of Europe, European Treaty Series N°30.

<sup>2</sup> Council of Europe, European Treaty Series N°99.

<sup>3</sup> Council of Europe, European Treaty Series N°182.

This statement can be justified by the many weaknesses of the cooperation mechanism :

- the channel for transmission of the request;
- the range of the facts giving rise to cooperation;
- the number of grounds for refusal;
- the lack of deadlines;
- the possibility given to the Member States to make reservations and declarations.

## **2.2. The “improved” mutual legal assistance within the EU**

Since 1970, there has been a slow movement towards a simplification of the system of mutual assistance. The Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985<sup>1</sup> (hereinafter referred to as the “1990 Schengen Convention”) is actually part of this improvement. Its Article 51 limits the possibility for Member States to make use of the reservations prescribed by the 1959 MLA Convention. The Member States may no longer make the admissibility of rogatory letters for search and seizure dependent on conditions other than the following:

- the offence is punishable under the law of both Member States by a custodial sentence of a maximum of at least six months, or is punishable under the law of one of the two Member States by an equivalent penalty and under the law of the other Member State by virtue of being an infringement which is being prosecuted by administrative authorities and where the decision may give rise to proceedings before a court having jurisdiction in particular criminal matters;
- the execution is otherwise coherent with the law of the requested Member State.

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<sup>1</sup> Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders , OJ 239, 22.9.2000, p.19.

The EU Convention of 29 May 2000 on Mutual Assistance in Criminal Matters<sup>1</sup> (hereinafter referred to as the “2000 EU MLA Convention”) and its 2001 Protocol<sup>2</sup> (hereinafter referred to as the “2001 EU MLA Protocol”) have also improved mutual legal assistance between the Member States.

Notwithstanding the fact that this Convention does not replace the existing instruments and does not abolish the principal grounds for refusal, such as the sovereignty of the Member States, it does however strengthen the mechanism of mutual legal assistance. The most significant improvements introduced by this Convention are the following:

- requests are directly transmitted between judicial authorities, with the exception of a limited number of particular cases;
- the requesting State may indicate formalities or procedures that will have to be complied with; and
- the Convention provides for the stipulation that the requested State has to execute the request as soon as possible.

Subsequently, this Convention has been supplemented by a 2001 EU MLA Protocol which concerns the mutual legal assistance in the banking sector and, in particular, the requests for information about bank accounts and bank transactions. Although the protocol maintains the *ordre public* of the Contracting Parties as a ground for refusal, it however weakens other grounds, such as the bank confidentiality, the fiscal and the political nature of the offence.

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<sup>1</sup> Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJC 197, 12.7.2000, p.1.

<sup>2</sup> Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the protocol to the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJC 326, 21.11.2001, p.1.

### 2.3. The principle of mutual recognition, a European Union feature

The principle of mutual recognition, which is a typical characteristic of the European Union, has been recognised as a cornerstone of judicial cooperation in civil and criminal matters since the European Council of Tampere in 1999. Mutual recognition has been developed in several EU working programmes, such as the 2000 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters<sup>1</sup>, the 2004 The Hague Programme<sup>2</sup>, the 2009 Stockholm Programme<sup>3</sup> and is now enshrined in article 81.2, a) of the Treaty on the functioning of the European Union.

The main benefits resulting from this principle are the following:

- requests are transmitted through direct contacts between judicial authorities;
- procedures are completely judicialised;
- requests are standardised through a single form;
- the scope of the facts giving rise to cooperation are extended;
- the grounds for refusal are limited;
- deadlines for the execution of requests are set.

In the field of obtaining evidence, two instruments based on the mutual recognition principle have been adopted so far: the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence<sup>4</sup> (hereinafter referred to as the “*FD on freezing orders*”) and the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters<sup>5</sup> (hereinafter referred to as the “*FD on the EEW*”).

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<sup>1</sup> OJ C 12, 15.1.2001, p. 10–22

<sup>2</sup> OJ C 53, 3.3.2005, p.1-14.

<sup>3</sup>

<sup>4</sup> Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. OJL 196, 2.8.2003, p.45.

<sup>5</sup> Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. OJL 350, 30.12.2008, p.72.

The purpose of the FD on freezing orders is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings. This instrument applies to freezing orders issued for the purpose of securing evidence or subsequent confiscation of property. Its scope is limited to provisional measures to prevent the destruction, transformation, moving, transfer or disposal of evidence. The freezing order must therefore be accompanied by a subsequent request of mutual legal assistance when the transfer of the evidence to the issuing Member State is required. As a result, different rules will be applicable to the freezing and to the transfer of evidence. The first will be governed by the mutual recognition and the second by the mutual assistance.

The FD on EEW stipulates that the European evidence warrant is a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for their use in proceedings in criminal matters. The scope covered by this instrument is likewise limited, because it only concerns pre-existing evidence and assumes that the issuing authority is able to describe in details the piece of evidence it is searching for. As a consequence, a large part of the evidence which needs to be collected may fall outside the scope of the European evidence warrant.

In the Stockholm Programme, the European Council points out that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be carried out. It underlines that a new approach, based on the principle of mutual recognition and taking into account the flexibility of the traditional system of mutual legal assistance, is needed. Furthermore, it estimates that this new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned.

### **3. PROBLEM DEFINITION**

The current situation with regard to the obtaining of evidence across internal borders of the EU is unsatisfactory. The main problems are related to the fragmentation and complexity of the current legal framework for the obtaining of evidence (3.1.), while the principle of mutual recognition has brought major benefits in other sectors (3.2.).

These problems affect a sector which represents the main part of judicial cooperation in criminal matters and which has been expanding over the years. The competence for the European Union to act is therefore obvious and solutions need to be brought (3.3.)

### **3.1. Fragmentation and complexity of the current legal framework**

The fragmentation and complexity is due to:

- the coexistence of mutual legal assistance conventions with mutual recognition instruments and
- the complexity within the new legal framework (mutual recognition instruments).

#### ***3.1.1. Coexistence of mutual legal assistance conventions with mutual recognition instruments***

In the first instrument having implemented the principle of mutual recognition of judicial decisions in criminal matters – the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – the Council decided to replace the existing instruments by the new one. Therefore, extradition procedures ceased to exist among EU Member States and were replaced by the European Arrest Warrant (EAW). Judicial authorities did not have the choice to opt for the extradition procedure or for the EAW. If a judicial authority wanted to obtain the surrender of a person, the only option was to issue an EAW. This, together with the improvements brought by the new regime, contributed to the success of the EAW, which has been widely used from the very beginning of its application.

With regard to the obtaining of evidence, however, a different solution was chosen.

In this field, traditional mutual legal assistance and mutual recognition exist side-by-side. That means that the issuing / requesting authority can decide whether to use mutual legal assistance or mutual recognition, with different rules applicable and, sometimes, different competent authorities.

This coexistence has been preferred due to the fact that the EAW only covers part of the obtaining of evidence. The magistrate must be able to use the traditional mutual assistance if, for example, he wishes to include in the same request evidence which are not covered by the EAW, or if he considers on a case-by-case basis that this would facilitate the processing of the request.

A same case might therefore be governed by one regime or another depending on the choice that would be made by the issuing authority and that would have consequences on the substantive conditions to be applied in the specific case. One may question the justification of the use of one regime in one case while in another similar case, the issuing authority may opt for a distinct regime.

Moreover, the coexistence of both regimes has for consequence to add a new layer to the collection of international instruments in this matter.

### ***3.1.2. Complexity of the new legal framework***

Beside the fragmentation of the legal framework, the instruments of mutual recognition adopted so far in the field of obtaining evidence have proven to be rather complex. First of all, the Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property of evidence is considered as too complicated by the practitioners and is seldom used in practice<sup>1</sup>. Secondly, the European Evidence Warrant, while not yet applicable in practice, is considered as a weak instrument which will probably cause several problems, notably because its scope of application is too limited.

The EEW is fully criticized because it complicates the cooperation instead of simplifying it, due to its limited scope of application. It has created a regime which is more complicated than the mutual legal assistance regime. While rogatory letters are characterized by their flexibility, the EEW is seen as formalistic and rigid.

For instance, the validation procedure provided for in Art. 11.5, while in conformity with the objective of judicialisation of the process, has the detrimental effect to add a supplementary procedural step in some Member States where judicial authorities are not necessarily competent at the stage of gathering evidence.

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<sup>1</sup> *Replies to the questionnaire on the evaluation of the tools for judicial cooperation in criminal matters*, EJN, doc. 5684/09 EJM 6 COPEN 3, 26 January 2009, p.6.

The fact that the EEW relates solely to evidence and not to measures is an element of complexity. Only pre-existing evidence are covered by the EEW (see Art. 4.1). The choice of the investigative measure is left to the executing authority, although this authority, which is not in charge with the whole file, does not necessarily have sufficient knowledge of the elements of the case to evaluate correctly the best choice to be made.

This complexity is aggravated by the fact that this new instrument only applies to some types of measures. It is explicitly laid down that the EEW cannot be issued in order to (Art. 4.2):

- a) conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;
- b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
- c) obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;
- d) conduct analysis of existing objects, documents or data;
- e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

In fact, the only investigative measures covered are search and seizure operations and production orders.

New grounds for refusal, as the territoriality principle, have also been introduced with the EEW which belonged to the extradition system and were no more applicable in mutual legal assistance related to the obtaining of evidence.

As a consequence of the complexity of the new legal framework, it is likely that the EEW will only be used in practice in a few cases, and where it will be used, the lack of experience will create difficulties. This is also why EEW has been considered by the practitioners as an example not to follow<sup>1</sup>. More generally this situation is problematic both because of the workload for the magistrates and of the effect on their confidence to European law.

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<sup>1</sup> G. Vernimmen-Van Tiggelen and Laura Surano, « *Analysis of the future of mutual recognition in criminal matters in the European Union* », Institute for European Studies, Université Libre de Bruxelles, *European Criminal Law Academic network*, p.16.



## **3.2. Benefits of the mutual recognition principle**

Even if the new instruments in the field of obtaining evidence have brought some complexity, mutual recognition should be preferred to the maintaining of mutual legal assistance because of its added value, especially in terms of judicialisation, limited grounds for refusal and time-limits.

### ***3.2.1. Judicialisation***

In the mutual legal assistance regime, requests are in principle solely executed through central authorities. This principle has however been softened over the years in the context of the European Union but still allows for a governmental filter.

On the contrary, mutual recognition involves a complete judicialisation of the procedure. It provides for a direct transmission between judicial authorities but does not allow any intervention of the executive and this mutual trust between Member States provides a simplification and an acceleration of the procedure.

### ***3.2.2. Limited grounds for refusal***

The main weakness of the mutual legal assistance is that it provides for wide grounds for refusal. These reasons permit mistrust that may impede or even prevent cooperation, and make wide range of discretion possible. The cooperation is not in itself mandatory but afforded between the Contracting Parties to the widest possible measure.

In the mutual recognition regime, the execution of the foreign decision is mandatory except if one of the grounds for refusal may be invoked and these grounds for refusal are exhaustively listed and limited to objective legal grounds to refuse the cooperation. Any discretionary reasons are in principle removed.

### 3.2.3. *Time limits*

Normally, in the mutual legal assistance regime, there is no obligation in terms of time limits. Article 6.2 of the 1959 Convention on Mutual Legal Assistance in Criminal Matters stipulates that “*any property, as well as original records or documents, handed over in execution of letters rogatory shall be returned by the requesting Party to the requested Party as soon as possible unless the latter Party waives the return thereof*”.

On the contrary, the mutual recognition regime does provide deadlines specifically indicated. In fact, the Council framework decisions on the EEW and EAW set several time limits for the execution’s requests and for the execution itself. There is a need to focus on time limits because it facilitates and accelerates the judicial cooperation.

This assertion is true even though no real sanctions are attached to the non-respect of the time limits. Above all, the setting up of time limits provides the issuing authority with confidence and security, by giving an idea of the timeframe within which its request will be executed and forcing the executing authority to keep it informed in case it would not be possible to comply with the time limits.

### **3.3. The need to bring solutions in the sector of gathering of evidence**

Practitioners insist on the need to bring solutions in the sector of gathering evidence<sup>1</sup>. Considering the problems caused by the current legal framework, it seems appropriate to provide for mutual recognition in a different way and to think about another scope of application which would be less limited than the EEW.

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<sup>1</sup> G. Vernimmen-Van Tiggelen and Laura Surano, *op. cit.*, p.10.

### 3.3.1. *Providing mutual recognition in a different way*

It seems necessary to reduce as far as possible (if not completely) the period during which the EEW will coexist with mutual assistance.

This cannot be a simple matter of “repairing” the EEW, for example by giving it a general field of application. The EEW solution is in fact basically flawed by an approach which does not suit to the collection of evidence.

Nevertheless, a return to mutual assistance is not desirable. In political terms, it would be difficult to avoid the image of a step backwards<sup>1</sup>. In addition, the Treaty of Lisbon clearly states that “*judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgements and judicial decisions*” and that the measures must be designed “*to lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgements and judicial decisions*”.

Mutual recognition must thus be provided because it presents benefits for the judicial cooperation in criminal matters, but differently.

The general concepts must be those of mutual recognition along with substantial improvements such as a radical limitation of grounds for refusal, a full judiciarisation and an abandonment of dual criminality and the setting up of time limits. But the procedure must continue to be based on the flexibility in mutual assistance in criminal matters.

If this combination is to succeed, mutual recognition as described in the existing instruments must not be taken as a starting point. The process must be reversed to start from the existing system of mutual assistance and move towards efficient, flexible mutual recognition, in the form in which it arises from both the 1959 MLA Convention and the 2000 EU MLA Convention and the use of practical tools, like the European Judicial Network.

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<sup>1</sup> Belgian national report to the “*Analysis of the future of mutual recognition in criminal matters in the European Union*”, *op. cit.*, p 29.

### ***3.3.2. The proposed scope of application of the new legal framework***

As it was said above, the main problem of the EEW is that its scope was far too limited. A totally generalized scope of application would be the ideal solution for simplification purposes. This solution makes it possible to avoid the current criticism of the EEW by enabling the magistrate to cover in a single request both searching measures (included in the EEW) and statement of individuals present at the location of the search (excluded from the EEW).

However, it would be a mistake to apply the same rules to every investigative measure that can be of very different nature. The existing flexibility should remain for the most sensitive measures.

### ***3.3.3. The purpose of the new legal framework: the measure to be executed and not the evidence to be collected***

Rogatory letters cover investigative measures permitting the gathering of evidence. The EEW, however, relates to the evidence and not to the measure to be used to gather it. It presupposes that the issuing authority already knows the piece of evidence it is searching for. The choice of investigative measures is left to the executing authority. This approach is problematic because it does not fully comply with the mutual recognition principle, as the national legal decision to be executed relates to a measure, not to an item of evidence and because it leaves to the executing authority to examine the “proportionality” of the measure requested.

It should, however, be noted that rogatory letters can easily cover the measure because the grounds for refusal are such that they leave a great discretion for the authority receiving the request.

#### 4. OBJECTIVES

The general objective is to **improve the search for truth in criminal proceedings** with a transnational aspect. This general objective will serve the goal of establishing an area of freedom, security and justice. The need to improve the search for truth in criminal proceedings is constantly challenging the efficiency and the quality of the criminal justice systems. It is essential for the prevention and repression of crime, as well as for the protection of the accused person. More generally, it is an important element to strengthen the trust of the citizen in their national system and in the EU framework: this includes trust in the ability of the system to prevent crime and to sanction offenders as well as trust in the fact that persons wrongly accused will be cleared.

The general objective is composed of more specific objectives relevant for this instrument:

1. Accelerating the procedure: resolving rapidly criminal cases is a key element for both the efficiency and the quality of the system. Justice requires some time to be appropriately done, but unnecessary delays must be avoided, as they have a negative impact on the quality of the evidence. Furthermore, every accused person has a right to be judged within a reasonable time.
2. Ensuring the admissibility of evidence: evidence can merely be useful as part of a case if it is admissible in court. Collecting evidence in another State raises specific challenges in this regard as the rules for admissibility and collection of evidence are often different in the requesting/issuing State and the requested/executing State.
3. Simplifying the procedure: with the number of transnational cases in the EU increasing, it is important that magistrates throughout the EU are able to cooperate through simple procedures. Procedural requirements should be limited to what is strictly necessary as excessive burden tends to discourage judicial authorities to cooperate with each other.
4. Maintaining a high level of protection of fundamental rights, especially procedural rights: the fact that a case does or does not involve the gathering of evidence in another Member State should not affect guarantees for the persons concerned, especially the right to a fair trial.

5. Reducing the financial costs.
6. Increasing mutual trust and cooperation between the Member States.
7. Preserving the specificities of the national systems and their legal culture: the sector of the gathering of evidence is among the sectors where major differences exist between the national systems and these differences are often deeply rooted in the legal culture as well as in the history of the Member State concerned. It is essential to improve cooperation in the field of gathering evidence, without touching upon the fundamental aspects and differences of the national systems.

## **5. POLITICAL OPTIONS FOR SOLVING THE PROBLEM**

### **Option A: No new action to be taken in the European Union**

This option implies that the EU would not undertake any new action (legislation, non-legislative instrument, financial support) to tackle the problem at issue. The current legal regime would be maintained and, as mentioned above, instruments of mutual recognition would continue to coexist with instruments based on mutual legal assistance. In this situation, practitioners would have to use different types of instruments for different aspects of the same case (for example, an EEW to collect documents and a MLA request for taking witness statement). Given the absence of the obligation to apply instruments of mutual recognition, there is a possibility that only instruments of mutual legal assistance would be used by the practitioners<sup>1</sup>.

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<sup>1</sup> This has already been verified with the FD on the freezing of assets and is foreseeable for the EEW.

## **Option B: Adopt non-legislative measures**

This option implies that the EU would not undertake any legislative action but instead non-legislative measures would be adopted:

- to raise awareness, for example by providing training to practitioners;
- to improve mutual understanding, for example by elaborating a manual or national fact sheets;
- to ensure the proper implementation of the instruments of mutual recognition, for example by establishing an evaluation system.

This option would maintain the current legal situation where practitioners have to rely on a variety of cooperation instruments in order to obtain evidence from other Member States.

## **Option C: Abrogation of the FD on the EEW (back to MLA)**

This option implies that the EU would abrogate the existing instruments based on mutual recognition applicable in the field of the gathering of evidence, in particular the FD on the EEW. Cooperation in this field would be governed within the European Union by the existing instruments on mutual legal assistance (the Council of Europe 1959 MLA Convention and its Protocols, the 1990 Schengen Convention and the 2000 EU MLA Convention and its Protocol).

The existing instruments based on mutual recognition are not satisfactory and have been criticised for being sometimes introducing further difficulties compared to mutual legal assistance. For example, the FD on the EEW is only applicable to certain types of evidence (evidence that already exists and that is directly available), has added new grounds for refusal (such as territoriality) and is more formalist (validation procedure). This option would re-establish mutual legal assistance as the legal regime for the cooperation between the Member States.

## **Option D: New legislative action taken in the European Union**

This option implies that the EU would further improve the existing legal framework based on the principle of mutual recognition, allowing for faster and more efficient cooperation. The main benefits of the mutual recognition principle are:

- standardisation (use of a single form which does not require further translation);
- fixed deadlines for the recognition and execution of the request;
- minimum safeguards;
- limited grounds for refusal.

### ***Option D.1.: Limited improvement of the EEW (EEW II)***

This option would aim at supplementing the existing instruments of mutual recognition, in particular the FD on the EEW. The adoption of a new instrument (EEW II) would allow covering all types of evidence.

This improved legal framework would replace the mutual legal assistance regime within the European Union.

### ***Option D.2.: Replacement of all existing instruments by an EIO with global scope***

This option would imply the adoption of a new legal instrument (the “European Investigation Order”) providing a single legal basis for executing all types of investigative measures throughout the European Union and replacing all the existing instruments (both of mutual legal assistance and of mutual recognition).

Given the weaknesses of the existing instruments of mutual recognition described above, the EIO would allow for a new approach based on mutual recognition, which would focus on the measure to be executed rather than on the evidence to be collected. The EIO would also drastically limit the grounds for refusal and would provide for specific time-limits. Concerning the most sensitive measures, the EIO would keep the flexibility of mutual legal assistance.



The EIO would also offer a single legal basis increasing the legal certainty of the overall system and making the system less burdensome for the practitioners.

## 6. IMPACT ANALYSIS

The impact of every policy option is measured below in function of the level of influence that it would have on specific issues falling within the context of the **economic, social and fundamental rights**. The aim of this analysis is to provide clear information as a basis for comparing the options against each other as well as against the status quo and for ranking them in relation to the identified objectives.

The **economic impact** consists in the costs incurred (e.g. human and infrastructure costs, co-funding of projects, enforcement costs...) for the implementation of the policy. In this context, consideration should be given to the likely implications of the proposal on the public expenditures, but also to the benefits of the action in the mid and long term.

The **social impact** is mainly assessed in terms of good administration of Justice (impact on the responsibilities of the public administration), confidence of the citizens in their State and in the European institutions to combat crime and carry out security and, finally, the level of satisfaction of the practitioners *vis-à-vis* their expectations.

The impact on **fundamental rights** also needs to be examined because of the necessary compatibility of the EU action with the Charter of Fundamental Rights. While all policy options described below respect the fundamental rights, some of them will however have a positive or negative impact on certain rights, identified in this assessment as the followings:

- the right to security and liberty (chapter II: freedoms);
- the right to good administration (chapter V: citizen's rights).

Table of symbols: "-" is used for costs and "+" for benefits

Low intensity	- / +
Medium intensity	-- / ++
High intensity	--- / +++
No impact	0

### **6.1. Policy option A: No new action in the European Union**

This option would not address the problem at issue and will not lead to a simplification of the procedures called for by a good administration of Justice and by the judicial authorities<sup>1</sup>. No positive impact under this option is expected, rather the contrary. The current evolution towards more confusion and complexity has slowed down the improvement of the judicial cooperation in criminal matters through mutual recognition in the EU and the achievement of an area of freedom, security and justice.

As already mentioned, the first point of criticism results from the fragmentation and complexity of various instruments based on mutual recognition. This situation will only deteriorate when the FD on EEW will be put into practice in 2011. While the introduction of the principle of mutual recognition in the field of extradition, *i.e.* the European Arrest Warrant, was a success story, this has not been the case in the field of obtaining of evidences. The difference between the above-mentioned situations can be explained by the fact that, for the matter of extradition, the system of mutual recognition has completely replaced the system of mutual legal assistance. On the contrary, these two systems will continue to co-exist in the field of obtaining of evidence: the issuing / requesting authority is occasionally given the choice to use mutual legal assistance or mutual

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<sup>1</sup> General report on the seminar "Judicial cooperation : from practitioners' expectations to the Union's legislative policy " (on the 10<sup>th</sup> anniversary of the European Judicial Network in criminal matters) doc. 5682/09 EJN 5 COPEN 16

recognition, with different rules applicable and, sometimes, different competent authorities. The fragmentation will be strengthened due to the fact that the EEW only covers part of the types of evidence and coexists with the instruments based on mutual assistance. Practitioners would have to use different types of instruments for different aspects of the same case: for example, an EEW to collect documents and a MLA request for taking a witness statement. Given the possibility to use mutual legal assistance to obtain objects, documents or data falling within the scope of FD on the EEW if they form part of a wider request for assistance or if the issuing authority considers in the specific case that this would facilitate cooperation with the executing State (Article 21 FD on the EEW), it is to be feared that it will never be used by the practitioners, like it is already the case with the FD on the freezing of assets<sup>1</sup>. This situation, which has to be absolutely avoided, will further weaken the confidence of the citizens in the ability of their Member States as well as in the capacity of the European institutions to take appropriate measures in order to enhance their security.

There are no discernible or measurable economic impacts of this option, but in the mid- and long-term, this 'status quo' option would entail a negative economic impact by a re-organization of the judicial authorities of the different Member States and a waste of time and means caused by the implementation of the FD on the EEW, while it should have resulted in a quicker and more effective judicial cooperation in criminal matters<sup>2</sup>.

In terms of social impacts, this option could lead, over time, to a lack of confidence between the EU Member States, which could result in the development of different practices in order to obtain evidence. This evolution would be at right angle to the objective of the European Union

Finally, the impact on fundamental rights is negative. Due to the numerous difficulties explained above, the lack of action to improve the current situation will jeopardize the right of the citizen to good administration and to security and freedom, since the disorganization of the competent authorities will affect the efficiency of the fight against crime and, as a consequence, the right of the citizens to live in a society with a high standard of safety.

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<sup>1</sup> See the replies to the EJM questionnaire, *op. cit.*

<sup>2</sup> COM(2003) 688 final, p. 2

## 6.2. Policy option B: Non-legislative action

This policy option, which concerns only non-legislative measures, has no precisely measurable economic impact. In the case of the adoption of recommendations, it is not easy to quantify the economic impact on the national budget, because this would depend entirely on the methods adopted by the individual Member States to comply with them. However, the financial cost of introducing such measures can be expected to be moderate.

This option could have a certain social impact, since there would be a particular improvement in the practice of judicial cooperation after the implementation of the FD on the EEW. Possible non-legislative measures are trainings or the drawing up of a manual or national fact sheets.

The impact on fundamental rights is difficult to assess. Indeed, if some improvements are expected by the setting up of non-legislative measures, there are still some uncertainties which remain concerning the real positive impact on fundamental rights.

### *Positive impact:*

Non-legislative measures, such as the training of judicial authorities or the drawing up of a manual or national fact sheets could result in perceptible improvements. In this field, it could be tremendously interesting for the practitioners to know which procedures are applicable in each Member States for each type of evidence. The compilation of national fact sheets or a manual could certainly facilitate the work of the judicial authorities. They would no longer, for each case, waste time to seek the procedures followed by the requested Member State. The establishment of national fact sheets could also stimulate Member States to reflect on and harmonise their own national practices.

The exchange of best practices and the adoption of recommendations are other possibilities to provide a degree of harmonisation of procedure for every type of evidence among the competent authorities of the EU.

*Negative impact:*

The drawing up of a manual, as already experienced with the EAW manual, is a labour-intensive job. To be useful and practical, it cannot be too complicated, but it has to be comprehensive. Insofar as each Member State will have internal and potentially evolving practices, this kind of manual might not to meet the practitioners' expectations.

The national fact sheets necessitate good coordination among the competent instances of each Member States, because the internal practices of a Member can differ depending on the competent authority in charge of the case. Otherwise, the national fact sheets would loose their usefulness. Moreover, the updating of these national fact sheets is very burdensome and requires regular attention from the Member States. The difficulty of such updating was already experienced with the 'Belgian fiche' of the EJM Network. Finally, non-legislative measures like recommendations are in general scarcely implemented. The level of compliance depends only on the goodwill of each Member State.

The objective of further improving the existing legal framework cannot be achieved with this option. The modest benefits brought by this option are not sufficient to avoid the disruption and confusion expected after FD on the EEW will put into practice.

### **6.3. Policy option C: Abrogation of the FD on the EEW (back to MLA)**

This policy option implies that the EU would abrogate the existing instruments of mutual recognition applicable in the field of the gathering of evidence, mainly the FD on the EEW.

In terms of economic impact, this option has a substantial impact. The implementation of the FD on the EEW (deadline: 19 January 2011) would be suspended by the Member States, which would entail a reduction of costs and of administrative work. The situation would remain as it was and

continue as it works at the moment. However, as explained in the explanatory memorandum of the EEW Commission's proposal<sup>1</sup>, the current situation is not satisfactory and an improvement of the legal framework is necessary. The cooperation in the field of obtaining evidence is slow and inefficient, because it makes use of the traditional mutual assistance procedures, even taking into account the improvements of the 2000 EU MLA Convention and its 2001 EU MLA Protocol. Differences between national laws also result in barriers to a good cooperation. So, in mid and long term, the absence of improvement of the legal framework will have a perceptible negative impact.

The return to mutual legal assistance would have an important social impact. With the recent entry into force of the Lisbon Treaty and the new adoption of the Stockholm Programme - which both enshrine the mutual recognition principle -, the signal sent to the citizens and practitioners would be highly contradictory and would not respond to the political mandate given by the European Council in December 2009.

The impact on the fundamental rights is difficult to appreciate: the scenario of "super-complexity" will not occur, but the weaknesses of the current situation will remain and the situation will not be improved by the abrogation of the FD on the EEW.

*Positive impact:*

To leave everything as it was has a positive impact, as the procedures for obtaining evidences will not be further complicated by the implementation of the FD on the EEW. The well-established rules will continue to apply and this *revival* of MLA implies significant advantages: it is a general framework permitting wide-ranging flexible cooperation providing the authorities involved are willing to do so and MLA is furthermore applicable to all investigative measures without requiring pre-existing evidence as such.

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<sup>1</sup> COM(2003) 688 final, p. 4, paragraphs 15 and following.

*Negative impact:*

The entry into force of the Lisbon Treaty enshrines the further development of judicial cooperation on the basis of the mutual recognition principle. The Stockholm Programme calls for the abrogation of the FD on the EEW and invites to replace it by a comprehensive instrument based on mutual recognition. This important political invitation would make it difficult to abrogate the FD on the EEW without a simultaneous deposit of a comprehensive instrument on the obtaining of evidence.

The return to traditional mutual legal assistance as it was seems not to be advisable.

Moreover, MLA presents some important weaknesses:

- the presence of numerous grounds for refusal, mainly matters of “public order”: this permits “mistrust” or “ill will” to impede or even prevent cooperation;
- the possibility of a government filter, even if it is hardly used in practice,
- the absence of fixed deadlines;
- the requirement of dual criminality authorised for search and seizure measures (and, by extension, for coercive measures).

In the explanatory memorandum of its proposal on EEW, the Commission also pointed out that some improvements are necessary in this field and reminded the conclusions of the first evaluation exercise on mutual legal assistance in criminal matters<sup>1</sup> which followed upon the comments and criticisms voiced from different sources.

#### **6.4. Policy Option D: New legislative action**

##### ***Option D.1.: Limited improvement of the EEW (EEW II)***

This policy option aims to supplement the existing FD on the EEW and strives to include all types of evidence in its scope.

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<sup>1</sup> OJ C 216, 1.8.2001.

The economic impact is significant: the substantial improvement brought by this option to the functioning of the cooperation between Member States for the obtaining of evidence will impose at the initial implementing stage an increased financial burden. Indeed, training and reorganisation of competent authorities at the very beginning of the implementation process will require an investment. On the other hand, it can be expected in the mid and long term that the procedures to obtain evidence in other countries will be faster and less burdensome and, as a consequence, will result in shorter criminal proceedings. The economic benefits will presumably far exceed the expected costs.

On the social and fundamental side, this option would entail a positive impact. Simplification of the legal framework would lead to a better administration of Justice and would reinforce the confidence of the citizens and the practitioners in the ability of their State and the European Institutions to combat criminality.

*Positive impact:*

The Framework Decision on EEW constitutes a starting point to incorporate the gathering of all types of evidence in one single legal regime. Another positive impact is the unification of the legal framework and, as a consequence, the simplification of the procedures based only on the principle of mutual recognition.

*Negative impact:*

The FD on the EEW has been criticised. The negotiation of this instrument was long and difficult. The instrument contains some complex provisions in comparison with other instruments of mutual recognition (validation procedure) and there is a degree of regress compared to the MLA instruments (introduction of the territoriality clause). There is an important risk that the difficulties encountered in the negotiation of the EEW I will occur again or increase during the negotiation of the EEW II. It is likely that the Member States which have obtained arrangements/exceptions as regards to the EEW I, which only covers simple types of evidence, will ask for the same arrangements/exceptions for the more sensitive measures which would be covered by the EEW II (expertise, interception of telecommunication...). If this policy option is chosen, the transitional



period (from the implementation of EEW I in January 2011 to the complete implementation of EEW II) will be a very difficult period and it can be feared that neither real progress nor simplification will be expected. Finally, if the EEW II will only supplement and not replace totally the EEW I, the risk of splitting up of the legal framework will not be resolved while it is an important topic for the practitioners. Multiple requests would still have to be sent depending of the nature of the requested act.

***Option D.2.: Replacement of all existing instruments by an EIO with global scope***

This option would imply the adoption of a new legal instrument (the “European Investigation Order”) providing a single legal basis for executing all types of investigative measures throughout the European Union and replacing all the existing instruments (both of mutual legal assistance and of mutual recognition).

This policy option entails an important economic impact: the replacement of all existing instruments will impose at the initial implementing stage an increased financial burden on the functioning of the cooperation between Member States in the field of obtaining of evidence. Indeed, a new legal framework will have to be implemented by the practitioners who will be trained accordingly. Reorganisation at the very beginning of the implementation will cost but, on the other hand, easier, quicker and consistent procedures to obtain evidence will replace the current and more complex framework. Economic benefits in the mid and long term, through fluent cooperation between Member States and shorter criminal proceedings, will presumably far exceed the costs.

On the social and fundamental side, this option would entail a positive impact. The unique legal framework will respond to the practitioner’s appeal. It will also meet the concern of the citizens to be protected and to combat criminality. Finally, the ability of the Member States and the European institutions to evaluate their policies and instruments and, if need be, to amend it, can be seen as a maturity posture and a good management skill.

*Positive impact:*

First of all, the replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition and covering all types of evidence is presented as the most effective solution to simplify the legal framework in the field of obtaining evidence.

Starting again from scratch will have some positive impact because Member States will not be bound by pre-existing arrangements or exceptions for that matter.

This option could respond to the criticism made both to mutual legal assistance and to mutual recognition in the EEW:

- MLA : numerous grounds for refusal, government filter still possible, no obligation in terms of time limits for executing the request, no standard forms to be used, requirement of dual criminality authorised for search and seizure measures
- EEW : very limited scope, regress and numerous grounds for refusal

Finally, it has to be noted that the entry into force of the Lisbon Treaty will also imply new voting procedure in the Council (qualified majority) and, as a consequence, it will be more difficult for one single Member State to impose exceptions.

*Negative impact:*

A single legal instrument will only make sense if it supplies an added value in regard to the existing Conventions and Framework Decisions and would actually reach the objective of a single and efficient instrument for obtaining evidence. But one must be realistic: the negotiation process of the FD on the EEW was long and difficult and it is likely that this scenario will be repeated during the adoption procedure of this new instrument. Some Member States will probably request to keep arrangements/exceptions already adopted in previous instruments of mutual recognition and this will reduce the efficiency of the new instrument.

## 7. COMPARISON OF OPTIONS

### 7.1. Cost-benefit summary table

Costs (-)/benefits (+)

Policy option	Economic impact	Social impact	Impact on fundamental rights
A	negative : - (in the mid/long term) positive : 0	negative : - positive : 0	negative : --- positive : 0
B	negative : - positive : +	negative : - positive : +	negative : - positive : +
C	negative : - positive : ++	negative : -- positive : 0	negative : -- positive : +
D1	negative : -- positive : ++	negative : 0 positive : ++	negative : 0 positive : ++
D2	negative : -- positive : +++	negative : 0 positive : +++	negative : 0 positive : +++

### 7.2. Advantages and disadvantages of the various policy options

Policy option	Advantages	Disadvantages
A	No advantages	No improvement of the current situation Complex legal framework remains Risk of non application of the FD on the EEW No response to the practitioner's expectations
B	Some improvements expected in the practice	Setting up of a manual on potentially changing practices is a long drawn-out (and maybe useless) job Scarcely implementation of recommendations expected No response to the practitioner's expectations

C	<p>Avoiding the super-complexification in the field of obtaining evidence</p> <p>Back to already known practices</p>	<p>Back to MLA is a negative political signal to practitioners and citizens</p> <p>No response to the political mandate included in the Stockholm Programme to propose a new comprehensive instrument</p> <p>No response to the practitioner's expectations</p>
D1	<p>Simplification of the current legal framework (by replacing the MLA legal framework) - no more coexistence of MLA and MR</p> <p>Integration of the advantages of the MR</p>	<p>No simplification of the current legal framework (as several instruments of MR will be applicable)</p> <p>Lots of criticism in relation to the basic text (FD on the EEWI) from the experts and practitioners</p> <p>Difficulties to stand back from the vested arrangements/exceptions of the EEWI</p> <p>Difficulties during the transitional period</p> <p>No response to the practitioner's expectations</p>
D2	<p>One single instrument for this field</p> <p>No more coexistence of MLA and MR</p> <p>Integration of the advantages of the MR</p> <p>Response to expectation's practitioners</p>	<p>Probable difficult negotiation (difficulties to maintain an added-value)</p>

### 7.3. Comparison of options

Objectives	A	B	C	D1	D2
Acceleration of the procedure	-	-	-	x	x
Ensuring admissibility of evidence	-	-	-	-	x
Simplification of the procedure	-	-	x	x	x
Maintaining a high level of protection of fundamental rights, especially procedural rights	-	-	-	x	x
Reducing the financial costs	-	-	-	-	x
Increasing mutual trust and cooperation	-	-	-	x	x
Preserving the specificities of national systems and their legal culture	x	x	x	x	x

The option A (no action) seems not to be advisable, in the light of all the above. Option B seems insufficient to improve the current situation, and option C presents some important political inconveniences.

Option D.1. and D.2. would certainly improve the current legal framework, by the removal of the coexistence of both system of MLA and MR. The advantages of the instruments of mutual recognition, like deadlines and form, will simplify and accelerate de procedure to obtain an evidence in another MS. The economic and social benefits, as described above, will be positive, as the impact on the fundamental rights.

Compared to option D.1., option D.2. is considered as the best option in view of the objectives pursued:

- Accelerating the procedure:
  - o specific deadlines applicable to all types of measures;
  - o general principle according to which the investigative measure should be carried out in the executing MS with the same celerity and priority as for a similar national case (“assimilation principle”).

- Ensuring admissibility of evidence:
  - o participation of the issuing authorities to the execution of the measure.
- Simplifying the procedure:
  - o one single instrument to be applied by the practitioners;
  - o flexibility in the execution of the measure.
- Maintaining a high level of protection of fundamental rights: neutral.
- Reducing the financial costs: results from the facilitation and acceleration of the procedures (see above).
- Increasing mutual trust and cooperation: increased and more automatic cooperation while maintaining direct contacts.
- Preserving the specificities of national systems and their legal culture: a Directive would provide the freedom for the Member States to determine which measures would be the most appropriate to reach the Directive's objectives, taking into account the specificities of the national systems and legal culture. The latter will be likewise strengthened by the implementation of the principle of mutual recognition and the stipulated flexible approach concerning the most sensitive measures.

## **8. MONITORING AND ASSESSMENT**

To assess whether and to which extent the objectives of the proposal are met, a comparison will be useful between the current situation (mutual legal assistance with, to some extent, coexistence with mutual recognition) and the situation under the application of the new instrument.

Such assessment will be difficult because of the lack of reliable and/or comparable statistics currently available in the Member States.

The practice developed in the Council regarding the assessment of the use of the European Arrest Warrant, even though it can not be considered yet as a rigorous statistical exercise at EU level, shows that evaluation on the basis of quantitative information is possible and indeed useful. However, the gathering of such information in the sector of evidence is much more complicated. Nevertheless, efforts should be dedicated to finding ways to compare the current and the future situation with regard to the objectives mentioned above.

The following annual indicators should in particular be or become available :

- number of requests for MLA and number of EIOs issued and received in each MS;
- number of requests for MLA and number of EIOs issued which resulted in the execution;
- number of requests for MLA and number of EIOs issued which led to a refusal to execute;
- average length of the procedure between the issuing/reception of an MLA request or an EIO and the decision on the execution;
- average length between a positive decision on the execution of the MLA request or the EIO and the actual execution of the measure;
- average length of the procedure between the execution of a measure on the basis of the MLA request or the EIO and the transmission of the evidence to the requesting/issuing authorities;
- number of cases where the evidence which resulted from the execution of MLA requests and EIOs was declared inadmissible.

These indicators will be useful to assess the fulfilment of objectives 1 (acceleration), 2 (admissibility) and 3 (simplification). More qualitative data will be necessary for objectives 4 (protection fundamental rights), 6 (increasing mutual trust) and 7 (preserving national systems). As for objective 5 (reducing the costs), a specific evaluation would be necessary.

## **9. LEGAL BASIS, SUBSIDIARITY, PROPORTIONALITY AND FUNDAMENTAL RIGHTS**

### **9.1. Legal basis and political mandate**

Article 67(1) of the Treaty on the Functioning of the European Union (TFEU) states that "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States" and Article 67(3) states that "the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation

between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws".

Article 82(1)(d) of the Treaty on the Functioning of the European Union states that "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to: (a) (...) (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions".

Point 3.1.1. of the Stockholm Programme approved by the European Council on 10 and 11 December 2009 states that "The European Council considers that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The existing instruments in this area constitute a fragmentary regime. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned. ». The European Council invites to replace all the existing instruments in this area, including the Framework Decision on the European Evidence Warrant, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.

## **9.2. Subsidiarity**

The Subsidiary principle is intended to ensure that decisions are taken as closely as possible to the citizen. It implies that the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level<sup>1</sup>. Obtaining of evidence has by its very nature a trans-border dimension that implies an EU action.

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<sup>1</sup> Article 5(1) and (3) of the Treaty on European Union



### **9.3. Proportionality**

In relation to the principle of proportionality and in accordance with Article 5(1) and (4) of the TFEU and of Protocol 2 annexed thereto, on the Application of the Principles of Subsidiarity and Proportionality, EU action in this area may not go beyond what is strictly necessary to attain its objective.

Insofar as the objective is the adoption of a single and efficient legal instrument for executing all types of investigative measures throughout the European Union and replacing all the existing instruments, the “European Investigation Order” appears to be the most appropriate, and as a consequence, the most proportionate way to reach this objective.

### **9.4. Fundamental rights**

All action by the European Union must respect fundamental rights and observe the principles recognised by the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the right to human dignity, life and physical and mental integrity, as well as the right to an effective remedy. When they apply EU legislation the Member States must act in compliance with these rights and principles, so that they cannot interfere with the fundamental legal principles enshrined in Article 6 of the Treaty on European Union.

As developed above, all policies envisaged respect the fundamental rights. However, the option of the “European Investigation Order” will have the most positive impact on the rights identified in this assessment, *i.e.* the right of freedom and security and the right to good administration.

## ACRONYMS

EIO	European Investigation Order
EU	European Union
FD	Framework Decision
EAW	European Arrest Warrant
EEW	European Evidence Warrant
MLA	Mutual Legal Assistance
MR	Mutual Recognition
MS	Member State(s)