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Formal and Informal Circulation of Cross-Border Evidence in Europe and Possible Improvements: Toward an "Annex E" of the European Investigation Order?[**]

Abstract

The present article discusses possible improvements in the field of circulation of cross-border evidence in Europe. It begins with an overview of the developments of the different channels for evidence circulation, by differentiating informal sharing of evidence from formal exchanges. It then discusses the many features of these two categories, with a view to identify shortcomings and incoherences. On the basis of these shortcomings, suggestions for improvements are put forward. The main proposal of this paper is to introduce in the European Investigation Order (EIO) a new form – annex E – for transmitting the requested evidence to the issuing State. It is argued that such a form would help clarify the formal nature of the exchange of evidence that takes places with the EIO and that it would be conducive to a better mutual trust and to a greater protection for fundamental rights at the moment of assessing evidence in the issuing State.

I. Trends

Circulation of cross-border evidence has increased in recent years, within the European Union (and beyond).[1] This is likely due to multiple factors: the increase in cross-border crime, the greater willingness to cooperate among States, and also the result of more established practices. Large scale digital investigations, like in the recent EncroChat or SkyECC cases, have also contributed to the increase.

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1 For instance, in the two years after the deadline of transposition of the European Investigation Order (on which instrument, see *infra*) Eurojust registered 1,529 cases dealing with such instrument: Eurojust, 'Report on Eurojust's casework in the field of the European Investigation Order, November 2020', available at < https://www.eurojust.europa.eu/sites/default/files/assets/2020_11_eio_casework_report_corr.pdf >, last accessed 19 June 2024.

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Such circulation increases the challenges that collection and use of cross-border evidence traditionally poses. Cross-border evidence is evidence collected in a territory other than that where it is (going to be) used, with all the problems of possible conflicts of rules and sovereignties that this might raise both at the time of gathering and at the time of admissibility and use of evidence. The latter point – admissibility and judicial use – is particularly sensitive. Many scholars point especially to the fact that inserting foreign evidence into a national system can create problems of compatibility between rules of different national orders. As was aptly written, "[t]he entire question of MLA [mutual legal assistance] in obtaining evidence becomes completely useless if in the end, the obtained evidence will not serve any purpose in trial due to inadmissibility."[2] At the same time, cross-border evidence might pose difficulties to the exercise of defence rights. Some have also claimed that "the 'exporting' of evidence (made possible by the principle of mutual recognition) risks undermining accused rights through the so-called 'forum shopping': that is, the choice of jurisdiction with the less developed fair trial rights".[3]

Given the above, it seems the right moment to reflect on the existing possibilities and rules for evidence circulation in Europe.[4] What is the current state of affairs and what, if any, is the way forward for evidence circulation in Europe? This article attempts to give a brief sketch of the situation and suggest some possible advancements.

II. Expanding channels

The last three decades have witnessed a multiplication of the channels for evidence and information exchange in criminal cases. Within Europe the purpose has been, first, to complement the existing framework of the Council of Europe – finding its basis in the 1959 Council of Europe Convention on Mutual Legal Assistance (hereafter, 1959 MLA Convention).[5] Progressively the 1959 MLA Convention has been largely supplanted in the relationship between member States of the European Union by new instruments and mechanisms.

The first goal was to establish new channels of exchange that could enlarge the flow of circulation and make it swifter. A second goal was to improve the quality of the exchange – particularly in order to ensure that foreign evidence could be received favorably and used in courts as lawful evidence. Sometimes, the introduction of a new channel pursued both goals simultaneously.

2 Gert Vermeulen, Wendy De Bondt, Yvonne Van Damme, *EU cross-border gathering and use of evidence in criminal matters* (Maklu 2010) 31.

3 Kai Ambos, *European Criminal Law* (Cambridge University Press 2018) 136.

4 As should be clear from the evidence, circulation is here intended in a broad manner so as to include any form of cross-border collection and/or exchange of evidence between two countries.

5 European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20.IV.1959) 30 ETS 1.

These developments also took place outside the European Union, although within the Union the pace of growth was faster. It is no secret that establishing closer cooperation in the field of evidence gathering and exchange has been a goal of the European Union for several decades.[6] Throughout the years, the EU has experimented with different options and models. It has created new channels based on the request model,[7] but also on the principle of availability,[8] besides introducing the principle of mutual recognition in the field of evidence gathering and exchange. Recently, it has also devised new "self-service" options (see *infra*, IV).

As for the first line of developments – the expansion of the flow of exchange and the creation of new channels – this happened in many different forms. The main divide that can be identified is between simplified, or informal, exchanges and formal ones.

III. Existing rules and instruments: the growth of channels for informal/simplified exchange

In the creation of new channels of circulation, the goal was not just to increase the circulation of evidence for judicial use. The approach taken was that of fostering the sharing of information in general, particularly with a view to increasing the efficiency of investigations. A major role in such expansion was played by the developments of channels of informal or simplified exchanges, where authorities (law enforcement authorities and/or judicial authorities) would share useful investigative leads and results to support each other's action of enforcement. Within this category a major role was played by forms of spontaneous exchanges,[9] which seemed initially the only possible way for simplified exchanges.

Within the European Union, new such channels were introduced as early as 1990 with the Convention Implementing the Schengen Agreement (CISA).[10] Article 46

6 See, among other documents, the European Commission's Green Paper on 'Obtaining evidence in criminal matters from one Member State to another and securing its admissibility', Brussels, 11.11.2009, COM(2009) 624 final.

7 André Klip, *European Criminal Law. An integrative approach* (4th edn., Intersentia 2021) 451.

8 That is the principle according to which "throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State": The Hague Programme: Strengthening Freedom, Security And Justice In The European Union (2005/C 53/01, OJ C 53/1, 3.03.2005, 7). Some authors also identify a model of "automated availability", whereby "information held by national law enforcement agencies is directly accessible in an automated manner to the law enforcement authorities of another member State", Klip (n. 7) 469.

9 Michele Simonato, 'The Spontaneous Exchange of Information between European Judicial Authorities from the Italian Perspective' (2011) 2 New Journal of European Criminal Law 220.

10 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany

establishes that "in specific cases, each contracting party may, in compliance with its national law and without being so requested, send the contracting party concerned any information which may be important in helping it combat future crime and prevent offences against or threats to public policy and security."

Later, in 2000, the European Union passed the Brussels EU Convention on Mutual Legal assistance (hereafter, Brussels Convention 2000), meant to complement the 1959 MLA Convention.[11] Among others, the Brussels Convention 2000 provides in its Art. 7 for the possibility of spontaneous exchange of information. The provision allows the competent authorities of the Member States (hereafter, MS) "[w]ithin the limits of their national law" to "exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law referred to in Article 3(1)". Article 7 clarifies that "[t]he providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority", in which case "[t]he receiving authority shall be bound by those conditions".

Similarly, in 2001, the Council of Europe adopted the Second additional protocol to the 1959 MLA Convention (hereafter, Second Additional Protocol to the 1959 MLA Convention)[12] including provisions on spontaneous information exchange. In this regard, Art. 11 provides, in line with the provision enshrined in Art. 7 Brussels Convention 2000, that competent authorities may "without prior request, forward to the competent authorities of another Party information obtained within the framework of their own investigations, when they consider that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under the Convention or its Protocols". Although also the instrument of the Council of Europe establishes that the receiving Party shall be bound by the conditions imposed by the providing Party, the Second Additional Protocol allows for the possibility for any contracting State to declare that it reserves the right not to be bound by such conditions unless it receives prior notice of the nature of the information to be provided and agrees to its transmission.

Some years later, in 2006, a framework decision (also called "Swedish Framework Decision" from the name of the proponent State) was also passed with a view to simplifying the exchange of information between law enforcement authorities, either upon request or on a spontaneous basis.[13] This channel was meant specifically to enhance cooperation in criminal investigations and criminal intelligence operations, and not with a view to allowing the circulation of evidence, though this possibility

and the French Republic on the gradual abolition of checks at their common borders (19/06/1990) OJ L239/19.

11 Council Act establishing in accordance with Art. 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (29 May 2000) OJ C197/1.

12 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 8.XI.2001) 182 ETS 1.

13 Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (18 December 2006) OJ L386/89.

is not totally excluded.[14] This instrument is the implementation of the availability principle, where simplified exchanges are created outside of a mutual informal agreement between authorities.[15] As mentioned, the instrument does not rule out spontaneous exchanges: however, it moves beyond a purely voluntaristic framework.

According to Art. 7 paras. 1 and 2 of Framework Decision 2006/960/JHA, competent law enforcement authorities shall, without any prior request being necessary, provide to the competent law enforcement authorities of other Member States concerned information and intelligence in cases where there are factual reasons to believe that the information and intelligence could be relevant and necessary for the successful detection, prevention or investigation of offences referred to in the list of offences dispensed from any double-criminality check enshrined in Framework Decision 2002/584/JHA on the European arrest warrant (Framework Decision EAW).[16]

Moreover, the Framework Decision introduces informal exchanges upon request: to this extent it creates obligations to exchange information and intelligence (Art. 3), save for specific reasons (Art. 10),[17] and this under conditions that are not stricter than those existing for equivalent domestic exchanges (Art. 3 para. 3). The provision of time limits for responding to the request (Art. 4) is meant to ensure swiftness, but also to strengthen the obligations provided for by the law. It might sound odd to consider these exchanges informal once a dedicated legal framework is established for them. Nonetheless, despite being encapsulated into legal rules, they maintain some traits of

14 Art. 1 para. 4 Framework Decision 2006/960 provides that the "Framework Decision does not impose any obligation on the part of the Member States to provide information and intelligence to be used as evidence before a judicial authority nor does it give any right to use such information or intelligence for that purpose." However, that same Article goes on to state that "Where a Member State has obtained information or intelligence in accordance with this Framework Decision, and wishes to use it as evidence before a judicial authority, it has to obtain consent of the Member State that provided the information or intelligence, where necessary under the national law of the Member State that provided the information or intelligence, through the use of instruments regarding judicial cooperation in force between the Member States. Such consent is not required where the requested Member State has already given its consent for the use of information or intelligence as evidence at the time of transmittal of the information or intelligence." See also Mar Jimeno-Bulnes, 'The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama' (2017) 8 New Journal of European Criminal Law 171, 178.

15 Other implementations of the availability principle can be found in the instruments establishing shared databases. See, for instance, Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008, 1–11.

16 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (13 June 2002) OJ L 190/1 as amended by Council Framework Decision 2009/299/JHA.

17 Art. 10 Framework Decision 2006/960 provides for the following reasons to refuse to provide information: i) harm to essential national security interests; ii) possible prejudice for ongoing investigations; iii) disproportionate or irrelevant requests in light of its purposes. Also, information can be withheld if the request relates to minor offences, punished with imprisonment of one year or less, or if there is no judicial authorization and this was required in the requested State,

informal exchanges, particularly when they are compared against requests for legal assistance or for mutual recognition (*infra*, IV.): a) they remain rather minimal in terms of procedural requirements, and much less precise in terms of their object; b) they are meant to advance investigations and intelligence operations, and they are not meant for allowing judicial use. In this respect, they still belong to the category of simplified, largely informal, exchanges.

As of 12 December 2024, the above-mentioned Framework Decision will be repealed by Directive (EU) 2023/977 on the exchange of information between the law enforcement authorities of Member States.[18] The Directive is meant to improve the earlier framework, which in earlier evaluations had proved to be insufficiently clear and, also due to this, scarcely used.[19] The model of exchange remains based on the availability principle, to which now four more principles are added: equivalent access, confidentiality, data ownership, data reliability (Art. 3).

The new EU legal instrument includes a provision on "own-initiative provision of information" that is very close to the one enshrined in Framework Decision 2006/960/JHA, but that can be considered, at the same time, an expanding development of the latter. Pursuant to Art. 7 Directive (EU) 2023/977, Single Points of Contact of the Member States or their competent law enforcement authorities may provide information to Single Points of Contact of another Member States or to the competent law enforcement of another Member State where there are objective reasons to believe that such information could be relevant to those other Member States for the purpose of preventing, detecting or investigating criminal offences. However, the information exchange of own initiative becomes compulsory if it could be relevant for the purpose of preventing, detecting or investigating serious criminal offences (Art. 7 section 2).[20] Exceptions to such duty are the case in which a judicial authorisation for the exchange of information would be required and is refused; and the case in which there are objective reasons to believe that the provision of the information would be contrary or harmful to the essential interests of the national security, jeopardise the success of an ongoing investigation or the safety of an individual, or unduly harm the protected important interests of a legal person.

The Directive maintains the possibility of an exchange upon request, which could happen either by request sent to the Single Points of Contact of the Member States (Art. 4), or sent directly to the competent law enforcement authority (Art. 8). When a request is sent to the Single Point of Contact, the latter has an obligation to respond and provide information within deadlines (now shorter than before, Art. 5), unless

18 Directive (EU) 2023/977 of the European Parliament and of the Council on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA (10 May 2023) OJ L134/1. Next to repealing Framework Decision 2006/960 (Art. 21), the Directive will replace arts. 39 and 46 of the CISA (Art. 20).

19 Preamble, point 6, Directive 2033/977.

20 Serious offences are defined with references to Art. 2 para. 2 Framework Decision EAW and Art. 3 paras. 1 and 2 Directive 2016/794.

there is a reason to refuse (Art. 6) – and the list of reasons here has been enlarged compared to the earlier Framework Decision 2006/960.

The new provisions of Directive (EU) 2023/977 arguably broaden the scope and opportunities for informal (here, simplified) exchanges compared to the Swedish Framework Decision. First, information exchange is no longer limited to investigations concerning the so-called 'list offences' included in Framework Decision EAW, but it must occur for (also any other) serious criminal offence. Second, the rule that the information may be shared only to the extent that it is deemed relevant and necessary for the successful detection, prevention and investigation of the conduct in question has not been included in the new Directive. Third, Directive (EU) 2023/977 introduces an additional possibility to discretionally share information without prior request in relation to (any type) of criminal offence.

Nonetheless, the point remains that the above exchanges are meant for the purpose of prevention and investigation of criminal offences, not with a view to using the information in evidence (Art. 1 para. 3 (c)). In this respective the text confirms the earlier approach that the exchange of information "does not establish any right to use the information provided" (Art. 1 para. 4).[21]

Further possibilities of exchange of information in criminal cases are also foreseen in instruments promoted by organizations other than the European Union: for instance, in the United Nations Convention against Transnational Organized Crime of 15 November 2000 and the Protocols Thereto (Art. 27, Art. 7 with regard to money laundering, Art. 10 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Art. 12 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime).[22] Similarly, other Council of Europe Conventions also provide for the spontaneous transmission and exchange of information. This is for instance the case of Art. 26 Convention on Cybercrime (Budapest Convention, hereafter CCC),[23] giving the possibility to forward information that could assist in "initiating or carrying out investigations or proceedings" concerning the offences harmonized by the Convention. Also, this Article establishes that information may be kept confidential or only used subject to

21 It could be argued that the new provisions of Art. 3 are softer on this point that the earlier Art. 1 para. 4 Framework Decision 2006/960, in that the latter always required consent of the sending State for a subsequent judicial use. No mention of consent is instead made in the new provisions, while point 14 of the preamble of Directive 2023/977 maintains that "even though they are not required to do so under this Directive", the sending State "should be allowed to consent, at the time of providing the information or thereafter, to the use of that information as evidence in judicial proceedings".

22 United Nations Convention against Transnational Organized Crime (Palermo, 15 November 2000) 2225 UNTS 209.

23 Convention on Cybercrime (Budapest, 23.XI.2001) 185 ETS 1.

conditions stablished by the transmitting State.[24] Provisions on spontaneous information exchange can also be found in Art. 20 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,[25] Art. 22 of the Convention on the Prevention of Terrorism,[26] Art. 28 of the Convention on Corruption,[27] Art. 34 of the Convention on action against Trafficking in Human Beings.[28]

All these cases of informal – often spontaneous – exchanges have a common feature. They are meant to allow national authorities (not necessarily judicial authorities, as in most cases they could be used also by law enforcement authorities in general) to improve the cooperation on an investigative level. They do not have judicial use of the exchanged elements as their main goal. It is therefore no surprise that most of these instruments do not contain specific safeguards for the procedural rights of people (directly or potentially) involved in the investigations. The rules concerning these exchanges, when present, are meant to either ensure efficiency or to protect the confidentiality of the information shared, the secrecy of investigations, and particularly the sending State and its sovereign interests. With regard to rights, they consider, at most, the right to privacy (data protection), but they are indifferent to the right of defence of suspects/accused: again, this is because they are not meant for adjudication purpose. Given this, one could be tempted to leave out these instruments from the forms of evidence exchange. They are instruments of policing, for sharing investigative information and intelligence, more than judicial tools for exchanging evidence.

However, insofar as the boundary between formal and informal exchanges is built along the divide between information and intelligence on the one hand, and evidence on the other, it remains a blurred one. In many countries the difference between intelligence, information, and evidence is not so sharp as in others. Information (and sometimes even intelligence) can easily turn into evidence and can then be used for judicial

24 Art. 26 (Spontaneous information) of the CCC provides that "A Party may, within the limits of its domestic law and without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request for co-operation by that Party under this chapter." According to section 2, "Prior to providing such information, the providing Party may request that it be kept confidential or only used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them."

25 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw, 16.V.2005) CETS 198.

26 Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16.V.2005) CETS 196.

27 Criminal Law Convention on Corruption (Strasbourg, 27.I.1999) ETS 173.

28 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005) CETS 197.

purposes.[29] In fact, it is not infrequent for these channels to be used also for evidence exchange.[30] For instance, in the recent EncroChat investigations, Art. 26 CCC has been used for sharing some of the results obtained from the hacking of the French servers of the cryptophone company.[31] Moreover, these instruments do not expressly exclude the possibility of judicial use, hence leaving such possibility open.[32] It is therefore unsurprising that these channels were described as "the 'bitterest enemy' to face" in the streamlining of cross-border evidence circulation.[33]

IV. New channels for formal exchanges. JITs, EIOs, direct gathering (or "self-service" model)

The creation of new channels was not limited to informal or simplified exchanges. It included also the creation of new "formal" channels for requesting/obtaining evidence from or in other countries. The goal of these new instruments was to create more efficient alternatives to the traditional system of rogatory letters for the collection of evidence abroad and its judicial use. Among these new options figures the creation of joint investigation teams (JITs), which permit the authorities of more countries to join forces and conduct a common investigation with the possibility to collect evidence in all the countries involved in the JIT.[34] The evidence collected can then be used for the purposes for which the JIT has been set up (and also for detection, investigation and prosecution of other offences but with the consent of the MS where the information became available).[35]

Meanwhile, the European Union has also introduced forms of circulation of evidence based on the principle of mutual recognition.[36] This is particularly the case with

29 On this, see the different national perspectives comprised in Benjamin Vogel (ed.), *Secret Evidence in Criminal Proceedings. Balancing Procedural Fairness and Covert Surveillance* (Duncker & Humbolt 2021).

30 Although it is to be said that overall cases of spontaneous exchange remain fairly limited despite the plethora of instruments and possibilities available.

31 See the judgment of the Supreme Court of the Netherlands (Hoge Raad, 13 June 2006, ECLI:NL:HR:2023:913), § 5 (*Feitelijke context*).

32 With specific regard to Framework Decision 2006/960: Jimeno-Bulnes (n. 14) 178.

33 Silvia Allegrezza, 'Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', ZIS (2010) 569, via < https://zis-online.com/dat/artikel/2010_9_489.pdf > accessed 19 June 2024.

34 Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA), OJ L 162, 20.06.2022, 1–3. The possibility was already introduced in Art. 13 of the Brussels Convention 2000 and when the latter enters into force in all Member States the provisions of the Framework decision shall cease to have effect.

35 Art. 10 Council Framework Decision on joint investigation teams (2002/465/JHA).

36 According to some, this instrument is a "combination of the efficiency of the *order model* (MR system) with the flexibility of the request model (MLA system)": Stefano Ruggeri, 'Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open issues', in Stefano Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* (Springer 2013) 9.

Directive 2014/41 on the European Investigation Order (hereafter EIO Directive),[37] which came to replace the earlier Framework decision on the European evidence warrant, and the many other overlapping instruments for evidence gathering, taking "precedence" between Member States over those other instruments (point 35 of the preamble). The European investigation order (EIO) is a judicial decision to collect evidence on behalf of the requesting State, or to share already existing evidence; if recognised, the decision is binding upon the requested State.[38] In the current landscape of instrument for collecting evidence abroad, the EIO is the most important, and most used, instrument. This is because it combines the swiftness of mutual recognition, with the possibility to collect usable evidence.

With the EIO, the purpose is explicitly that of permitting judicial use of the evidence collected abroad. As it is mainly – almost exclusively – intended for evidence collection, the rules show a distinctive greater complexity than those of informal exchanges. First, they put the instrument in the hands of judicial authorities, in that it is only a judicial authority that can issue the order, either a judge (court) or a public prosecutor (Art. 2 EIO Directive). Other authorities, including law enforcement authorities, have to see their request validated by either a prosecutor or a judge (Art. 2 (c) (ii) EIO Directive). Second, the conditions for filing the request are more exacting, and it is not difficult to argue that even the assessment of necessity and proportionality (enshrined in Art. 6 EIO Directive and left to the appreciation of the issuing State) is stricter than it is in informal exchanges. Third, the instrument is meant not solely to collect already existing evidence, but also to obtain from the executing State the collection of evidence. Because the mechanism employed is that of mutual recognition, the requested State is in principle obliged to act upon the order of the issuing State, though a long list of refusal grounds can be activated (Art. 11 EIO Directive). Moreover, the requested State is given the possibility to employ an alternative inves-

37 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, 1–36.

38 In general, on the EIO, see Marcello Daniele, 'Evidence Gathering in The Realm of The European Investigation Order. From National Rules to Global Principles' (2015) 1 New Journal of European Criminal Law 179; Inés Armada, 'The European Investigation Order and the lack of European standards for gathering evidence' (2015) 1 New Journal of European Criminal Law 8. On the proposal: Silvia Allegrezza, 'Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality', in Stefano Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe* (Springer 2014) 51–67; Lorena Bachmaier Winter, 'The Proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessment', in Ruggeri (*ibid.*) 68–90; Catherine Heard and Daniel Mansell, 'The European Investigation Order: Changing The Face of Evidence-Gathering in EU Cross-Border Cases' (2011) 2 New Journal of European Criminal Law 353; Annalisa Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order' (2014) 10 Utrecht Law Review.113; Frank Zimmermann, Sanja Glaser and Andreas Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order' (2011 European Criminal Law Review (2011) 56.

tigative measure in a number of instances (where the measure does not exist or would not be available, but also where an alternative measure would be less intrusive). The rules on refusals particularly, together with those provided for some specific investigative measures (Arts. 22–31 EIO Directive), show the greater complexity of this instrument, which must combine the interest of the requesting State to obtain evidence, with that of the executing State to ensure that any activity of data collection on its soil is done in ways that are compatible with the national rules, interests and national protection of rights. Therefore, the innovative idea of introducing the mechanism of mutual recognition with regard to evidence collection did not entail an absence of formalities or controls. The Directive is instead silent as to the use of the obtained evidence, and this leads (as we shall see, *infra*, § VI) to quite some debate. What is (or should be) obvious is that the instrument, although meant to ensure circulation of evidence and its possible use in the issuing State, does not entail an obligation for the issuing State to admit the requested evidence.[39]

Lately, the European Union has also introduced forms of direct collection of evidence abroad (the European Production order for digital evidence).[40] This new instrument lies somewhere between a form of direct collection of cross-border evidence and a more advanced form of mutual recognition. This "self-service" model might be the opening of a new era, although the possibility of the extension of this model beyond the collection of documentary pre-existing evidence held by qualified subjects (such as Internet Service Providers and, possibly, banks and other similar institutions) seems in the near future rather unlikely.

V. Lex loci v lex fori

As for the other line of improvements to the 1959 MLA Convention – those meant to advance the quality of the circulation – the approach taken mainly moved in the direction of reducing as much as possible frictions between the national laws (conflicts of laws). The traditional rule in the 1959 MLA Convention is that evidence is to be collected following the rules in force in the territory of the country where the activity of evidence collection takes place (*locus regit actum*) in order to respect the territorial sovereignty of countries. This could however raise problems when the evidence is later to be used in another country, as the rules followed to collect the evidence in one State might be at odds with the rules and principles of the receiving State.

To this end, the Brussels Convention 2000 introduced for the first time a temperament to the *locus regit actum* principle, whereby requests of mutual assistance for evidence collection could also require that specific "formalities and procedures" be

39 Zimmermann *et al* (n. 39) 72.

40 Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, OJ L 191/118, 28.07.2023.

followed, unless this would be contrary to the fundamental principles of the law of the requested State.[41] It is a shift in the direction of the *lex fori* principle,[42] whereby evidence is to be collected (also) in light of the indications of the requesting (that is, receiving) State.[43]

This change has been confirmed within the European Union by the EIO Directive, which provides for a similar opportunity in its Art. 9. According to para. 2, and unless the Directive requires otherwise, "[t]he executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority" as long as "such formalities and procedures are not contrary to the fundamental principles of law of the executing State".

This innovation was welcomed by many as a true advancement in the field of judicial cooperation.[44] Yet, it is still to be confirmed that such innovation brought about major changes in the daily practice of the circulation of evidence. Some scholars have speculated that "although the strong language of the EIO Directive suggests that the executing State of the EIO will mostly apply the *lex fori*, practice seems to be different", with practitioners seemingly reporting "that, in many cases, the issuing Member State does not […] specify formalities for the execution of the EIO."[45] The latter is only partly confirmed by the MEIOR study. In the study, several stakeholders in five different countries (Belgium, Italy, Poland, Spain, Sweden) were interviewed also about this point – the request to gather evidence following formalities and conditions indicated by the issuing State – and their answers varied from country to country and even within country.[46] At best, it can be said that there seems to be no established routine, or codified practice, to request compliance with additional conditions or formalities in the issuing of an EIO.

All in all, while the possibility to request the application of the *lex fori* is indeed a legal advancement toward ensuring the subsequent admissibility of evidence,[47] it

41 Art. 4 para. 1 EU MLA Convention 2000.

42 Dirk Van Daele, Mutual assistance between Belgium, France, Germany and the Netherlands. A comparative analysis of possibilities and difficulties, in Cyrille Fijnaut and Jannemieke Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Koninklijke Brill 2010) 143. It seems incorrect to term this an adhesion to the "*forum regit actum*" principle: Armada (n. 38) 19.

43 Meanwhile, the same possibilities are foreseen by the 2nd protocol to the 1959 MLA Convention (n. 12).

44 Klip (n.8) 530. In more neutral terms, Lorena Bachmaier Winter, 'The European Investigation Order, in Kai Ambos and Peter Rackow (eds.), *The Cambridge Companion of European Criminal Law* (Cambridge University Press, 2023) 300, speaking of a "pragmatic approach", though maybe insufficient "to provide an adequate level of protection of the defendant's rights".

45 Katalin Ligeti, Balázs Garamvölgyi, Anna Ondrejová, and Margarete von Galen, 'Admissibility of Evidence in criminal proceedings in the EU' (2020) 3 Eucrim 201, 204.

46 For an earlier study showing a fragmented approach on recourse to this possibility, Gert Vermeulen, Wendy De Bondt and Charlotte Ryckman, *Rethinking international cooperatin in criminal matters in the EU* (Maklu, 2012), 406.

47 Though some scholars criticise it because it would represent a contradiction in the logic on which the principle of mutual recognition is based: Gert Vermeulen, 'Het Europees Onder-

is to be doubted that it impacted the circulation of evidence in a significant way. It might therefore be too much to consider the innovation truly groundbreaking (revolutionary) as it was sometimes depicted. While there are cases where the issuing authorities make regular use of this opportunity, elsewhere, the daily routine of the EIO still revolves mostly around simple requests of collecting evidence, without any additional procedural requirements accompanying them. Moreover, where the possibility is used, it is to be checked whether this does not create other types of difficulties, such as, for instance, the executing authority not complying properly with the requested conditions, or the requested conditions being at odds with general principles of the executing State. The Meior study did not find evidence of the latter, though the possibility is not to be ruled out entirely.

Lastly, one should not lose sight of the lesson of the European Court of Human Rights (ECtHR). In the *Stojkovic* case, the Court emphasised that – regardless of the applicable rules of international cooperation – it is the responsibility of the State conducting the trial to ensure that the evidence-gathering activities conducted abroad do not violate the rights of the defence and that the entire procedure – including its foreign extension – remain overall fair – which could also mean to exclude foreign evidence collected in ways that violate defence rights in the executing State.[48]

VI. Evidence coming from abroad: problems of admissibility?

A major point of debate concerning the rules of circulation of evidence – and particularly those of the EIO – centres around evidence admissibility. This is looked at as a major weakness in the circulation of evidence.

zoeksbevel In Strafzaken. Het Verdriet Van België', in Philippe Traest, Antoinette Verhage, Gert Vermeulen (eds), *Strafrecht en strafprocesrecht : doel of middel in een veranderende samenleving?* (Wolters Kluwer 2017) 425; Armada (n. 39) 20. For a different view: Daniele, 'Evidence Gathering in The Realm of The European Investigation Order' (n. 39) 182.

48 *Stojkovic c. France et Belgique*, App. No. 25303/08 (ECtHR (5th Chamber), 27 October 2011), § 55: "*La Cour note au demeurant que les règles de droit international applicables, en vertu desquelles la partie requise fera exécuter les commissions rogatoires dans les formes prévues par sa législation…* ont été modifiées peu après… *En tout état de cause, le régime juridique de l'audition litigieuse ne dispensait pas les autorités françaises de vérifier ensuite si elle avait été accomplie en conformité avec les principes fondamentaux tirés de l'équité du procès et d'y apporter, le cas échéant, remède. Certes, les conditions légales dans lesquelles l'audition litigieuse a été réalisée ne sont pas imputables aux autorités françaises, lesquelles étaient soumises, en vertu de leurs engagements internationaux, à l'application des dispositions internes belges. Pour autant, en vertu de l'article 1 de la Convention, aux termes duquel « [l]es Hautes Parties contractantes reconnaissent à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention », la mise en œuvre et la sanction des droits et libertés garantis par la Convention revient au premier chef aux autorités nationales… Il incombait donc aux juridictions pénales françaises de s'assurer que les actes réalisés en Belgique n'avaient pas été accomplis en violation des droits de la défense et de veiller ainsi à l'équité de la procédure dont elles avaient la charge, l'équité s'appréciant en principe au regard de l'ensemble de la procédure*."

With regard to informal exchanges of evidence, it was said earlier that such exchanges do not have – should not have – as their end-goal the use of the evidence in trials in the receiving States. Hence, they are clearly unfit to ensure proper evidence circulation when "circulation" is meant to include the use of evidence in criminal proceedings (and particularly at trial) against suspects/defendants.

As for formal exchanges, these are instead normally meant to obtain evidence to be used in criminal proceedings.[49] Here, the problem of admissibility of evidence comes to the fore. Scholars have repeatedly deplored the lack of rules on evidence admissibility in the context of evidence circulation. With specific regard to the EIO, scholars have lamented that the EIO "is not free from conceptual weaknesses which will hamper its cross-border efficiency", particularly in that "the Directive is not accompanied with rules facilitating mutual admissibility of evidence gathered using the EIO, which is the key to its effectiveness".[50] If this approach is correct, the same criticism could be voiced against the traditional rules of mutual legal assistance (in the 1959 MLA Convention and also in the 2000 Brussels Convention), in that they too do not explicitly address this issue.

Clearly evidence admissibility could pose a problem in the formal exchange of evidence, particularly if requesting States have stringent rules on evidence and they file EIOs without the request to comply with the conditions and formalities of their national rules. It was already said in the earlier section that the latter does not happen regularly. It is also to be carefully considered if it truly happens so frequently that evidence collected abroad is excluded, either due to conflict between national laws, or for other principled reasons.

A quick look at the case-law of some countries on this point seems to suggest otherwise. In Belgium, for instance, it is possible to find only few decisions concerning the exclusion of evidence coming from abroad.[51] Similarly, in Italy, the case-law shows only few instances where evidence was rejected.[52] If one looks at the recent cases

49 It should be noted that Art. 4 para. 1 (a) of Directive 2014/41 gives the possibility to file an EIO also for future proceedings "that may be brought before" a judicial authority. However, this does not detract from the formal nature and exchange and from the fact that the evidence is sought with the purpose of its use within criminal proceedings. Also of note is that the same Article extends the scope of the instrument beyond criminal proceedings to some administrative proceedings.

50 Martyna Kusak, 'Mutual admissibility of evidence and the European Investigation Order: Aspirations lost in reality' (2019) 19 *Era Forum* 391, 392.

51 For one of the few instances in which the Court considered the exclusion of foreign evidence necessary: Hof van Cassatie, 10 May 2016, P.15.1643.N, NC 2017, 151. Normally, however, challenges concerning the omitted exclusion of foreign evidence are not successful: see for instance, Hof van Cassatie, 2 May 2023, P.22.1780.N/10. See on these issues, Dirk Van Daele and Lore Mergaerts, 'Het recht van verdediging ten aanzien van in het buitenland verkregen bewijs' (2023) 1 Politie & Recht 41–49.

52 It is in fact more common to find decisions that consider foreign evidence admissible despite the lack of some conditions normally required by domestic law or the presence of some formal irregularity: see for instance, Corte Suprema di cassazione (Cass.), 6 November 2019, 19216 Ascone, in Ced Cass., rv..279246; Id., 22 gennaio 2009, Pizzata, n. 21673, in Ced Cass.,

dealing with evidence coming from the SkyECC and EncroChat operations, the large majority of decisions have considered so far the evidence admissible, with only few exceptions.[53] It does not appear to be so frequent that evidence coming from abroad is excluded.[54] This begs the question whether evidence admissibility is really the daily problem of evidence circulation, or at least one of its major weaknesses. It is, in fact, to be wondered whether courts are not too tolerant with evidence coming from abroad, often on the ground of an explicit, or implicit, principle of mutual trust.[55] An example of the latter approach can be found in the decisions of the Dutch Supreme Court[56], where the Court observed that "it does not fall among the tasks of the Dutch judicial authorities to scrutinise if the way in which the investigations under the responsibility of a foreign authority are carried out complies with the legal rules that apply in that country concerning the execution of the investigations", in that this would "cause a violation of the sovereignty of that country."[57] The Dutch judges – the Supreme Court added – remain responsible for assessing the "overall fairness" of the trial and the reliability of the foreign evidence, but even with regard to the latter they should move from the presumption that "the investigations conducted under responsibility of the foreign authorities is carried out in such a way that the investigative results are reliable".[58] In a similar fashion, the Italian Supreme Court of Cassation has recently held that the assessment of the admissibility – *rectius*, possibility to use in evidence

rv. 243795; Id., 15 June 2010, 34412, Amato, in Ced Cass., rv. 248242; Id., 16 December 2014, 17379, D.G., in Ced Cass., rv. 263347.

53 See for instance, in Germany: Bundesgerichtshof (BGH), 2. March 2022, 5 StR 457/21, ECLI:DE:BGH:2022:020322B5STR457.20.0. In the Netherlands: Supreme Court of the Netherlands (Hoge Raad, 13 June 2006, ECLI:NL:HR:2023:913) (n. 30). In Belgium: Hof van Cassatie, 31 October 2023, AR:P.23.0998.N, T.Strafr. 2024/2, 96, noot S. Royer. In Italy: Corte Suprema di cassazione (Cass.), Sezioni Unite (Grand Chamber), 29 February 2024, n. 23756; Cass., 26 October 2023, n. 46833, Bruzzaniti, in Ced Cass., rv. 285543; Id., 26 October 2023, n. 46390, Rosaci, in Ced Cass., rv. 285494; Id., 11 October 2023, n. 48838, Brunello, in Ced Cass., rv. 285599; Id., 4 October 2023, n. 44882, Barbaro, in Ced Cass., rv. 285386; Id., 27 September 2023, n. 46482, Bruzzaniti, in Ced Cass., rv. 285363; Id., 5 April 2023, n. 16347, Papalia, in Ced Cass., rv. 284563; Id., 13 January 2023, 19082, Costacurta, in Ced Cass., rv. 284440; Id., 25 October 2022, n. 48330, Borrelli, in Ced cass., rv. 284027–1; Id., 13 October 2022, n. 6364, Calderon, in Ced Cass., rv. 283998; some doubts on the admissibility are express by Cass., 26 ottobre 2023, n. 44155, Kolgjokaj, Ced Cass., rv. 285362; Id., 26 October 2023, n. 44154, Iaria, in Ced Cass., rv. 285284;

54 This already resulted in a study conducted some years ago: Vermeulen et al. (n. 2) 145–146.

55 Some also call it the "principle non-inquiry": Aukje A.H. van Hoek and Michiel J.J.P. Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights' (2005) 1 Utrecht Law Review 1, 2.

56 Hoge Raad, 13 June 2023 (n. 32).

57 Hoge Raad (*ibid*.) § 6.5.2, "Het behoort niet tot de taak van de Nederlandse strafrechter om te toetsen of de wijze waarop het onderzoek onder verantwoordelijkheid van de buitenlandse autoriteiten is uitgevoerd, strookt met de rechtsregels die gelden in het betreffende land voor het uitvoeren van dat onderzoek. Zou de Nederlandse strafrechter wel tot zo'n toetsing overgaan, dan levert dat een aantasting op van de soevereiniteit van dat land." This argument is then specifically applied to the results obtained by means of an EIO in § 6.16.3.

58 Ibid., §§ 6.5.4, 6.6 (§ 6.16.4 with specific reference to the results of an EIO).

– of foreign evidence moves from a (rebuttable) presumption of compliance of that evidence with fundamental rights.[59]

The above suggests that (unwarranted) exclusion of foreign evidence is not the biggest problem of evidence circulation today. Arguably, the real problem might be more the opposite one: that is, the tendency to admit foreign evidence (and use it as reliable) with quite some leniency.

VII. The way forward. Increasing transparency

In order to consider what improvements are required in the area of evidence circulation, the preliminary step is to establish what the ultimate goal should be. Too often, the impression is that evidence circulation is a goal in itself, that a swifter circulation with no frictions between requested end and receiving end is the desired achievement: ease/speed of circulation combined with admissible/usable evidence. Such an approach overlooks a rather important element: that evidence should circulate and be used in ways that are not unfair for the defendant.

It cannot be said that the biggest issue for evidence circulation today is the lack of channels. Neither can it be said that it is the rejection of the foreign evidence which causes the greatest problems. It is argued here that currently the biggest issue for the circulation of evidence is that of transparency and control. In this respect the most relevant point to be addressed is whether evidence circulates today in ways that ensure sufficient/adequate protection to the fair trial rights of suspects and defendants. In the context of the circulation of evidence, protection of fair trial entails in essence two elements: a) that the defence, but also the adjudicating court, is put in a position to gain adequate knowledge of what is circulating, including the way and the context in which the evidence was gathered; b) that the evidence is used against the suspect/defendant in ways that do not unfairly affect the suspect/defendant, either because it is unreliable or because it was obtained in improper ways, or because it was not put to the scrutiny of the defence (the defence did not have an adequate chance to challenge it both on the merits and as to the ways the evidence was obtained).

Transparency is a too often neglected issue. This might be due to a misunderstanding, namely: the more States exchange information on the case for which cooperation is sought and on the way requests for cooperation were carried out, the more States might be tempted to second guess what other countries have done/are doing, hence breaching mutual trust. The above leads to the belief that authorities should give each other limited information as to what is being/was done on both ends. Such an approach is wrong. Knowing how evidence was collected, gathered and shared is conducive to a higher quality of justice, even if this leads to no further control. Mutual trust should not entail silence or ignorance, it should, instead, go hand in hand with

59 Corte Suprema di cassazione (Cass.), Sezioni Unite (Grand Chamber), 29 February 2024, n. 23756, § 10.6.

greater transparency. Moreover, knowledge on how evidence was collected/gathered and shared increases the overall protection of fair trial rights.

1. Improving circulation of evidence: informal (spontaneous and simplified) exchanges

In light of the above, it should be consequential what improvements are needed in the field of circulation of evidence. To begin with informal exchanges (either spontaneous or simplified), there seems to be little need to create further channels for evidence to circulate. Rather, it seems more necessary to streamline the existing channels and better clarify the conditions and consequences of the exchange.

The first step in this direction is to differentiate clearly between informal (spontaneous or simplified) exchanges and formal exchanges. The former are to be intended as means of "investigative cooperation", where States help each other out in prevention and investigation of crimes. Due to these goals and the more informal settings in which the exchange takes place, the information exchanged is in principle not suited for formal use in proceedings against suspects and defendants.

For the most part, the current rules on informal exchanges (simplified and spontaneous) are concerned with the protection of the interests of the sending State (mostly with respect to the confidentiality of the information shared), allowing the latter to impose conditions on the use of the information. However, the current rules do not take sufficiently into account the position of suspects and defendants when the information is exchanged informally, and they do no set clear and stringent conditions for its judicial use. In the latter case, the information can potentially be used against suspects and defendants (unless the internal rules of procedure prevent it). However, the informal (simplified/spontaneous) exchanges make it more difficult (if not, at times, impossible) for the defence to trace back the way in which the evidence was taken and then exchanged, hence making it difficult to raise adequate challenge against the lawfulness of the evidence. For instance, the defence might not know how exactly the information in the sending State was collected, whether it was collected lawfully there, whether all relevant information to the case was exchanged (including evidence that could have been of exculpatory nature), and so on.

In light of the above, the improvement here is to establish clearly that the information spontaneously exchanged can be used for prevention or investigation purposes, but not directly to adjudicate upon crimes and/or restrict the liberties and freedom of suspects and defendants, unless with them consenting. If the judicial use of such informally exchanged information is to be allowed beyond cases where suspects and defendants consent to its use, this should be the exception to the rule. The exception moreover should require that the sending States also provide further information on the way and the context in which the evidence was collected, on the fact that all the relevant material was transmitted (including possible exculpatory pieces), and further similar information to ensure a control on the evidence and its fairness: this would make the exchange of information compatible with fair trial rights, although

it would clearly transform the nature of the exchange into a less informal and more cumbersome cooperation.

2. Improving circulation of evidence: EIO

In formal exchanges, where a State requests another state to send over evidence (and collect it, if not already available), it is normally the case that the evidence exchanged is for judicial use. Here the attention should particularly go to the rules of the EIO, as this is now the most used channel. The instrument already accommodates the needs of the State requesting the collection of the evidence by allowing that State to indicate additional safeguards or conditions that would be mandatory (or relevant) under national law. It also accommodates the needs of the requested State because the latter can decide – in light of the existing grounds for refusal – whether or not the fulfilment of the foreign request could breach the national legal order and/or the rules therein.

However, the exchange of evidence under EIO rules does not seem to entirely accommodate the protection of defence rights. First, the combination of *lex loci* and *lex fori* might still leave some gaps in the protection of those rights when evidence is collected, in that the requested formalities might lose part of their protective function when transposed in the different legal setting of the law of the executing State. Second, the defence is still at some difficulty when foreign evidence is received and used in the State conducting the proceedings. This is because the defence does not normally have much information on how the evidence was gathered, neither do the existing rules provide for information on the gathering process to be conveyed. The EIO does not require the requested country to do much more than send the requested evidence to the issuing/requesting State. No accompanying explanation is required as to what was done, and according to what rules. The empirical research conducted in the MEIOR study shows that there is no uniform way of sending evidentiary results to the issuing State, and it is also not infrequent for the "raw evidence" to be sent without any further indications.

Ultimately, the sending of evidentiary results is treated in a way that is no different from informal exchanges, despite the different formal nature of the EIO cooperation. This lack of adequate information on the gathering process makes it difficult for the defence to mount adequate challenges in the receiving State against the collected evidence. Many practitioners interviewed in the study pointed to this difficulty. Challenges are formally possible but they become unlikely if the defence has no issue, or even suspicion, to raise as to how the evidence was collected and to its reliability. Judges too observed that it is difficult for them to exercise adequate control on the evidence, given the limited knowledge of what has happened in the executing State. Moreover, the rules on admissibility of the receiving State can be – *de jure* or *de facto* – rather relaxed with regard to the control exercised by the Courts of the proceeding State.

Given the above, the useful improvements are also easy to identify. With regard to cross-border evidence collection, the issuing State should always request to ensure that the defence be allowed to participate every time such participation would be possible according to national rules. Such request for additional safeguards to the executing state should be mandatory, and not just left at the discretion of issuing authorities. Moreover, the existing channels for the formal exchange of evidence – and particularly the EIO – should provide not just that evidence be exchanged but that each exchange be accompanied by a brief explanatory letter with a description of the way in which the evidence was collected. Such explanation should also include an explicit indication of the national provisions of the executing State that have been applied (the legal basis of the *lex loci*), the name of the officers involved in the collection process, a brief description of the steps taken, and few more elements.

The objections to the above proposal are not difficult to foresee. Any accompanying letter requires the executing authorities to do further work, and it would make cooperation mechanisms slower, and more cumbersome. Moreover, the executing authorities have little knowledge of what kind of accompanying information is needed by the issuing State to assess the lawfulness of the evidence. Ultimately, each authority would draft the accompanying letter according to an own style and own preferences, in a way that might not be suitable for the needs of the receiving (i.e. issuing State).

VIII. A new annex E for the EIO

The above criticism can easily be overcome by clarifying more in detail the terms of the proposal for improvement that is advanced here. In fact, such proposal is not about the introduction of an accompanying report, where the authorities have to detail step by step the evidence collection that has taken place in the executing State. The idea is to introduce a standardised form to transmit the evidentiary results, in such a way that it would both: a) give some indications on the activities that have taken place in the executing States when collecting evidence; and b) streamline the way in which the evidentiary results are sent to the issuing States across Europe.

With particular reference to the EIO, the above would not necessarily require amendments to the text of the Directive (although they too could be envisaged). It is here simply suggested to introduce a new form, specifically designed for the sending of evidence to the issuing/requesting State. The EIO already provides in the annexes for two forms, one for sending an EIO request and one for acknowledging receipt.[60] However, no form is provided for when the evidentiary results are sent back, which though is a crucial moment in the steps of evidence sharing. Such a new form (which could be included as a new annex E to the instrument) would allow to identify the elements useful to shed more light on the process of evidence collection: the type of

60 Annex A contains the form for the issuing of an EIO; under annex B is the form for confirmation of the receipt of an EIO. Also, annex C includes the form to notify a Member State about the interceptions in that country's territory without its technical assistance.

evidence collection that has taken place in the executing country, the legal provisions employed, whether or not a judge intervened to authorise and/or supervise the act, a brief (few lines) indication of the steps taken, the name of the officials involved, the clarification that all evidentiary results (or only part of it) are being sent to the requesting State. Practically, the sending of the new form could take place by means of the new rules on digitalization in judicial cooperation, at least where the type of evidentiary results collected could also be exchanged digitally.[61]

To emphasise, a form is not a report. It is not a report because it is much easier to fill out for the executing authorities, in that (and insofar) it identifies the exact type of information requested. Also, a well-designed form has ideally identified the main elements and variables that should be communicated to the issuing State, to the extent that it might reduce the effort of the executing authorities to a tick-box exercise for most of its parts. In essence, it is only a predesigned form that can ensure both a more meaningful transmission of evidentiary results and at the same time a form of harmonisation of the communication of the evidentiary results.[62] Moreover, it would be a way to further differentiate – at the moment of transmission – the formal exchange of evidence through the EIO from the informal exchanges (simplified or spontaneous). Lastly, sending the EIO results with a form that carries some indications on the process would help re-establish, also symbolically, an important principle: that evidence does not exist in a vacuum, but it depends closely on – and remains connected to – the way in which it was collected.

IX. Concluding remarks

The last few words should address the elephant in the room, namely the lack of harmonisation of evidence rules at European level. This is indeed a major weakness of the circulation of evidence. If evidence rules were harmonised to a minimum degree, this would allow for swifter circulation, fewer conflicts and greater mutual trust.[63] The increase in judicial cooperation and evidence circulation across Europe would suggest that it is time to reopen the discussion. To this end, new inspiring projects are now reviving the debate.[64]

61 Article 3 of Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, OJ L 27.12.2023.

62 The proposal for an annex E can be found at the address: https://www.meior.org/.

63 See the reflections of John Spencer, 'The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer' (2010) 9 ZIS 602–606, particularly at 605 on "common standards".

64 ELI proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings, Draft Legislative Proposal of the European Law Institute, available at—< https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Proposal_for_a_Directive_on_Mutual_Ad

It is however largely known how sensitive such debate is, due to many reasons, starting with the differences in evidence law, but also in legal cultures. It is not just a debate on the type of harmonisation, it is also a debate on whether there should be more harmonisation in the field of criminal procedural law. Some argue that the instrumental nature of harmonisation within the design of the EU law should represent a stricter limit to the exercise of legislative competences:[65] harmonisation should be the way forward only when there is clear and convincing empirical evidence that it is needed to improve cooperation. Understanding what "improving cooperation" means is however not as simple as it may seem. The need for improvements in cooperation cannot be measured solely on the number of refusals of cooperation requests, or on the number of cases in which the admissibility of foreign evidence was rejected – or in which foreign evidence was excluded. As was argued above (supra, § VI), it can be an equally significant problem that too much evidence is used, or that evidence is never excluded; it can be a significant problem that cooperation affects fundamental rights. To improve judicial cooperation, one must also consider the "quality" of the judicial cooperation, and not just the "quantity": sometimes, it can be an achievement to introduce rules that strengthen fundamental rights at the expense of some efficiency in the swiftness of cooperation mechanisms. Discussing harmonisation of evidence should therefore not be a taboo, even for those who want to keep harmonisation competences strictly connected to the improvement of judicial cooperation.

Yet the difficulty remains as to how to harmonise evidence. The same concept of admissibility of evidence has different understandings in the different countries, also because of the different nature and structure of proceedings: for instance, in some countries evidence requires an explicit decision for it to be admitted (included in the file), while in others it does not. In some countries, evidence admission and evidence exclusion are taken to be synonyms, because the rules for exclusion determine what is admissible, while in others this is not the case. The divide between admissibility of evidence, exclusion of evidence, usability of evidence, and assessment of evidence is different across countries, and it can easily lead to misunderstandings. Next, it is also to be wondered to what extent cross-border law collection and exchange can be harmonized apart from evidence law in general.[66]

The proposal made in this article is that of harmonising the communication of evidentiary results following a formal EIO exchange of evidence; it is in itself not a proposal to harmonise evidence. However, the first step for harmonising evidence – and particularly cross-border evidence – is to have a better understanding of the different rules, practices, and approaches in both the collection of evidence, and the assessment of evidence. In this respect, the main proposal that this article puts forward

missibility_of_Evidence_and_Electronic_Evidence_in_Criminal_Proceedings_in_the_EU.pdf > last accessed 19 June 2024.

65 Jacob Oberg, 'Trust in the law? Mutual recognition as a justification to domestic criminal procedure' (2020) 16 European Constitutional Law Review 33, 35.

66 See the reflections of Gert Vermeulen, *Free Gathering and Movement of Evidence in Criminal Matters in the EU* (Maklu, 2011) 46.

– that of introducing a standardised form for the transmission of results – is strongly connected to evidence harmonisation. The proposed form is intended to ensure greater transparency and openness in both the gathering and the subsequent appraisal of foreign evidence: such transparency can lead to increased knowledge as to the exact problems of assessing the fairness of foreign evidence, and it can ultimately offer – through a bottom-up approach – solutions for a future harmonisation.