The Recovery and Admissibility of Foreign Evidence

The European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20.IV.1959) provides at:

Article 1

1. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

Such a request will be made by letter of request which will provide information on the crime under investigation and the nature of the evidence sought to be recovered. However, such evidence will be recovered under the procedural and substantive law of the requested Member State:

Article 3

1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request and the requested Party shall comply with the request if the law of its country does not prohibit it.

3. The requested Party may transmit certified copies or certified photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request.
It was not until this article was amended by the Second Additional Protocol in 2001 that the requested MS Judicial authorities could specify execution of requests in a manner that would make the recovered evidence admissible under national law of the requesting MS rules of procedure and practice:

Article 8 – Procedure

Notwithstanding the provisions of Article 3 of the Convention, where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law, unless otherwise provided for in this Protocol.

This was the first step towards recognition of a need to ensure that while evidence is recovered, it is of equal, if not greater, practical importance that the evidence is admissible before the Courts of the requesting MS.

European Evidence Warrant

The principle of mutual recognition of judicial decisions has been successful in the context of the EAW and it has been developed within the recovery of evidence. This has been within the Framework Decision on the European Evidence Warrant (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.).

An EEW may be issued for the following proceedings and for evidence that already exists.

Article 5

Type of proceedings for which the EEW may be issued

The EEW may be issued:
(a) with respect to criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

(b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and

(d) in connection with proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE

Article 7

Conditions for issuing the EEW

Each Member State shall take the necessary measures to ensure that the EEW is issued only when the issuing authority is satisfied that the following conditions have been met:

(a) obtaining the objects, documents or data sought is necessary and proportionate for the purpose of proceedings referred to in Article 5;

(b) the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.

These conditions shall be assessed only in the issuing State in each case.

An EEW may also be used in the recovery of evidence in possession of the executing authority or discovered during execution of the EEW. (Article 4.4 and 4.5)
The EEW is in the now familiar form similar to that for the EAW.

The EEW must be recognised and evidence recovered as it would be under ordinary domestic procedure:

Article 11
Recognition and execution

1. The executing authority shall recognise an EEW, transmitted in accordance with Article 8, without any further formality being required and shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents or data, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 13 or one of the grounds for postponement provided for in Article 16.

2. The executing State shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State.

3. Each Member State shall ensure:

(i) that any measures which would be available in a similar domestic case in the executing State are also available for the purpose of the execution of the EEW; and

(ii) that measures, including search or seizure, are available for the purpose of the execution of the EEW where it is related to any of the offences as set out in Article 14(2).

Importantly, the evidence has to be proportionate to the investigation. To that end it ought to meet any challenge made with reference to Article 8 of the European Convention on Human Rights.
However the EEW may not be issued for the recovery of the following evidence (which will likely lead to an EEW being issued together with a traditional letter of request, especially from those Member States whose systems of law and rules of procedure are reliant on oral evidence in trial proceedings):

2. The EEW shall not be issued for the purpose of requiring the executing authority to:

(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; and

(e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

Statements of witnesses may be taken where:

“the EEW may, if requested by the issuing authority, also cover taking statements from persons present during the execution of the EEW and directly related to the subject of the EEW. The relevant rules of the executing State applicable to national cases shall also be applicable in respect of the taking of such statements.” (Article 4.6)

Importantly, in addition, an EEW should be issued only where the object, documents or data concerned could be obtained under the national law of the issuing State in a comparable case. In other words the requesting judicial authorities may only seek recovery of that evidence which is could under its own territorial and jurisdictional rules of procedure.

A consideration of the recitals to the FD bear fruit in addressing the deficit of the admissibility of evidence:
(14) It should be possible, if the national law of the issuing State so provides in transposing Article 12, for the issuing authority to ask the executing authority to follow specified formalities and procedures in respect of legal or administrative processes which might assist in making the evidence sought admissible in the issuing State, for example the official stamping of a document, the presence of a representative from the issuing State, or the recording of times and dates to create a chain of evidence. Such formalities and procedures should not encompass coercive measures.

(15) The execution of an EEW should, to the widest extent possible, and without prejudice to fundamental guarantees under national law, be carried out in accordance with the formalities and procedures expressly indicated by the issuing State.

(16) To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EEW, as well as the grounds for postponing its execution, should be limited. In particular, refusal to execute the EEW on the grounds that the act on which it is based does not constitute an offence under the national law of the executing State (dual criminality) should not be possible for certain categories of offences.

However most importantly, the EEW provides that the execution of the request and the recovery of the evidence sought should be as required by the law and procedure of the requested MS procedural requirements.

This is a significant step forward.

Under the 1959 Convention, search and seizure of property is subject to the test of dual criminality. This is no longer necessary under the EEW where the crime under investigation is one of the Framework list of offences thus enabling the recovery of evidence in such cases to be in accordance with the rules of procedure of national law of the requested MS.
As mutual recognition of a judicial decision seeking the recovery of evidence the grounds of refusal are limited.

The executing state may refuse to recognise or execute the EEW within 30 days of receiving it if:

- the execution breaches the *ne bis in idem* principle;
- in certain cases specified in the framework decision, the act is not an offence under its national law;
- execution is not possible with the measures available to the executing authority in the specific case;
- there is an immunity or privilege under the law of the executing state that makes its execution impossible;
- it has not been validated by a judge, court, investigative magistrate or public prosecutor in the issuing state when so required;
- the offence was committed on the territory of the executing state or outside the issuing state where the law of the executing state does not allow for legal proceedings;
- it would harm national security interests;
- the form is incomplete or incorrectly completed.

The FD also requires at recital
(27) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to execute an EEW when there are reasons to believe, on the basis of objective elements, that the EEW has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person’s position may be prejudiced for any of these reasons.

Therefore the interaction of the recovery of evidence, its admissibility under the procedural law of the requested MS and that of the requesting MS and the rights of the accused when such evidence is sought to be introduced at trial ought to be considered.

Recital 14 Member States must ensure that all interested parties have access to legal remedies against the recognition and execution of an EEW. These remedies may be limited to cases where coercive measures are used. The actions are to be brought before a court in the executing state; however, the substantive reasons for issuing the EEW may only be brought before a court in the issuing state.

However Article 18 provides:

Legal remedies

1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against the recognition and execution of an EEW pursuant to Article 11, in order to preserve their legitimate interests. Member States may limit the legal remedies provided for in this paragraph to cases in which the EEW is executed using coercive
measures. The action shall be brought before a court in the executing State in accordance with the law of that State.

2. The substantive reasons for issuing the EEW, including whether the conditions established in Article 7 have been met, may be challenged only in an action brought before a court in the issuing State. The issuing State shall ensure the applicability of legal remedies which are available in a comparable domestic case.

3. Member States shall ensure that any time limits for bringing an action mentioned in paragraphs 1 and 2 are applied in a way that guarantees the possibility of an effective legal remedy for interested parties.

It is therefore envisaged that challenge may be taken by “any interested party” may challenge the recovery of the evidence under the EEW prior to transmission to the requesting Member State. For a third party, the ability to challenge the grounds of issuing the EEW being as it should before the Court of the issuing Member State will be potentially difficult.

The question arises whether, as in the UK, the accused could be regarded as such a party having an interest. This must be the case where, for example, a property owned by him is searched in one jurisdiction and evidence recovered and then sought to be introduced at a trial against him in another Member State.

The question arises whether on different grounds he would be able to challenge that evidence within the trial context. The answer appears to be in the affirmative, as logically the tests to be applied to determine the issues are different and for different reasons.

The issue before the Court of the requested MS will be to determine whether the evidence is recovered in terms of domestic law implementing the EEW whereas the challenge before the trial court will be on the question of fairness and fair trial which
must include issues of fairness and lawfulness and regularity of recovery of the evidence.

The question that can only be determined at national level is whether the Court in the requested Member State having determined the evidence to have been lawfully and regularly recovered under the domestic law implementing the EEW that will be sufficient to enable to trial court in the requested Member State to accept the evidence has been lawfully recovered and any residual issue of fairness and fair trial would fall to be on much more restricted grounds.

In such circumstances we ought to consider the guidance provided in the case of Steffensen (C-276/01) from the European Court of Justice. Unless the evidence recovered is subject to a rule of community law, then the ordinary rules of national law are applicable.

72. In this case, account must be taken, more specifically, of the right to a fair hearing before a tribunal, as laid down in Article 6(1) of the ECHR and as interpreted by the European Court of Human Rights.

73. It is necessary; first of all, to examine the argument of the Danish Government and the Commission that in this instance the right to a fair hearing and the consequences arising from it are not applicable in the case in the main proceedings since the question referred concerns an administrative act and not proceedings before a tribunal.

74. Although the evidence at issue in the main proceedings was obtained in an administrative procedure preceding the appeal brought before the national court, it is nevertheless clear that the specific question referred by it seeks to establish whether that evidence may be admitted in a proceeding pending before it. Therefore, the question clearly concerns the admissibility of
evidence in a procedure before a tribunal within the meaning of Article 6(1) of the ECHR.

75. It should be noted, next, that, it follows from the case-law of the European Court of Human Rights that Article 6(1) of the ECHR does not lay down rules on evidence as such and, therefore, it cannot be excluded as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted. According to that case-law, it is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced (see Mantovanelli v. France, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 33 and 34; and Pélissier and Sassi v. France, judgment of 25 March 1999, Reports of Judgments and Decisions 1999-II, § 45).

76. However, according to the same case-law, the review carried out by the European Court of Human Rights under Article 6(1) of the ECHR of the fairness of a hearing - which requires essentially that the parties be given an adequate opportunity to participate in the proceedings before the court - relates to the proceedings considered as a whole, including the way in which evidence was taken.

77. Lastly, it should be observed that the European Court of Human Rights has held that, where the parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively on it in order for the proceedings to reach the standard of fairness required by Article 6(1) of the ECHR. That point must be examined, in particular, where the evidence pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on the assessment of the facts by the court (see Mantovanelli, cited above, § 36).
It is for the national court to assess whether, in the light of all the factual and legal evidence available to it, the admission as evidence of the results of the analyses at issue in the main proceedings entails a risk of an infringement of the adversarial principle and, thus, of the right to a fair hearing. In the context of that assessment, the national court will have to examine, more specifically, whether the evidence at issue in the main proceedings pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on its assessment of the facts and, should this be case, whether Mr Steffensen still has a real opportunity to comment effectively on that evidence.

79.

If the national court decides that the admission as evidence of the results of the analyses at issue in the main proceedings is likely to give rise to an infringement of the adversarial principle and, thus, of the right to a fair hearing, it must exclude those results as evidence in order to avoid such an infringement.

As Advocate General Stix-Hackl stated in her opinion in this case:

68.

It follows from the case-law of the European Court of Human Rights that, although the convention does not lay down rules on evidence as such, the particular proceedings considered as a whole, including the way in which evidence was taken, must meet the requirements of a fair trial within the meaning of Article 6(1) of the ECHR. (22) Among those requirements are, above all, the adversarial nature of proceedings and the equality of arms of parties to the proceedings. In accordance with those principles, a party to a criminal or civil trial must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision; moreover, he must be able to present his case in court in circumstances which do not put him at a significant disadvantage in

69.

Thus, according to the case-law of the European Court of Human Rights, the use in court of evidence which is vitiated by irregularities is not automatically precluded. What is decisive here too is whether the party to the proceedings can effectively defend himself in the circumstances of the case. (with reference to Schenk v. Switzerland, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45 and 46, and Mantovanelli v. France, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, pp. 436-37, § 34.)

Ultimately the resolution of seemingly complex issues of evidence must be governed under either common principles of fairness under national law as well as Article 6 of the Convention, as the accused must receive a fair trial. The locus for challenge of that evidence will be within the Court of the issuing member state in other words when the evidence is in fact sought to be led against the accused.

However, when such evidence is being recovered there may be scope for that evidence to be challenged where the accused is aware of the investigation. This can occur within the UK where, in addition to the prosecutor, the Court may allow officials of the requesting member state to participate and a lawyer who represents any party to the proceedings, in the hearing of evidence from a witness.
European Arrest Warrant

Recovery of evidence under Article 29 of the EAWFD must be considered. That article provides for the recovery of evidence connected to the crime but also for effectively the proceeds of crime.

Handing over of property

1. At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:
   (a) may be required as evidence, or
   (b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated.

This provision raises a number of issues.

It has been implemented in MS in an inconsistent manner. Additionally the FD provides no guidance or provision on rules of procedure to be followed, how the
rights of third parties may be exercised, the route of transmission of the recovered evidence.

It is also far reaching as it provides for the search and seizure of the proceeds of crime.

In practice, either ordinary rules governing mutual legal assistance are utilised or a formal letter of request is issued together with the EAW. This is potentially problematic if these requests are required to be transmitted to different offices in the requested Member State.

However it provides none of the guidance or safeguards provided in Article 8 of the 2000 Convention on mutual legal assistance:

“Restitution

1. At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.

2. In applying Articles 3 and 6 of the European Mutual Assistance Convention and Articles 24(2) and 29 of the Benelux Treaty, the requested Member State may waive the return of articles either before or after handling them over to the requesting Member State if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.

3. In the event of a waiver before handing over the articles to the requesting Member State, the requested Member State shall exercise no security right or other right of recourse under tax or customs legislation in respect of these articles.”
The direct evidence of witnesses can be as problematic as no witness can be compelled to attend and give evidence before a Court in another jurisdiction. However the ability to utilise either video conference or telephone conference for giving evidence has been beneficial although care needs to be taken to ensure practical aspects such as the witness viewing productions is taken into account.

In the event of a joint investigation team then such issues ought to be the subject of agreement in advance and much more readily addressed by the lawyers from the Member States parties to the JIT.

Stockholm Programme

The Stockholm Programme revisits the issue of procedural rights:

2.4 Rights of the individual in criminal proceedings

The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the European Union. The European Council therefore welcomes the adoption by the Council of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, which will strengthen the rights of the individual in criminal proceedings when fully implemented. That Roadmap will henceforth form part of the Stockholm Programme.

Swift implementation is sought as well as “examine further elements of minimum procedural rights for accused and suspect persons”.

It also goes on to state:

3.3 Developing a core of common minimum rules
To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters, the Union may adopt common minimum rules. The European Council considers that a certain level of approximation of laws is necessary to foster a common understanding of issues among judges and prosecutors, and hence to enable the principle of mutual recognition to be applied properly, taking into account the differences between legal traditions and systems of Member States.

On future development of mutual recognition (and especially on evidence) the Stockholm Programme provides:

3.1 Furthering the implementation of mutual recognition

The European Council notes with satisfaction that considerable progress has been achieved in implementing the two programmes on mutual recognition adopted by the Council in 2000 and emphasises that the Member States should take all necessary measures to transpose at national level the rules agreed at European level. In this context the European Council emphasises the need to evaluate the implementation of these measures and to continue the work on mutual recognition.

3.1.1 Criminal law

In the face of cross-border crime, more efforts should be made to make judicial cooperation more efficient. The instruments adopted need to be more "user-friendly" and focus on problems that are constantly occurring in cross-border cooperation, such as issues regarding time limits and language conditions or the principle of proportionality. In order to improve cooperation based on mutual recognition, some matters of principle should also be resolved. For example, there may be a need
for a horizontal approach regarding certain recurring problems during negotiations on instruments.

The approximation, where necessary, of substantive and procedural law should facilitate mutual recognition. Mutual recognition could extend to all types of judgments and decisions of a judicial nature, which may, depending on the legal system, be either criminal or administrative. Victims of crime or witnesses who are at risk can be offered special protection measures which should be effective within the Union. 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 the Commission to

propose a comprehensive system, after an impact assessment, 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,

explore whether there are other means to facilitate admissibility of evidence in this area,

explore whether certain investigative measures could be executed by law enforcement or judicial authorities of the requesting/issuing Member State in liaison and agreement with the authorities of the executing state in accordance with Article 89 TFUE, and, where appropriate, make necessary proposals,
explore if and how authorities of one Member State could obtain information rapidly from private or public entities of another Member State without use of coercive measures or by using judicial authorities of the other State,

explore the results of the evaluation of the European Arrest Warrant, and, where appropriate, make proposals to increase efficiency and legal protection for individuals in the process of surrender, by adopting a step-by-step approach to other instruments on mutual recognition,

prepare a comprehensive study on existing legal and administrative obstacles to cross-border enforcement of penalties and administrative decisions for road traffic offences, and to present, where necessary, further legislative and non-legislative initiatives to improve road safety in the Union.

**Commission Green Paper**

The Commission brought forward a Green Paper which set out various questions but which principally was designed to determine if Member States would welcome a replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition covering all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination. There appeared, at an early stage, to be feedback that MS welcomed such an instrument but there was a lack of consensus how that should be achieved and whether it should apply to all evidence or certain categories of evidence.

**European Investigation Order**

Europe has 28 countries operating 30 legal systems each with its own tradition and criminal procedure codes. Against that, the principle of mutual
recognition by each state of the domestic law of requesting state became the cornerstone of justice and home affairs and it would not be unreasonable to foresee that in the area of the admissibility of recovered evidence agreement would be near impossible absent harmonisation of legal principles and rules of evidence.

The Member States then brought forward the proposal for an European Investigation Order which was eventually adopted on 3 April 2014 and must be implemented within three years. ¹ This instrument will replace the EEW.

The EIO seeks to provide a simple, single regime for the recovery of evidence based upon the principle of mutual recognition and as such recognising and respecting the evidential rules and procedures of the Member States.

Preambles 10 and 11 set out the objective sought to be achieved:

“(8) “The EIO should have a horizontal scope and therefore should apply to all investigative measures aimed at gathering evidence.”

(10) The EIO should focus on the investigative measure which has to be carried out. The issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which measure is to be used. However, the executing authority should have the possibility to use another type of measure either because the requested measure does not exist or is not available under its national law or because the other type of measure will achieve the same result as the measure provided for in the EIO by less coercive means.

(11) The execution of an EIO should, to the widest extent possible, and without prejudice to fundamental principles of the law of the executing State,

¹ Directive on the European Investigation Order 3 April 2014
be carried out in accordance with the formalities and procedures expressly indicated by the issuing State. The issuing authority may request that one or several authorities of the issuing State assist in the execution of the EIO in support of the competent authorities of the executing State. This possibility does not imply any law enforcement powers for the authorities of the issuing State in the territory of the executing State.”

The EIO seeks to achieve in the recovery of evidence in another jurisdiction similar coherence that has been achieved in the surrender of fugitive offenders by the European Arrest Warrant.

Article 1.1 provides

“A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State ("the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive.”

However, the EIO must be proportionate to the crime under investigation although that decision rests with the issuing authority, although there is provision for the executing authority to question the issue of proportionality and to seek, where necessary, recovery of the evidence by a less intrusive means\(^2\).

\(^2\) EIO article 6.3
Article 6.1 provides:

“The issuing authority may only issue an EIO where the following conditions have been met:

(a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and

(b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.”

Coherence is provided for in article 9.1

“The executing authority shall recognise an EIO, transmitted in accordance with this Directive, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in this Directive.”

The EIO must be executed speedily: a decision to execute within 30 days and "shall carry out the investigative measure without delay" and within a further period of 90 days.\(^3\)

The EIO may be issued for the following enquiry

"with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the

\(^3\) Article 12.4
national law of the issuing State;

(b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters, and

(d) in connection with proceedings referred to in points (a), (b), and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State. ”

It must be issued in the form provided.

However, the issue of admissibility of evidence recovered under the EIO is addressed as follows:

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

This seeks to ensure executing authorities recover evidence in conformity with the rules of evidence and procedure in the issuing state such that the evidence will then meet domestic evidential rules in the issuing state, absent a

---

4 Article 4

5 Article 5.1 and annex A
harmonised system.

If the executing authority may have recourse "to a different type of investigative measure

1. The executing authority shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where:

(a) the investigative measure indicated in the EIO does not exist under the law of the executing State, or;

(b) the investigative measure indicated in the EIO would not be available in a similar domestic case;"  

This reinforces the obligation to provide judicial assistance.

Defence rights must be respected as provided in the preamble 7

"When issuing an EIO the issuing authority should pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter of Fundamental Rights of the European Union (the Charter). The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice. Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others."

Interestingly, in particular in light of the decision of the Court of Justice of the

6 Article 10.1
7 Preamble 12
European Union in Radu 8 the EIO explicitly provides for the protection of the fundamental rights of the accused. This is explained in the preamble 9

"The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused."

This protection is specifically provided for in the directive 10

"there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter;"

In addition, the directive provides 11 provides the accused will have a right to challenge the decision to issue and execute the EIO although in two jurisdictions:

"Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.

2. The substantive reasons for issuing the EIO may be challenged only in an

8 Case C-396/11: Where contrary to the opinion of Advocate General Sharpson, the Grand Chamber declined to observe whether human rights considerations could be a bar to surrender. See also IB where the court held the grounds to refuse the execution of the EAW was restricted to the exhaustive list of mandatory and discretionary grounds.

9 Preamble 19

10 Article 11.1(f)

11 Article 14.1 - 14.2
action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State."

The EIO provides for specific measures such as evidence by video conference, evidence by telephone, temporary transfer of prisoners to provide evidence, recovery of information on bank accounts and interception of communications. It does not provide for joint investigation teams and evidence recovered under the operation of such teams.12

In the interests of judicial cooperation, the EIO may be transmitted via the European Judicial Network. 13

Victims rights

The recent EU directive on the rights of victims14 lays down minimum rights of information for the victims of crime can expect to receive from national authorities and in particular as observed at preamble 13:

"This Directive applies in relation to criminal offences committed in the Union and to criminal proceedings that take place in the Union. It confers rights on victims of extra-territorial offences only in relation to criminal proceedings that take place in the Union. Complaints made to competent authorities

________________________

12 Preamble 8 and article 3

13 Article 7.4


establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
outside the Union, such as embassies, do not trigger the obligations set out in this Directive."

The right of review of a decision not to prosecute is particularly innovative. The directive provides:

"The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position."\(^{15}\)

Article 11 provides

"Article 11

Rights in the event of a decision not to prosecute

1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision

\(^{15}\) Preamble 43
not to prosecute. The procedural rules for such a review shall be determined by national law.

2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.

5. Paragraphs 1, 3 and 4 shall not apply to a decision of the prosecutor not to prosecute, if such a decision results in an out-of-court settlement, in so far as national law makes such provision."

In Croatia, the victim of an offence sought to utilise this provision to challenge the decision of the court to refuse to execute an EAW. The Supreme Court\textsuperscript{16} held that the proceedings in Croatia to execute the EAW were \textit{Sui generis} procedure that is connected with the criminal process in the wider sense and as such the victim had standing in the proceedings.

\footnote{\textit{Kž-eun-5/14}}
Article 17 provides

“Rights of victims resident in another Member State

1. Member States shall ensure that their competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a Member State other than that where the criminal offence was committed, particularly with regard to the organisation of the proceedings. For this purpose, the authorities of the Member State where the criminal offence was committed shall, in particular, be in a position:

(a) to take a statement from the victim immediately after the complaint with regard to the criminal offence is made to the competent authority;

(b) to have recourse to the extent possible to the provisions on video conferencing and telephone conference calls laid down in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (17) for the purpose of hearing victims who are resident abroad.

2. Member States shall ensure that victims of a criminal offence committed in Member States other than that where they reside may make a complaint to the competent authorities of the Member State of residence, if they are unable to do so in the Member State where the criminal offence was committed or, in the event of a serious offence, as determined by national law of that Member State, if they do not wish to do so.

3. Member States shall ensure that the competent authority to which the
victim makes a complaint transmits it without delay to the competent authority of the Member State in which the criminal offence was committed, if the competence to institute the proceedings has not been exercised by the Member State in which the complaint was made."

This provision reinforce the mutual cooperation to ensure engagement of victims in cross border cases.

These combined instruments seek to ensure the primary objective of any criminal justice system namely that the victims of crime see the state brings offenders to justice to account for their alleged wrongdoing and, if convicted, appropriately punished.

Close working with colleagues through the European Judicial Network and Eurojust can in practice often overcome some of the practical issues around recovery of evidence to ensure it is admissible at trial. However, these developments ought not to be seen solely in light of prosecutorial tools but the procedural rights and safeguards of the accused and especially the overarching requirement of observance of Article 6 fair trial rights needs to be taken into account and likewise developed.

**Conclusion**

The EIO is a significant step forward and should ease judicial cooperation. It is an improvement on the limited mechanism and scope of the European Evidence Warrant. However, while it addresses and reinforces the obligation to assist in the recovery of evidence and to do so in a manner which is as close as possible to the procedural requirements of the issuing state and as long as not contrary to fundamental rights, a right of challenge exists in two jurisdictions which may lead to delay and the issue of admissibility of
evidence remains unresolved.

David J Dickson
Solicitor Advocate