CROSS BORDER GATHERING EVIDENCE
“GOOD PRACTICES” IN MUTUAL LEGAL ASSISTANCE

EUROPEAN JUDICIAL TRAINING NETWORK

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1. Police and judicial authorities increasingly feel the need for “mutual (legal) assistance” in cross-border cases.
2. Until recently, the classic form of “mutual legal assistance” were the “rogatory letters”. Those “rogatory letters” are still in use, even if new forms of mutual legal assistance exist in the European Union.

3. In a general understanding, “mutual legal assistance” corresponds to a request of help, issued by a (competent authority of a) State and transmitted to (the competent authority) of another State, with the objective to ask the last to do some kind of diligence, namely to gather and transmit evidences, as:

   - Hearings of suspects, of indicted persons, of witnesses, of victims, and of experts;

   - Search of places, including houses or professional offices;

   - Seizure/freezing of goods, products and evidences of the crime and confiscation, including of bank accounts;
4 - The classic legal framework - (Council of Europe and the first legal instruments in EU (Schengen Agreements)) - is based on principles, rules and practices that, nowadays, are not considered to be kind to an efficient cooperation, by:

- The existing slow communication channels, too much formalism and bureaucracy;

- The “locus regit actum”, the rule in the execution of requests, meaning that the requests will be executed according to the law of the requested State, imposing possible difficulties on the requesting State, regarding the validity and admissibility of gathered evidence.

- Unclear and multiple grounds of refusal

- Weak interaction between involved authorities
5 - In European Union, “mutual legal assistance”, with the objective of cross-border gathering of evidence, has been the object of a strong evolution, by

- The definition of a (new) legal framework to establish Joint Investigations Teams, in cross-border cases;

- The establishing of a special legal framework (Convention of 2000 and the Protocol)

- The approval (and implementation) of new Framework Decisions and Directives with the goal to improve and to facilitate mutual legal assistance/cooperation in specific areas (freezing of goods and evidences; confiscation, exchange of information, etc.).
6 - Even so, to make real (to make effective) the cooperation/mutual assistance, the “law in action” is not less important as the “law in books”, being essential to observe “good practices” in the everyday life of the Courts.
II - GOOD PRACTICES

A. IN GENERAL

1. GENERAL PRINCIPLE: Proportionality check:

   – no trivial or disproportionate requests (e.g. no wiretap in a shoplifting case)
2. REQUESTS (Content, grounds and legal base)

a) The requests should be properly formulated in a clear way, specifying precisely what is requested. For example: distinction between a request of mere freezing and a request of freezing in view of a future confiscation; distinction between a hearing of a suspect and the interrogation of a witness or an expert;

b) A copy of national law should be attached, translated in an accepted language, if possible;

c) The requests should contain a maximum of necessary “facts” (who, what, when, where, why, how), allowing a better understanding about what is “in cause”;
d) The description of the facts should be simple but clear, avoiding unnecessary or confusing use of legal terminology;

e) The reason for the request should be indicated;

f) The drafting of the request should be done or (at least) supervised by the (judicial) competent authority;

g) When possible the international legal instrument(s) providing for the specific requested cooperation should be mentioned (Treaty, Convention, Agreement, Framework Decision or Directive);

h) The classification of the request as “urgent” must be well evaluated by the issuing authority, and, if it is the case, the executing authority must execute it priority;
3. TRANSLATION:

a) For a clear understanding of the requests, translation should be rigorous and of high quality, both on the concerned “facts” and the legal grounds;

b) Translation should be done by experts, with profound knowledge on criminal matters. A revision by the judicial competent authority is convenient;

c) A copy of the original decision might be joined;

d) Agreements avoiding the need of translation should be taken into account and used;
4. CONTACTS AND CONSULTATIONS (DIALOGUE AND AGREEMENT)

a) In requests and respective answers, authorities should include a maximum of contact details (telephone numbers; electronic addresses; fax; mail address) in order to dispose of easy communication ways, in real time, for mutual consultation;

b) Mutual consultations may/should be performed when deemed useful or necessary “to find a solution”, especially
   - (i) in “complex” cases,
   - (ii) in cases of concurrent prosecution or proceedings,
   - (iii) in starting own proceedings, and
   - (iv) in the transmission of evidence (when and how);

c) The contacts of the Central Authorities may help;

d) The executing authority should confirm reception and keep the requesting authority informed;
Whenever the request should be executed according to specific rules and formalities, imposed by the law of the requesting State in order to guarantee the validity of the evidence, the issuing authority should, in a express and clear way, specify those rules and formalities (example: hearing of suspects under some age; searches of houses or of specific professional offices (lawyer offices) or other measures (monitoring of bank accounts; interception of telecommunications) for which a preceding judicial authorization is required.

If it is not possible to execute according to those specific procedure rules, talk and find a solution.
b) The issuing authority should answer in a fast, clear and comprehensible way to issues and questions raised by the executing authority;

c) A request should be treated as if it were a national case (your own case!)
6. TRANSMISSION

a) As a general rule, requests and answers must be transmitted directly between competent authorities. (However there is an excessive transmission through the Central Authority in each State, today!).

b) That transmission should be done in the best possible and correct way to the competent authority. In order to know which requested authority is the competent one, the help of EJN and or Eurojust could be asked.

c) Secure and fast channels must be used, in a written way (post, email, fax)
7. EUROPEAN JUDICIAL NETWORK

a) In case of difficulties, or need of help (performing of forms/requests; information on the law of another Member State), the intervention of national contact points of EJN should be asked;

b) The tools of the EJN (Judicial Atlas) should also be used (see EJN Website.)
8. EUROJUST

a) When several Member States might be involved, the intervention of Eurojust should be asked, to perform the necessary coordination. In doubt, an advice of or meetings at Eurojust may be useful (www.eurojust.eu);

b) Simultaneous execution in several countries? (Eurojust videoconference?)
B. JOINT INVESTIGATION TEAMS (JIT)

1. With this measure, the goal is to improve the gathering, the sharing, the transmission and the use of evidence between all authorities participating in the JIT, in the context of the established agreement;

2. As, in principle, a JIT presupposes the existence of several criminal investigations, simultaneous, (in several MS), the local coordinator of the JIT should observe and create the conditions to gather the evidence in respect of the mandatory formalities in each MS, allowing for valid and admissible evidence in each national criminal proceeding;
3. To get a good result, he or she should consult, at the earliest stage, the other participants of the JIT and study together the law applicable in each case/MS;

4. At the moment of evaluation of the setting up of a JIT, national sensibilities and mistrustfulness against other MS should be avoided. In contrary, the eventual added value of other MS to help investigations should be taken into account;

5. As a rule, the advice of Eurojust should be asked before the setting up of the JIT or the establishment of the agreement, not only to formulate the JIT or the agreement but also to have practical, financial or legal help, and for an eventual participation in the JIT.
6. The agreement should be very precise on the role of each participant, the objectives of the JIT, responsibilities, and so on;

7. The eventual participation of EUROPOL should be evaluated;

8. If the need of third countries outside of the EU could be useful, the setting up of the JIT should respect the legal bases of each State involved.
C. USEFUL LINKS AND OTHER INFORMATION

1. Form: for a European model of a MLA request, see: https://www.consilium.europa.eu/uedocs/cmsUpload/FormRequestEN.pdf


3. Future legislation: European Investigation Order (EIO) – specific form