Debate Topics:
Romania 2 vs. France 2

Team France 2
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THEMIS 2012 – Grand Final
International cooperation in criminal matters

= Criminal activities

= National policemen and investigators

= Joint Investigation Team (JIT)
Transmission of evidence = Criminal activities
National policemen and investigators = Joint Investigation Team (JIT)
How should evidence gathered by the JIT acting in and on the territory of EU Country B be transmitted to EU Country A if it is considered also relevant to Country A’s investigations?

France 2 shall sustain that the issuing of a common Letter Rogatory to that effect is unnecessary.
Introduction

I. The futility of a Letter Rogatory: better alternatives for transmission of evidence
   A. Transmitting evidence through the JIT itself
   B. Transmitting evidence thanks to other tools of cooperation

II. The irrelevance of a Letter Rogatory: the shortcomings of a counterproductive instrument
   A. Drawbacks in form
   B. Drawbacks in content

Conclusion
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Letters Rogatory

- Traditional instruments of cooperation:
  - European Convention 20th April 1959

  Aim at promoting cooperation in criminal matters

Joint Investigation Teams

- Recently created:
  - MLA Convention 29th May 2000
  - Framework Decision 13th June 2002

  Aim at making cooperation more efficient

DO THEY NEED a LETTER ROGATORY?
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Conclusion
I. The futility of a Letter Rogatory
A) Transmitting evidence through the JIT itself

Reason n°1: A JIT is a convenient framework for sharing evidence

EFFICIENCY of Police officers
And
CROSS BORDER COORDINATION Of judges and prosecutors

MUTUAL TRUST

THE SPIRIT OF THE JIT = SHARING EVIDENCE
I. The futility of a Letter Rogatory
A) Transmitting evidence through the JIT itself

Reason n°1: A JIT is a convenient framework for sharing evidence.

First implication: SIMPLIFICATION OF THE INVESTIGATIVE PROCESS

Fading borders: the JIT acts as if it were investigating in only one State.

→ A specific procedure to transfer evidence shouldn't be necessary.

Second implication: FLEXIBILITY OF THE INVESTIGATIVE PROCESS

☐ Joint Investigation Team Manual: « JITs are designed as a flexible tool for supporting investigations involving cross border crime and building mutual trust ».

☐ A JIT relies on a written agreement that can be amended at any time.

☐ The Operational Action Plan containing a paragraph on evidence gathering and « translation » of evidence.
I. The futility of a Letter Rogatory
A) Transmitting evidence through the JIT itself

Reason n°1: A JIT is a convenient framework for sharing evidence
= JIT's legal supports are sufficient on their own

JIT Agreement
between
COUNTRY A
and COUNTRY B

Article 10: Transfer of evidence

Amendment to the JIT Agreement
between
COUNTRY A and COUNTRY B

Article 1: Transfer of evidence

OR

OR

Operational Action Plan
for the JIT between
COUNTRY A
and COUNTRY B

Article 10: Transfer of evidence

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**I. The futility of a Letter Rogatory**

**A) Transmitting evidence through the JIT itself**

**Reason n°2**: Provisions on transmission of information could be used to transmit evidence.

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
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<td>2000 MLA Convention</td>
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<td><strong>Art. 13§10</strong>: use of information lawfully obtained by a member or seconded member while part of a JIT which is not otherwise available to the competent authorities of the Member States concerned, for the following purposes.</td>
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</table>
I. The futility of a Letter Rogatory

A) Transmitting evidence through the JIT itself

Reason n°2: Provisions on transmission of information could be used to transmit evidence.

Article 13§10:

« Information lawfully obtained (...) may be used for the following purposes:

a) for the purposes for which the team has been set up;

b) subject to prior consent of the Member States where the information became available, for detecting, investigating and prosecuting other criminal offences (...);

c) for preventing an immediate and serious threat to public security;

d) for other purposes to the extent that this is agreed between Member States setting up the team »
1. The futility of a Letter Rogatory
A) Transmitting evidence through the JIT itself

Reason n°2: Provisions on transmission of information could be used to transmit evidence.

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<td>Model agreement on the establishment of a JIT</td>
<td>13.4: Conditions under which seconded members may share information derived from seconding authorities.</td>
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<tr>
<td>(26 February 2010)</td>
<td><strong>13.10bis</strong>: Confidentiality and use of information already existing and/or obtained during the operation of the JIT.</td>
</tr>
<tr>
<td>Check list for the Operational Action plan</td>
<td><strong>Information exchange and communication</strong> – describe how information will be exchanged.</td>
</tr>
</tbody>
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→ Wide scope of transmission of information...AND EVIDENCE!
Evidence (Oxford dictionary): *information* drawn from personal testimony, a document, or a material object, *used to establish facts in a legal investigation*

**Difference between evidence and information is thin**

**Example:** A JIT between the United Kingdom and France

**Interception of telecommunications** carried out in the UK by the JIT
A French magistrate asks for transmission of the interception

→ Information in one country, evidence in the other

**Fingerprint** discovered in France
French policemen ask for transmission of the UK’s fingerprints database

→ Information when isolated, evidence taken together
I. The futility of a Letter Rogatory

B) Transmitting evidence thanks to other tools of cooperation

Possibilities to share evidence apart from the JIT itself:

→ By transferring evidence under the provisions of article 39 of the Schengen Agreement of 1985

« 2. Written information (...) may not be used (...) as evidence of the offence charged other than with the consent of the [Member State where the information was collected] »

→ No use of Letter Rogatory, but restriction to countries members of the Agreement.

→ By using new instruments of cooperation based on mutual recognition: Freezing Order and European Evidence Warrant

→ Provisional seizure of evidence accompanied by a procedure aiming at collecting and transferring evidence.
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II. The irrelevance of a Letter Rogatory: A) Drawbacks in form

Numerous drawbacks in form which concern the writing, translation and transmission of a Letter Rogatory.

- No standardized document
  - *Time lost to understand the Letter Rogatory... (origin, content, ways of execution)*

- Difficulty of translation
  - *Cordoba does not accept Letters transmitted in English*

- Complex identification of the foreign authority
  - *In Spain, each city has its own investigating judge*

- No binding deadlines
  - *Not sure to receive an answer before the ending of the JIT*
II. The irrelevance of a Letter Rogatory: B) Drawbacks in content

GROUND FOR REFUSAL: LEGAL BASIS

1959 Convention on mutual assistance in criminal matters (article 2):

« Assistance *may be refused*:

a. if the request concerns an offence which the requested Party considers a political offence [...] or a fiscal offence;

b. if (...) that execution is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country. »

GROUND FOR REFUSAL: THE MAIN FLAWS

TOO BROAD and NOT PRECISE ENOUGH

Grounds for refusal are so numerous and broad that a Letter Rogatory can be refused almost every time

Our case: Might involve a serious offence, such as terrorism (ETA,...)

Risk of refusal because of prejudice to public order
II. The irrelevance of a Letter Rogatory

The use of a Letter Rogatory in our case would be both:

- **Rather impractical** (Drawbacks in form)
- **Unpredictable** (Drawbacks in content)

**S. Mogini:** « *a letter rogatory is like a castaway’s message in a bottle which he or she hopes will reach its destination* »

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A Letter Rogatory

The magistrate
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**Conclusion : answer to the debate**

**QUESTION** : How should evidence gathered by the JIT acting in and on the territory of EU Country B be transmitted to EU Country A if it is considered also relevant to Country A’s investigations?

**ANSWER** : The issuing of a Letter Rogatory to transmit evidence when a JIT is created is:

1) **Unnecessary** because better solutions exist.

2) **Irrelevant** because of its numerous weaknesses.
Conclusion: proposals

How could we make this answer more obvious and avoid such a questionning in the future?

Three proposals:

- To promote other tools specially designed to transmit evidence
  to make the most of freezing orders and EEW

- To clarify the status of evidence in the legal basis of the JITs
  by rewriting the MLA Convention to assimilate evidence and information

- To provide Member States with an example of agreement
  by modifying the Model Agreement on the Establishment of a JIT
Final Step:

To Harmonize the national rules regarding the admissibility of evidence

- As proposed by the EU Commission in its 2010 Action plan implementing the Stockholm programme...

- But nothing has been launched yet...
THANK YOU FOR YOUR ATTENTION!