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Limits of Evidence within EU

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Abstract: The issue of admissibility of evidence has been regulated only very scarcely in the EU. Judicial cooperation in criminal matters has been embracing the increasing number of instruments, covering plethora of aspects, however, the field of admissibility of evidence remains almost untouched. Can the Area of Freedom, Security and Justice be called the Common Evidence Area? From the national perspective, the issue of admissibility of evidence is still subject to divergent solutions in the Member States, concerning the common law and continental law systems, i.e. the right of access to a lawyer. Thus, the paper aims to take into account the tendencies of legal rule in matter of admissibility of evidence, the dynamic of evidence movement within EU area.

Keywords: EPPO; testimony; prejudice; admissibility; gathering

1. Mutual Recognition

When the principle of mutual recognition concerns different types of decisions, rendered on all stages of the proceedings, the legal gap in the field of admissibility of evidence gives rise to concern insofar as no principles are established with regard to their transfer between the Member States. This has provoked commentaries about a possibility of “free movement of evidence” whereby evidence gathered could circulate without barriers between the Member States. In an extreme case, an obligation to recognize all evidence gathered abroad could lead to a situation of forum-shopping, i.e. evidence would be collected a country where most liberal evidential rules are applied and then transferred to another one where it would need to be recognized.

The issue of admissibility of evidence is subject to divergent solutions in the Member States. The two opposite models may be attributed common law and continental law systems. The common law system is attached to a fairly strict system of admissibility of evidence. This is often linked to the fact that non-professionals sitting in a jury remain key actors in the judicial process, hence the need to provide them with a clear framework for their decision through introduction of a set of rules on admissibility of evidence and, thus, avoid a distortion of justice which set a clearer framework for the decision of the jury. The specificities of the common law system include limitations in hearsay evidence; limitations in testimonies of anonymous witnesses, limitations in scope of persons entitled to refuse to testify (not all closest persons are protected); specific position of accused persons (who testifies under oath unlike in continental law systems where no legal consequences are attached to

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them lying), wide scope of plea bargaining (transactions) which impacts on the entire evidence gathering process.

In the Continental law system, the limitations in the use of evidence are only few. In some countries it is hardly possible to formally restrict admissibility of evidence in the court. One example of the divergent approaches in this field may be the Directive 2013/48/EU on the right of access to a lawyer (1). The initial proposal of the Commission linked strict evidential consequences with the prior non-respect of the right of access to a lawyer. According to the proposal “*Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.*” This proposal met with a determined opposition of some Member States who considered that such limitations would adversely impact on the independence of the Court which should enjoy of freedom of assessment of evidence.

Two models of cross-border gathering of evidence have been established in the EU. The first system covering nearly all types of evidence is contained in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. The second one is covered by some mutual recognition instruments, however, its material scope is very limited. Namely, it concerns only freezing of evidence based on Council Framework Decision 2003/577/JHA (2). It is apt note that a more ambitious attempt to legislate on other evidential measures failed, since the framework decision 2008/978/JHA on the European evidence warrant (3) has been implemented by only 3 Member States (Denmark, Finland). This instrument is considered obsolete; the instruments contain only fragmentary rules on the manner of evidence gathering which poses a risk of evidence being considered inadmissible or of a reduced probative value.

Under MLA 2000 Convention, the *forum regit actum* principle has been established. Under this principle:

Art. 4.1. Where mutual assistance is afforded, the requested MS shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State.

Additionally, in line with Article 4.3, If the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting MS, the authorities of the requested MS shall promptly inform the authorities of the requesting MS and indicate the conditions under which it might be possible to execute the request. The authorities of the requesting and the requested MS may subsequently agree on further action to be taken concerning the request.

2. Forum Regit Actum

The *forum regit actum* principle does not, obviously, solve the problem of evidence collected through so-called spontaneous exchange of information. It results from this procedure that one state has no impact on the manner of gathering evidence, since it is spontaneously exchanged. It may happen that it will not be automatically used as evidence but only as information about evidence. It may also require further authentication in the forum state.

One of the key challenges encountered in the course of international judicial assistance is a principle of direct examination of evidence by a judge. This principle is, by nature, put at risk in the

circumstances of the geographical distance of the location of evidence. One way to remedy this difficulty is to organize a videoconference. Using this technology is on occasions suggested by the ECHR as a way to bypass the shortcomings of traditional legal assistance. However, this avenue has its legal limits. Certain states do not allow for this form of evidence gathering with regard to accused persons.

The issue of admissibility of evidence may also be raised in one of the novel frameworks for evidence gathering, that is joint investigation teams. Since this issue will be, here again, governed by the national law of the Member State where the court proceedings take place, it is very essential to examine this question in the phase of drafting the agreement before any operational activities have been undertaken by the JIT. This is also expressly provided by the JIT model agreement (7) according to which the parties entrust the leader or a member (s) of the JIT with the task of giving advice on the obtaining of evidence.

The new signals of possible activity of the European Union appeared with the publication in 2009 of the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. This paper provided more questions i.e. if common standards should be adopted, which would envisage?, are preferred the adoption of general standards applied to all types of evidence or more specific standards accommodated to the different types of evidence?

The Treaty of Lisbon provided for an explicit legal basis in this field, namely Art. 82.2. of the Treaty on Functioning of the European Union:

“Art. 82.2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

The instruments referred to above cover legal assistance between judicial authorities. It may be often the case that the information comes from non-judicial authorities. One should scrutinize such information with particular attention before using it as evidence, as it might have not necessarily be subject to adequate procedural safeguards in the course of its collection, since the administrative/customs authorities are not subject to as strict standards as judicial authorities in criminal proceedings.

3. European Public Prosecutor Office

A novelty in the area of admissibility of evidence is offered by the proposal of the establishment of the European Public Prosecutor's Office (EPPO) (4) made by the Commission in line with Article 86 of the Treaty on Functioning of the European Union with the aim of prosecution of offences against financial interests of the EU. As opposed to traditional “horizontal” methods of cooperation, the proposal introduces a “vertical” model where the EPPO could carry out the pre-trial proceedings and make a binding decision on which jurisdiction should carry on with the judicial phase of the process. This puts the problem of admissibility of evidence in a completely different perspective. It sets up a list of investigative measures which the EPPO should have the power to request or to order. Member States shall ensure that the measures referred to in par. 1 may be used in the investigations and prosecutions conducted by the European Public Prosecutor's Office. The evidence collected in accordance with such rules shall be admitted in the trial without any validation or similar legal process

even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence. Once the evidence is admitted, the competence of national courts to assess freely the evidence presented by the European Public Prosecutor's Office at trial shall not be affected.

4. Study Cases

Case Rantsev v. Cyprus and Russia (no. 25965/04)

From the perspective of the ECHR, does the state of nationality of the victim of crime has an obligation to initiate its own criminal proceedings?

What obligation is incumbent on the member states concerning evidence? Does the state where the evidence is located have an obligation to secure it in the absence of the legal assistance request from the investigating state?

An possible Romanian answer is according to Art. 35 (1) "Each Contracting Party shall institute, at the request of the other Contracting Party, in accordance with and subject to the provisions of its own law, criminal proceedings against its own citizens who are alleged to have committed an offence in the territory of the other Contracting Party".

On the other hand, Latvia may identify some provisions in matter of mutual legal assistance "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". Also, it was found the taking of evidence from litigants, accused persons, defendants, witnesses and experts as well as recognition and enforcement of judgments in civil matters, institution of criminal prosecutions and extradition of offenders.

5. Conclusions

The issue of admissibility of evidence rises up usually in national contexts. It takes into account difference in legal systems referred to above and it is able to look at this issue from the more general perspective of fundamental rights (5). Some guidelines should be primarily taken into account: Admissibility of evidence is primarily a matter for regulation by national law; the Court's task under the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken; all the evidence must be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. Authorities should take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Using modern technologies, such as videoconference, should be considered. In the event of a particular geographic obstacle, the authorities should take measures which sufficiently compensated for the limitations of the applicant's rights.

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7. References

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Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final

Inter alia: Case of Zhukovskiy v. Ukraine (no. 31240/03).

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