

# Situation Before the European Investigation Order (EIO) in Criminal Matters

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# Structure

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## Traditional MLA framework | adequate but fragmented

- overview
- EU 2000 Convention & Protocol 2001

## Mutual recognition-based instruments

- European Freezing Order
- European Evidence Warrant (EEW)

Icing on the cake: free movement of evidence?

EIO proposal | Feather in Belgium's cap?

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# Traditional MLA framework | Adequate but fragmented

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## overview (non-limited)

- 1962 Benelux Treaty
- CoE 1959 MLA Convention + Protocols 1978 & 2001
- 1990 Schengen Implementing Convention
- 1997 Naples II Convention
- EU 2000 MLA Convention + 2001 Protocol [infra]
- 2004 Benelux Police Treaty
- EU 2006 'Swedish' FD
- Prüm Convention/2008 EU Prüm Decisions

## principal rules of play

- inter-state cooperation
- coercive/intrusive measures/actions: exequatur or transfer procedure, compatibility with law requested state + dual criminality

## convention shopping for certain (special) cooperation forms

- hot pursuit, cross-border surveillance, controlled delivery, covert investigations, JITs

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# EU 2000 Convention & Protocol 2001

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- compliance with
  - formalities and procedures of requesting MS
  - deadlines set by requesting MS
- interception of telecommunications
- controlled deliveries
- covert investigations (infiltration)
- joint investigation teams
- spontaneous exchange of information
- sending and service procedural documents
- hearing by video or telephone conference
- temporary transfer detainees to requested MS
- direct transmission of requests
- account and transaction information
- account monitoring

# Mutual recognition-based instruments

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to be implemented domestically

principal rules of play

- between locally competent judicial authorities
- no more exequatur or transfer procedures
- blind recognition – via order (+ certificate) or warrant
- dual criminality requirement basically abandoned
- refusal for (disguised) fiscal reasons further restricted

MLA sphere: fragmented introduction MR only

- 2003 FD European Freezing Order [\[infra\]](#)
- 2008 European Evidence Warrant (EEW) [\[infra\]](#)

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# European Freezing Order

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immediate execution (within 24 hours)

of freezing orders, aimed at preventing transfer, destruction, conversion, disposition or movement etc of objects, documents or data which could be produced as evidence in criminal proceedings in the issuing MS

- (also of alleged proceeds from crime, equivalent goods, instrumentalities + objectum sceleris)

if accompanied by standard certificate

no exequatur procedure

no dual criminality check for offences

- punishable in issuing MS with +3 years
- and appearing in the standard list of 32 'list' offences

freezing maintained until transmission

- following a separate request to that end (awaiting the EEW)

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# EEW | Introductory classification

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## obtaining existing (available) evidence

- house search
- freezing order (with 3rd parties)
- seizure (often requiring house search)
- order to provide/allow access to

## obtaining “new” evidence

- hearing, confrontation, covert investigations, analysis, expertise

## obtaining evidence “in real time”

- interception telecommunication
- covert investigations
- monitoring bank accounts

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# EEW | Assessment

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logical post-freezing step (even if freezing is often not useful/needed)

execution within strict time limits of requests

- for transmission of objects, documents and data
- for seizure, transfer, house search

via uniform EEW

no conversion or exequatur procedure

no dual criminality check if

- no house search is required
- offence in 32-list
- Germany allowed opt-out
  - reintroduction dual criminality check for 6/32 offences

goal: fast/efficient mechanism for obtaining existing evidence

- including accounts/transactions (Articles 1-2 Protocol 2001)
- not for new neither for real time evidence

evaluation

- not a proper MR instrument (no decision to be recognized, FRA)
- quite useless
  - only existing evidence
  - need to rely on traditional MLA in case anything more is needed (which usually is the case)
- 5 y negotiations | no support any longer | formally repealed January 2016

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# Icing on the cake: free movement of evidence?

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## 2003 Explanatory Memorandum to EC proposal for EEW

- additional FD's announced, to be consolidated in a single MR instrument for all forms of MLA
- MR of evidence (if lawfully collected in locus MS?)

## 2007 TFEU (post-Lisbon): approximation procedural law in view of admissibility of evidence

## 2009 Action Plan for the Stockholm Programme

- study on the laws of evidence in criminal proceedings throughout the EU
- = 2009-10 IRCP EC study cross-border evidence gathering & use ([open access](#))

## 2009 EC Green Paper cross-border collection and admissibility of evidence

Spring 2010 | results Evidence study & Green Paper response presented to MS

## 2010 proposal for a directive on a European Investigation Order (EIO) [infra]

## 2010-12 IRCP EC study future judicial cooperation ([open access](#))

summarized in: Free gathering and movement of evidence ([open access](#))

# EIO proposal | Feather in Belgium's cap?

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## 2010/2 Belgian EU Presidency

- despite clash with former Justice Commissioner Reding
- obstinate in tabling its proposal
- co-sponsors: Austria, Bulgaria, Estonia, Slovenia, Spain, Sweden

end 2011: general approach agreed in JHA Council

2012-2013 EP and trilogue

3 April 2014 Directive 2014/41/EU adopted

transposition legislation required by 22 May 2017

- deadline missed by most MS

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