

SESSION 1

Towards the European Investigation order

25 October 2018 - Barcelona

Prof. dr. Wendy De Bondt

t. +32 9 264 69 84

f. +32 9 264 69 71

Wendy.DeBondt@UGent.be

Obtaining existing 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

Judicial cooperation



- Contemporary landscape blurred
- MS discretion to appoint ‘judicial’ authorities
- Often built-in authority-flexibility
- No ‘judicial’ authority requirement for data protection

MLA - list

MLA - rules

LRA vs FRA

MR - rules

Wide range of traditional legal instruments

- Council of Europe Mutual Legal Assistance Convention (1959) and its protocols
- Schengen Implementation Convention (1990)
- Napels II Convention (1997)
- EU Mutual Legal Assistance Convention (2000) and its protocols
- Swedish Framework Decision (2006)
- Prum Convention (2005) and EU Prum Decision (2008)
- Decisions on Eurojust (2002, 2008)
- ...

MLA - list

MLA - rules

LRA vs FRA

MR - rules

Principal rules of play

- Assistance -> Requesting and requested state
- Inter-state perspective – i.e. regulating cooperation between states
- Double criminality (not general rule)
- Locus regit actum & forum regit actum

MLA - list

MLA - rules

LRA vs FRA

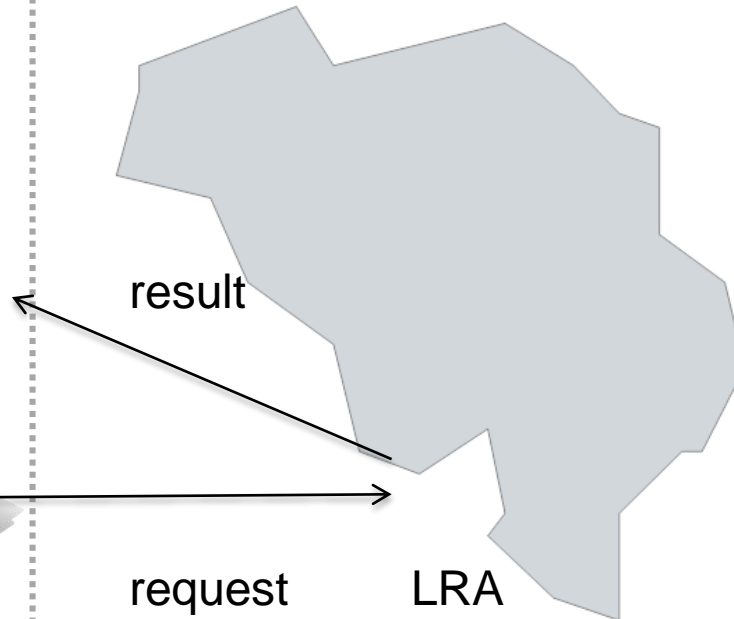
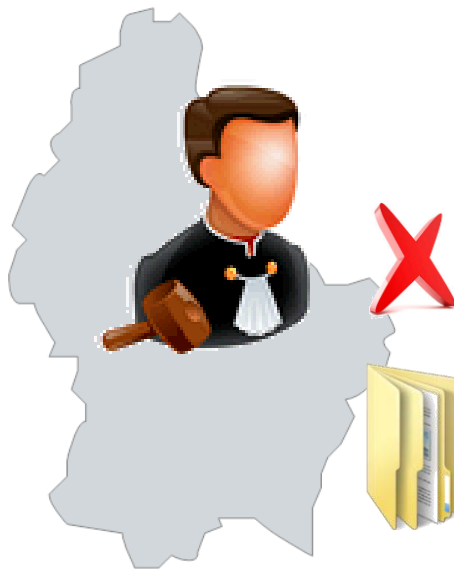
MR - rules

Locus Regit Actum



Forum-country with the court

Locus-country where the investigation takes place



MLA - list

MLA - rules

LRA vs FRA

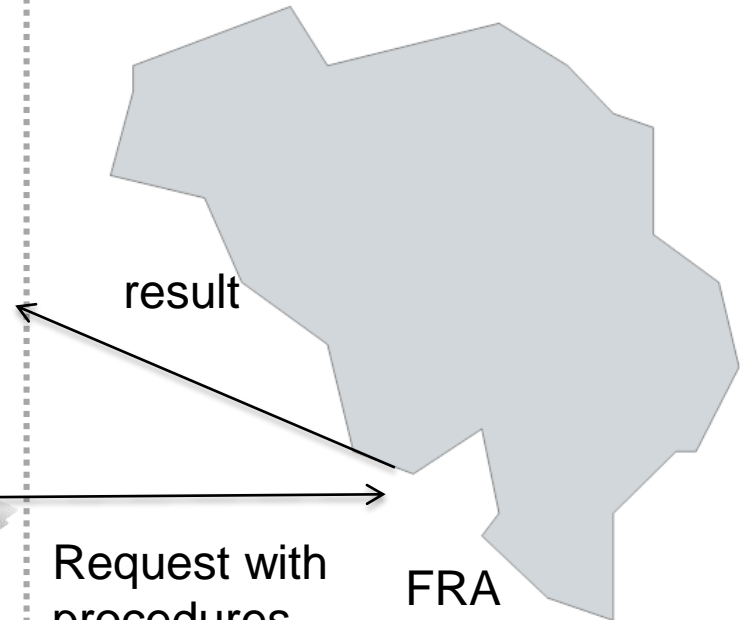
MR - rules

Forum Regit Actum



Forum-country with the court

Locus-country where the investigation takes place



Request with procedures & formalities

FRA

MLA - list

MLA - rules

LRA vs FRA

MR - rules

to be implemented domestically

principal rules of play

- between locally competent judicial authorities
- Issuing and executing authorities
- no more exequatur or transfer procedures
- blind recognition – via order+certificate or warrant
- dual criminality requirement basically abandoned

Freezing Order

EEW

IRCP 37

EIO

IRCP 37

2003 FD European Freezing Order

- 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

Freezing Order

EEW

IRCP 37

EIO

IRCP 37

2003 FD European Freezing Order

- 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)

Freezing Order

EEW

IRCP 37

EIO

IRCP 37

2008 FD European Evidence Warrant

- 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
- limited dual criminality test (opt out Germany)

Freezing Order

EEW

IRCP 37

EIO

IRCP 37

2008 FD European Evidence Warrant

- evaluation
 - not a proper MR instrument
 - quite useless
 - only existing evidence
 - need to rely on traditional MLA in case anything more is needed (which usually is the case)
- 5 y of negotiations | no support any longer

Evidence

Judicial cooperation

MLA vs MR

Instruments

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Freezing Order

EEW

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“You know, sometimes I wish the EU would sit still long enough to allow it to be evaluated”

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+32 9 264 69 84
Wendy.DeBondt@UGent.be

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Freezing Order

EEW

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EIO

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EU cross-border gathering and use of evidence in criminal matters

Towards mutual recognition of investigative measures and free movement of evidence?

G. Vermeulen
W. De Bondt
Y. Van Damme



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+32 9 264 69 84
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2009 IRCP Evidence Study

- overcomplexity of the environment
 - combination of MR and MLA instruments
 - partial coverage of investigative measures
 - need for benchmarking framework
- feasibility of future MR based MLA
 - MLA flexibility through “widest possible measure of assistance”
 - incompatibility MR and MLA features (e.g. spontaneous information, JIT, ...)
- free movement of evidence
- usually not covered by cooperation instruments

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Future perspective : a comprehensive MR-based instrument

- ✓ Comprehensive
- ✓ 32 defined offence list as MR character
- ✗ Forum regit actum-technique
- ✗ Some measures: JIT, unregulated measures, spontaneous information exchange
- ✗ Procedural rights persons involved (best of both worlds, lex mitior)

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Freezing Order

EEW

IRCP 37

EIO

IRCP 37

European Investigation order

- ✘ **Comprehensive** -> hardly more than consolidation instrument in terms of measures regulated
- ✘ **32 defined offence list** as MR character
- ✘ **Solution for stringency / capacity**
- ✘ **No admissibility of evidence – solution** -> painful considering 2003 priority

Evidence

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MLA vs MR

Instruments

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Freezing Order

EEW

IRCP 37

EIO

IRCP 37

42

Rethinking
international
cooperation in
criminal matters
in the EU

Moving beyond
actors, bringing
logic back, footed
in reality



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SESSION 2

Scope and Content of an European Investigation order

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Prof. dr. Wendy De Bondt

t. +32 9 264 69 84

f. +32 9 264 69 71

Wendy.DeBondt@UGent.be

Suicide

Fraude

**Golden rule:
call your
colleague to
discuss**

Polish National Residing in The Netherlands,
Psychological problems, psychiatrist, **suicide
with pill cocktail**, concurring outcome post
mortem analysis, **case closed**.

Polish relatives contact Polish prosecutor to look
into the death of their relative, Poland sends
number of EIOs to The Netherlands to
interrogate a number of people, the pathologist,
to conduct a house search in the house of the
'relative' and the apartment of his girl friend, ...

Is it proportionate to be forced to re-open a closed
case?

Suicide

Fraude

Belgian national living Belgium near the Dutch border; **buys a toy for** his son on an internet platform (**second hand**). **Money is wired** to Dutch bank account. **No contact** anymore. Belgian authorities send out EIO to The Netherlands to look into the bank account.

Is it proportionate to be forced to set up a bank account monitoring for such a small seemingly meaningless case?

Dutch practice: Analysis Center; start up after 10 hits

“Evidence gathering in criminal matters”

Which means that the following actions are excluded

- Purely for confiscation
- Non-criminal investigations
- Simple arrest (of convicted person)
- Regulating information that you already have

Sometimes you have received information from abroad which you cannot use in a criminal proceeding. To be allowed to do that, you should still send an MLA, not a EIO

However, as MLA is ‘form –free’ some countries will accept and regard the incoming EIO as an MLA-request for efficiency reasons.

Judicial

Ministry

Police

Court

Remedies

What constitutes judicial cooperation?

- Cooperation between judicial **authorities**?
- Cooperation based on judicial **decisions**?
- Cooperation based on **provisions** relating to judicial cooperation (as opposed to police cooperation)?

For long the position of the **European Commission** was that the qualification of authorities belonged to the discretion of the individual member states.

Judicial

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Court

Remedies

What constitutes judicial cooperation?

- Cooperation between judicial **authorities**?
- Cooperation based on judicial **decisions**?
- Cooperation based on **provisions** relating to judicial cooperation (as opposed to police cooperation)?

The court concludes that it is an **autonomous** EU **concept** that should not be left to the sole interpretation of the individual MS. It is **not limited** to designating only to **judges or courts** of a Member State, but **may extend**, more broadly, to the authorities required to **participate** in administering justice in the legal system concerned.

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Remedies

Can a Ministry of Justice be the competent authority to issue warrants?

C-477/16 – Ruslanas Kovalkovas – 10 November 2016

- Lithuania, The Netherlands
- Convicted for infliction of grievous bodily injury
- The Ministry of Justice of Lithuania issues an EAW
- Dutch District Courts questioned whether decision of MoJ qualifies as required judicial decision.



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Remedies

Can a Ministry of Justice be the competent authority to issue warrants?

C-477/16 – Ruslanas Kovalkovas – 10 November 2016

*“It must, however, be held that the term ‘judicial authority’, referred to in that provision, **cannot** be interpreted as also covering an organ of the executive of a Member State, such as a ministry; which would be in breach of the general principle of **separation of powers**; it would also not sufficiently guarantee that the **procedural safeguards** are met during the procedure.”*



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Prof. dr. Wendy De Bondt
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Can a Ministry of Justice be the competent authority to issue warrants?

C-477/16 – Ruslanas Kovalkovas – 10 November 2016

*“It is **accepted** that a non-judicial authority, namely a central authority, is appointed for the **transmission** and **reception** of European arrest warrants. Action by such an authority is limited to practical and administrative assistance for the competent judicial authorities.”*



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Remedies

Can a decision made by a police authority be used as the basis to issue European warrants?

C-452/16 – Krzysztof M. Poltorak – 10 November 2016

- Sweden, the Netherlands
- SE convicted the Polish national for infliction of grievous bodily injury
- The Swedish police board issued an EAW
- The District Court in Amsterdam questioned whether a warrant issued by a police board qualifies as a judicial decision in the sense of article 1 FD EAW



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Remedies

Can a decision made by a police authority be used as the basis to issue European warrants?

C-452/16 – Krzysztof M. Poltorak – 10 November 2016

*“It must, however, be held that the term ‘judicial authority’, referred to in that provision, **cannot** be interpreted as also covering the **police** services of a Member State”*



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+32 9 264 69 84
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Remedies

Can a decision made by a police authority be used as the basis to issue European warrants?

C-453/16 – Halil Ibrahim Özçelik – 10 November 2016

- Hungary, the Netherlands
- Hungarian District Court issued an EAW
- In the annex, reference is made to the national arrest warrant of the Police Department of Ajka, **confirmed by** decision of the **Public Prosecutor's Office of Ajka.**



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Can a decision made by a police authority be used as the basis to issue European warrants?

C-453/16 – Halil Ibrahim Özçelik – 10 November 2016

“ A confirmation, such as that at issue in the main proceedings, by the public prosecutor’s office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a ‘judicial decision’, within the meaning of that provision.”



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Remedies

Can a decision of a non-criminal court / actor be executable via the European criminal warrants?

C-60/12 - Marián Baláž – 14 November 2013

- Czech Republic, Austria
- Road Traffic Offences – appeal possible in court that “also” deals with criminal cases
- Balaz argues that it does not qualify as a “court having jurisdiction in particular in criminal matters”



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Remedies

Can a decision of a non-criminal court / actor be executable via the European criminal warrants?

C-60/12 - Marián Baláž – 14 November 2013

“The term ‘court having jurisdiction in particular in criminal matters’, set out in Article 1(a)(iii) of the Framework Decision, is an autonomous concept of Union law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure.”



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Remedies

Does the EIO require the availability of a legal remedy in the issuing MS?

*Article 14 (2) EIO - The substantive reasons for issuing the EIO may **be challenged only** in an action brought in the **issuing State**, without prejudice to the guarantees of fundamental rights in the executing State.*

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Remedies

Does the EIO require the availability of a legal remedy in the issuing MS?

Case C 324/17 – Gavanozov – (lodged 31 May 2017)

- Referred by Bulgaria
- Are national legislation and case-law **consistent** with the EIO, in so far as they **preclude a challenge**, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing an EIO for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness?

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Remedies

Does the EIO require the availability of a legal remedy in the issuing MS?

Case C 324/17 – Gavanozov – (lodged 31 May 2017)

- Is the person who **occupies** the property in which the search and seizure was carried out or the person who is to be examined as a **witness** a **concerned party** within the meaning of Article 14(4) in connection with Article 14(2) of the directive??

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Transformation

Postponement

Refusal

Optional vs
mandatory

Double crim.

Ne bis in idem.

Immunities.

No formalities, recognize & execute , unless ...

Art. 10 – different type of investigative measure

- does not exist
- would not be available in similar national case
- same result through less intrusive measure

Art. 10.2 – list of investigative measures that should be accessible for other MS

- existing evidence
- information in police or judicial databases
- **hearing** of witness, expert, victim, suspect or accused
- **non-coercive** investigative measures
- identification measures (IP address)

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Art. 12 – Strict deadlines

- As soon as possible
- Recognise within 30 days (max 60 days)
- Execute within 90 days (max agreed days)

Art. 15 – Postpone execution

- Might prejudice an **ongoing** criminal investigation
- Evidence is being used -> required to stay in the country

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+32 9 264 69 84
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Art. 11.1 – List of optional grounds**(a) immunity or privilege**

(b) ordre public ‘narrow’

(c) would not be authorized in similar national
“administrative / infringement”-case**(d) ne bis in idem**

(e) territoriality clause

(f) violation of Art 6 TEU & Charter

(g) double criminality

(h) severity-thresholds

(g) and (h) not for minimum investigative measures that have to
be available (e.g. all non-coercive measures)

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International Research on Criminal Policy
Ghent UniversityProf. dr. Wendy De Bondt
+32 9 264 69 84
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Transformation

Postponement

Refusal**Optional vs
mandatory**

Double crim.

Ne bis in idem.

Immunities.

Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?

C-42/11 – JP Lopes Da Silva Jorge – 5 September 2012

- Portugal, France
- Convicted for drug trafficking in PT
- Mr Lopes Da Silva Jorge subsequently moved to France → resident status
- Optional ground limited and made mandatory



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Prof. dr. Wendy De Bondt
+32 9 264 69 84
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Refusal

Optional vs
mandatory

Double crim.

Ne bis in idem.

Immunities.

Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?

C-42/11 – JP Lopes Da Silva Jorge – 5 September 2012

*“That ground for **optional** non-execution has in particular the objective of **enabling** the executing **judicial authority** to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires”*



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Refusal

Optional vs
mandatory

Double crim.

Ne bis in idem.

Immunities.

Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?

C-42/11 – JP Lopes Da Silva Jorge – 5 September 2012

“Although a Member State may, in transposing Article 4(6), decide to limit the situations in which an executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it cannot automatically and absolutely exclude from its scope the nationals of other Member States staying or resident in its territory.”



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Postponement

Refusal**Optional vs
mandatory**

Double crim.

Ne bis in idem.

Immunities.

Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?

C-579/15 – Daniel Adam Popławski – 29 June 2017

- Poland, the Netherlands
- PL national convicted to prison sentence in PL. PL issues EAW with a view to execution
- NL wants to refuse based on residence
- Refusal = de facto impunity?



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Immunities.

Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?

C-579/15 – Daniel Adam Popławski – 29 June 2017

Legislation of a Member State providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, [...] cannot be regarded as compatible with that framework decision”



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Ne bis in idem.

Immunities.

Can a member state oppose the abandonment of the double criminality requirement?

C-303/05 – Advocaten voor de Wereld – 3 May 2007

- Belgium
- Motion for annulment of EAW law
- Abandonment requirement is discriminatory
- List of 32 offences breaches legality principle



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Double crim.

Ne bis in idem.

Immunities.

Can a member state oppose the abandonment of the double criminality requirement?

C-303/05 – Advocaten voor de Wereld – 3 May 2007

“Article 2(2) of the Framework Decision is not invalid inasmuch as it does not breach Article 6(2) EU or, more specifically, the principle of legality of criminal offences and penalties and the principle of equality and non-discrimination”



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Postponement

RefusalOptional vs
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Ne bis in idem.

Immunities.

0200 00 Open Category	PARTICIPATION IN A CRIMINAL ORGANISATION
0201 00	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
0201 01	Directing a criminal organisation
Article 2 (b) , Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.
0201 02	Knowingly participating in the criminal activities, without being a director
Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's criminal activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed,
0201 03	Knowingly taking part in the non-criminal activities of a criminal organisation, without being a director
Article 5 - United Nations Convention on Transnational Organised Crime (UNTS no. 39574, New York, 15.11.2000)	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities
0202 00	OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION

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Postponement

RefusalOptional vs
mandatory**Double crim.**

Ne bis in idem.

Immunities.

35 EU LOCS
The EU level offence
classification system

A bench-mark
for enhanced
internal
coherence of the
EU's criminal
policy

G. Vermeulen
W. De Bondt

**OPEN
ACCESS**

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Prof. dr. Wendy De Bondt
+32 9 264 69 84
Wendy.DeBondt@UGent.be

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Immunities.

Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if the prior conviction is not yet executed?

C-129/14 – Zoran Spasic – 27 May 2014

- Germany, Italy, Austria
- Organised fraud, counterfeit banknotes
- IT conviction: prison & fine
- “fine paid” so sentence in the course of being executed?
- Ne bis in idem: article 50 Charter vs 54 CISA



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C-129/14 – Zoran Spasic – 27 May 2014

*“CISA which makes the application of the **ne bis in idem** principle subject to the **condition** that, upon conviction and sentencing, the penalty imposed ‘has been **enforced**’ or is ‘actually **in the process of being enforced**’, is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined.”*



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C-129/14 – Zoran Spasic – 27 May 2014

*“Article 54 CISA must be interpreted as meaning that the **mere payment of a fine** by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is **not sufficient** to consider that the penalty **‘has been enforced’** or is ‘actually in the process of being enforced’ within the meaning of that provision.”*



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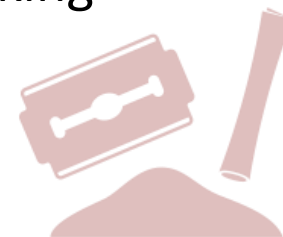
Ne bis in idem.

Immunities.

Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if additional conviction based on another qualification is possible in any of the other member states?

C-261/09 – Mantello – 16 November 2010

- Italy, Austria, Germany
- IT arrest warrant referring to participation in a criminal organisation & cocaine trafficking
- IT conviction for unlawful possession of cocaine, intended for resale
- Arrest in AT based on outstanding arrest warrant



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Immunities.

Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if additional conviction based on another qualification is possible in any of the other member states?

C-261/09 – Mantello – 16 November 2010

“The concept of the ‘same acts’ also appears in Article 54 of the CISA, where it has been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected”



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Immunities.

Can MS decides what does and does not fall within the scope of execution of political duties?

C-163/10 - Aldo Patriciello – 6 September 2011

- Italy
- Member of European Parliament
- Insulting police officer at hospital parking lot
- Outside EP buildings
- Connection with performance of duties?



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Immunities.

Can MS decides what does and does not fall within the scope of execution of political duties?

C-163/10 - Aldo Patriciello – 6 September 2011

“A statement of an MEP beyond the precincts of that institution and giving rise to prosecution does not constitute an opinion expressed in the performance of his duties covered by the immunity unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties.”



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Immunities.

Can MS decides what does and does not fall within the scope of execution of political duties?

C-163/10 - Aldo Patriciello – 6 September 2011

“It is for the court making the reference to determine whether those conditions have been satisfied in the case in the main proceedings.”



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+32 9 264 69 84
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Transformation

Postponement

Refusal

Specific rules
for measures

Transfer to you (Art. 22)

- Person in custody in another MS – have him transferred to you for investigative measure – to gather evidence in the presence of person involved
- *Additional optional refusal grounds both related to the person involved: consent & possible prolonged detention*

Transfer along (Art. 23)

- Person in custody in your MS – transfer along with the order to have the investigative measure carried out in the EMS, in the presence of the person involved (e.g. reconstruction, line up, ...)
- *Additional optional refusal ground consent*

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Postponement

Refusal

Specific rules
for measures

Video conference (Art. 24)

- witness, expert AND suspect and accused
- additional optional refusal ground consent + contrary to fundamental principles
- *applicable rules: best of both worlds “procedural rights that accrue to him under the law of the executing and the issuing member state”*

Telephone conference (Art. 25)

- only witness and expert -> no extension to suspect and accused

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+32 9 264 69 84
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Transformation

Postponement

Refusal



Human rights

Reciprocity

What if the other country has not implemented the EU instrument?

C-396/11 – Ciprian Vasile Radu – 29 January 2013

- Romania, Germany
- German EAW for robberies based on several national arrest warrants
- German EAW law declared **unconstitutional**
- Reciprocity as a requirement / refusal ground?



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Human rights

Reciprocity

What if the other country has not implemented the EU instrument?

C-396/11 – Ciprian Vasile Radu – 29 January 2013

*“Member States may **refuse** to execute such a warrant **only** in the cases of **mandatory** non-execution provided for in Article 3 thereof and in the cases of **optional** non-execution listed in Articles 4 and 4a. [...] The executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in Article 5 of that framework decision.”*



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Prof. dr. Wendy De Bondt
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Financial

Operational

Financial capacity

- MLA vs MR philosophy
- Costs borne by the executing Member State
- Exceptional costs -> consultation & discussion
- Alternative: cost-sharing-mechanism
 - Cost efficiency
 - Accumulation of ‘small costs’
- Suggest less costly alternatives
- Legal basis to be created

Proportionality

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Admissibility

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Financial

Operational

Operational capacity

- New aut exequi aut tolerare rule?
- Art. 9.4
 - Request of IMS needs to be complied with
 - Unless against fundamental principles
- JIT and Naples II acquis – no constitutional hurdles

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LRA - FRA

Evaluation

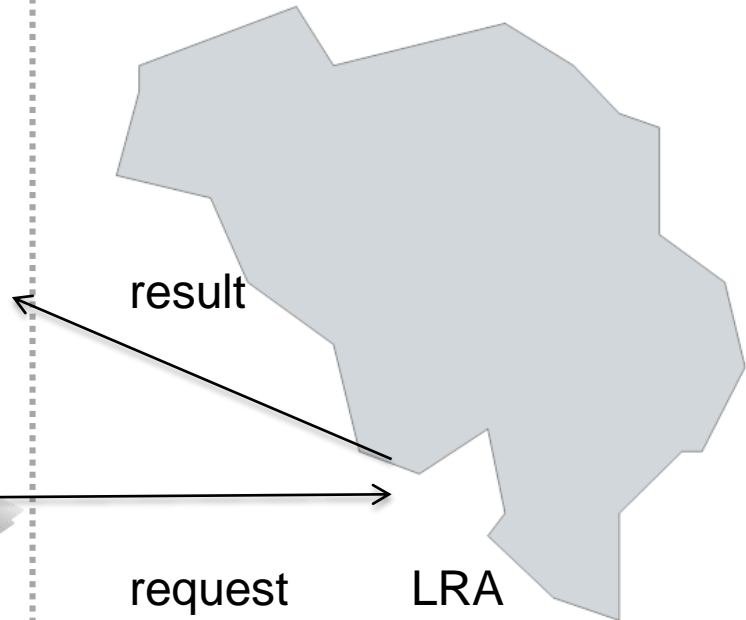
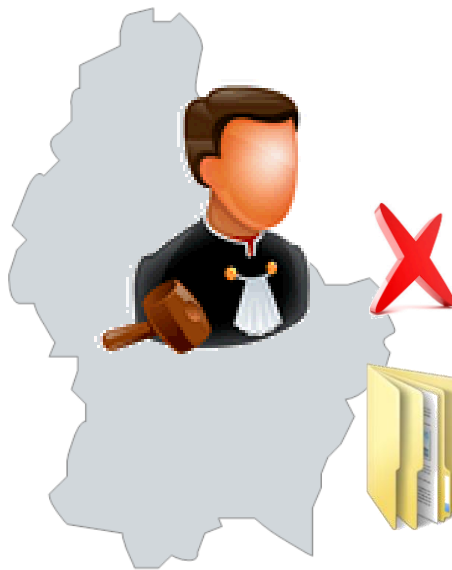
Minimum standards?

Locus Regit Actum



Forum-country with the court

Locus-country where the investigation takes place



LRA - FRA

Evaluation

Minimum standards?

Forum Regit Actum



Forum-country with the court



Locus-country where the investigation takes place



result

Request with procedures & formalities

FRA

Proportionality

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Evaluation

Minimum
standards?

Art. 9.2 – Forum Regit Actum

- Identify procedures and formalities to include
- Correctly interpret and apply
- Concept: ‘Fundamental principle’
- No per se admissibility
- Best outcome in 1-on-1 situation
- Problem needs alternative solution

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Prof. dr. Wendy De Bondt
+32 9 264 69 84
Wendy.DeBondt@UGent.be

LRA - FRA

Evaluation

Minimum
standards?

Towards minimum standards?

- Cfr. DNA standards

Evidence gathered in a mere domestic procedure

- Only possible through common minimum standards also
- Treaty competency EU limited to cross-border situations only
- However often overstepped in recent years

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Questions and discussion



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www.ircp.org

Prof. dr. Wendy De Bondt
+32 9 264 69 84
Wendy.DeBondt@UGent.be

www.ircp.org

Contact

Prof. dr. Wendy De Bondt

t. +32 9 264 69 84

f. +32 9 264 69 71

Wendy.DeBondt@UGent.be

IRCP

Ghent University
Universiteitstraat 4
B – 9000 Ghent