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Esperanto for EU Expert Evidence in criminal matters

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Esperanto for EU Expert Evidence in Criminal Matters

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Abstract

Fully in line with the growing EU interest in cross-border gathering and use of evidence in criminal matters, the European Commission confirmed its intention to review the entirety of the current mutual legal assistance framework with a view to introduce more "mutual recognition"-like features therein. In practice this can lead to the obligation to recognize per se admissibility of foreign evidence in the course of criminal proceedings, if such evidence is admissible in the member state that gathered the evidence.

When attempting to introduce mutual recognition-like features into the cross-border gathering and use of evidence in criminal matters, specific types of evidence deserve a special focus. Expert evidence in criminal matter is one of those special types of evidence. At member state level, a wide variety exists in the practice of appointing and remunerating experts, in the criteria for expertise, reliability and independence of experts and in the admissibility and value of their evidence. Because of this debate at national level, significant distrust between member states is more than likely.

This article links in with these recent developments. Only thorough relection on the on the differences between national practices with regard to expert evidence in criminal matters and the setting up of EU level recommendations and quality standards will make mutual recognition of expert evidence acceptable.

Keywords: EU, expert evidence, criminal matters, free movement

Esperanto for EU Expert Evidence in criminal matters

1 Introduction

This paper combines two ongoing discussions: first the recent evolutions in the development of European standards of evidence gathering and second the national discussions on the position of experts in criminal law. The fact that the discussion on evidence gathering neglects issues of admissibility, that the discussion of evidence gathering is separated from discussions on specific types of evidence, and that discussions on expert evidence are conducted at national level without focussing on cross-border problems, is considered problematic.

This introduction will provide some background on the two ongoing discussions and will elaborate briefly on the aims of the paper.

1.1 Evidence gathering techniques

Nowadays, there is a lot of attention for evidence gathering (techniques) at European level. The existing rules on evidence gathering (techniques) are of two kinds. On the one hand there are the instruments based on the *mutual legal assistance* principle (MLA principle). These most notably include the European Convention on mutual assistance in criminal matters (ECMA), supplemented by the Schengen Agreement, the Implementation Convention (SIC) and the Convention on mutual assistance in criminal matters (EU MLA) and its Protocol (EU MLA Protocol)[1]. On the other hand, there are the instruments based on the *mutual recognition* principle (MR principle)[2], of which the European Evidence Warrant (EEW) is the best known example. Fully in line with the growing EU interest in cross-border gathering and use of evidence in criminal matters, the European Commission confirmed its intention to review the entirety of the current *mutual legal assistance* framework with a view to introduce more "*mutual recognition*"-like features therein. In practice this can lead to the obligation to

[1] NILSSON, H. G. "From classical judicial cooperation to mutual recognition." *Revue International de Droit Pénal* 2006, 77 (1-2), p 53-59, SATZGER, H. and ZIMMERMANN, F. "From traditional models of judicial assistance to the principle of mutual recognition: new developments of the actual paradigm of the european cooperation in penal matters", in BASSIOUNI, C., MILITELLO, V. and SATZGER, H., *European Cooperation in Penal Matters: Issues and Perspectives*, Milan, CEDAM - Casa Editrice Dott. Antonio Milani, 2008, p 337-361, MILITELLO, V. and MANGIARACINA, A. "The Future of Mutual Assistance Conventions in the European Union", in, 2010, p

[2] BANTEKAS, I. "The Principle of Mutual Recognition in EU Criminal Law." *European Law Review* 2007, 32 (3), p 365-385, MORGAN, C. "The Potential of Mutual Recognition as a Leading Policy Principle", in FIJNAUT, C. and OUWERKERK, J., *The Future of Police and Judicial Cooperation in the European Union*, Leiden, Brill, 2010, p 231-239

recognize *per se* admissibility of foreign evidence in the course of criminal proceedings, if such evidence is admissible in the member state that gathered the evidence.[3]

The European Commission has recently tasked a consultancy company to assess the impact of the different policy options on evidence gathering (techniques) and the Council has simultaneously introduced the Belgian proposal for a European investigation order which would cover (almost) the entirety of evidence gathering in the EU and is currently subject to debate. It is remarkable and most regrettable however, that this discussion on evidence gathering does not focus more on problems related to the admissibility of evidence as the obtaining of evidence. After all, obtaining evidence is useless without ensuring its admissibility in court in a later stage in the criminal procedure.

In spite of this observation, it is only fair to say that discussions about the admissibility of evidence are far from new[4], though they ever really seem to get airborne and translated into binding legal instruments. The 1999 Tampere conclusions note that "evidence lawfully gathered by one member states' authorities should be admissible before the courts of other member states" (EUROPEAN COUNCIL 15-16 October 1999).

The more recent European Commission's Green Paper on the European Public Prosecutor specifically addressed the question of the mutual admissibility of evidence. The Green Paper concluded that the prior condition for any mutual admissibility of evidence is that the evidence must have been obtained lawfully in the member state where it is found. A number of comments were submitted in response to the question in the Green Paper on mutual admissibility of evidence (EUROPEAN COMMISSION 2009). Some considered that such a system raised serious problems both for defence rights and for certainty as to the law. The differences between national criminal justice systems and alleged inequalities in the protection of fundamental rights were also reported as obstacles. Many of the member states were of the opinion that the mutual admissibility principle proposed by the Commission should therefore be adopted only if appropriate mechanisms are established to secure legal guarantees and the effective protection of fundamental rights.[5]

In spite of all the good intentions, a clear discrepancy exists between the arguments in policy documents and the translation thereof in legal instruments. Even though the EEW is intended

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[3] THE BRITISH LAW SOCIETY *Study of the laws of evidence in criminal proceedings throughout the European Union.* Brussels, European Commission DG Justice and Home Affairs, 2004

[4] CASSWELL, D. G. "Through the admissibility of evidence maze: an attempt at a purposive structuring." *Alberta Law Review* 1991, XXIX, p 584-616-584, BEZAK, E. M. (1991-1992) "DNA Profiling Evidence: the need for a uniform and workable evidentiary standard of admissability." *Valparaiso University law Review* **26**, 595-638 , NOSSEL, D. J. (1993). The admissibility of ultimate issue expert testimony by law enforcement officers in criminal trials. Colombia Law Review, Heinonline, GANE, C. and MACKAREL, M. "The admissibility of evidence obtained from abroad into criminal proceedings - the interpretation of mutual legal assistance treaties and use of evidence irregularly obtained." *European Journal of Crime, Criminal Law and Criminal Justice* 1996, 2, p , WALSH, J. T. "The evolving standards of admissibility of scientific evidence." *The Judges' Journal* 1997, p 33-37

[5] VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu, 2010

to facilitate the admissibility of evidence gathered by another member state, it does not explicitly address the issue of mutual admissibility of evidence, nor do any other MR and MLA-instruments. Alternatively, admissibility of evidence is facilitated in the EEW by maintaining and clarifying the approach of previous instruments with regard to *requiring additional formalities and procedures* for the execution of requests. The possibility for member states to attach additional requirements to their request is provided for in several MLA instruments. Art. 3 ECMA stipulates that requests are to be executed in the manner provided for by the law of the requested state. Art. 4.1 EU MLA Convention states that requested member states must comply with the additional formal or procedural requirements of requesting member states, when they agree to afford MLA. In other words, MLA does not have a compulsory character but when a state agrees to grant MLA, they are agreeing to the "full package", unless of course the additional requirements are contrary to their fundamental principles of law or where the Convention itself expressly states that the execution of requests is governed by the law of the requested member state. According to the explanatory report of the EU MLA Convention, the reason for this provision is to facilitate the use of the information gathered by MLA as evidence in the subsequent proceedings in the requesting member state.

The EEW goes further than the EU MLA Convention by removing the possibility to refuse to comply with those formalities. Art. 12 EEW proscribes that the executing authority shall comply with the formalities and procedures expressly indicated by the requesting authority unless otherwise provided, and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing state. Differently put and obvious in the light of the compulsory character of EEW's, requested member states are not only obliged to answer to the request, but equally have to respect additional formal or procedural requirements attached by the requesting state provided that the requirements are not contrary to the requested member states' fundamental principles of law.[6]

From an academic perspective, allowing the issuing or requesting member state to order to take certain formalities into account, is highly controversial from a pure mutual recognition philosophy (authors, forthcoming). After all, mutual recognition should not only be looked at from the perspective of the executing member state and its obligation to execute an order, but also from the perspective of the issuing member state to accept (i.e. mutually recognise) the way the request is being executed in the other member state. The possibility to request formalities and thus the introduction of client-oriented provisions in mutual legal assistance instruments is of course connected to the admissibility of the evidence in a later stage of the

[6]VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu, 2010 .

criminal procedure, and are therefore not to be condemned all together. However, their position in the developing mutual recognition era is highly controversial. Therefore the question rises whether the same effect cannot be achieved by introducing minimum standards with regard to the different investigative techniques. The experience member states now have with the requested formalities under the current instrumentarium can be used as a base line to determine what those minimum standards should look like. Introducing minimum standards reflecting the formalities now requested, will have the same effect and is compatible with the mutual recognition philosophy.

Even though admissibility receives a lot of attention in academic literature[7], this attention is not reflected in the day to day practice. Empirical results from a recent study have shown on the one hand that far from all member states use the possibility to request for formalities to ensure admissibility of the evidence gathered abroad[8], which indicates that mutual trust in each other's criminal justice system is high enough to do without them. Of course opponents will say that the limited use of the possibility to request for formalities is due to the lack of sufficient knowledge of each other's criminal justice system and therefore the lack of knowledge on what to ask for to ensure admissibility in later stages in the criminal justice process. Furthermore, the empirical results also learn that admissibility of foreign evidence is not a common issue during trial. Nor the judges, nor the defence councils often raise issues with respect to the formalities taken into account during the evidence gathering stage (authors, 2010). Again it can be argued that this is due to the lack of knowledge of the other member states' criminal justice systems and the difficulty to assess whether all the procedural requirements foreseen in the domestic regulations of the law of the gathering state were taken into account. With these arguments in mind, it becomes even more clear that the setting of minimum standards to be taken into account during the evidence gathering stage can only be beneficial for all parties involved.

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[7] HERASIMCHUK, C. C. "A practical guide to the admissability of novel expert evidence in criminal trials under federal rule 702." *St. Mary's Law Journal* 1990, 22, p -181, CASSWELL, D. G. "Through the admissibility of evidence maze: an attempt at a purposive structuring." *Alberta Law Review* 1991, XXIX, p 584-616-584, NOSSEL, D. J. (1993). The admissibility of ultimate issue expert testimony by law enforcement officers in criminal trials. Colombia Law Review, Heinonline, NASH, S. (1995). The admissibility of witness statements obtained abroad: R v Radak. International Journal of Evidence & Proof, Heinonline: 195-199, GANE, C. and MACKAREL, M. "The admissibility of evidence obtained from abroad into criminal proceedings - the interpretation of mutual legal assistance treaties and use of evidence irregularly obtained." *European Journal of Crime, Criminal Law and Criminal Justice* 1996, 2, p , WALSH, J. T. "The evolving standards of admissibility of scientific evidence." *The Judges' Journal* 1997, p 33-37, CUMES, G. "The admissability of expert evidence of mental disorder in criminal law and the application of the Evidence Act 1995 (NSW)." *Psychiatry, Psychology & Law* 2000, p 264-278, LILLQUIST, R. E. (2003) "A comment on the admissability of forensic evidence." *Seton Hall L.R.*, 1189-1205 , PATTENDEN, R. (2006) "Admissibility on criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT." *Int' l. J.* , SPENCER, J. R. "Are Foreign Convictions Admissible As Evidence Of Bad Character?" *Archbold News* 2007, p 6-9

[8] VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu, 2010

The discussions related to the introduction of a new instrument to cover evidence gathering in Europe fall short, not only of attention for admissibility itself, but also because it focusses on evidence gathering *techniques* only. This means that discussions on specific *types of evidence* risk of getting lost. Nevertheless, there are certain types of evidence that deserve a special focus because of their high sensitivity and the expected differences between the member state that could potentially obstruct admissibility even where all the minimum standards for investigative measures when gathering evidence where complied with. One of those specific types of evidence is *expert evidence*, which is used as a case study for this paper.

1.2 Expert evidence in criminal matters

The use of expert evidence will only briefly be introduced here and elaborated on more in the body of this paper. Expert evidence in criminal matters is still (or has recently (again) become) controversial in a lot of member states.

The introduction of expert evidence is linked to the progress made in science and technology in the 21st century, and will continue to increasingly influence legal decision making in the future. In criminal matters, expert evidence, can come from physical analyses such as chemistry, physics and biology; from social sciences such as psychology, sociology, criminology and economics; and from technical sciences such as engineering, computer sciences.[9] It was found that judges could not specialise in all those areas of science and technology and therefore needed to make an appeal to specific experts.[10] As a result, in today's criminal justice it is not uncommon that certain analyses or investigations need to be conducted for which the criminal justice actors lack the expertise required.

The introduction of expert evidence in criminal matters initially brought along a sense of euphoria. A lot of confidence was entrusted in these experts as it was believed that science could not but facilitate the journey to uncover the truth. Expert evidence has always been considered to be extremely reliable.[11] As result, a *laissez-faire* mentality could be seen with regard to the setting of rules with regard to the manner in which an expertise should be conducted and the results brought to court. Paradoxically, in recent years, reality has kicked in and due to a series of miscarriages of justice the initial euphoria has changed positions with a significant amount of scepticism (GROENHUIJSEN 2008; ROBERTS 2008). This explains why nowadays in different member states a lot of debate is taking place on how to prevent this

[9] DE RUITER, C. "Forensisch gedragsonderzoek in strafzaken." *justitiële Verkenningen* 2000, 1/04, p 50-59, MEINTJES-VAN DER WALT, L. "Expert evidence: Recommendations for future research." *Afr. J. Crim. Just.* 2006, p 276-302, EDIS, A. (2007) "Privilege And Immunity: Problems Of Expert Evidence." *Civil Justice Quarterly*, 40-56

[10] GROENHUIJSEN, M. S. "Deskundigen in de aanval. Het strafrecht in de verdediging?" *DD* 2008, 2008 afl. 9/65, p 929-941

[11] MEINTJES-VAN DER WALT, L. "Expert evidence: Recommendations for future research." *Afr. J. Crim. Just.* 2006, p 276-302, HEFFERNAN, L. and COEN, M. "The Reliability of Expert Evidence: Reflections on the Law Commission's Proposals for Reform." *J. Crim. L.* 2009, p 488-507

from happening again in the future and on how to best organise the link between experts and the criminal justice system.

1.3 Aims of the paper

The combination of both these evolutions (i.e. admissibility of evidence at EU level and organisation of expert evidence in criminal matters at MS level) lies at the basis of this paper, because its authors consider the combination thereof of utmost importance. One cannot but agree with the position that national differences in the organisation of expert evidence and the extent to which it can be allowed in court, will inevitably give rise to discussions when attempting to regulate and facilitate the admissibility of evidence gathered in another member state.[12] Especially because obtaining expert evidence is not only time consuming but also costly [13] and it is not always possible to repeat the expert analysis in case of admissibility issues,[14] it is important to link the discussions on expert evidence to the discussions on mutual admissibility of evidence at European level. Therefore, this paper aims first at identifying a number of national discussions related to expert evidence in criminal matters, second at demonstrating how these discussions link in with the current debate on admissibility of evidence and should therefore be dealt with at that same EU level and third and final at feeding the debate with suggestions on how to draw parallels from solutions that already appear in EU regulations.

2 Challenges in expert evidence

Based on a literature review four challenges in the use of expert evidence were singled out to be discussed in this paper: first the qualifications of experts, second the appointing of experts, third the remuneration of experts and fourth the fields of expertise. There are of course more challenges that could be brought up. However, the authors do not seek to give a comprehensive overview of all challenges at national level, but rather seek to illustrate why this discussion should be held at EU level, in the context of the current discussions on cross-border evidence gathering.

[12] NASH, S. (1995). The admissibility of witness statements obtained abroad: R v Radak. International Journal of Evidence & Proof, Heinonline**:** 195-199, GANE, C. and MACKAREL, M. "The admissibility of evidence obtained from abroad into criminal proceedings - the interpretation of mutual legal assistance treaties and use of evidence irregularly obtained." *European Journal of Crime, Criminal Law and Criminal Justice* 1996, 2, p , EPSTEIN, D. (2001) "Obtaining evidence in the United States for use in foreign courts." *Bus. L. Int'L*, 260-271 , GERSCH, A. (2001) "A defence perspective on obtaining foreign evidence." *Archbold News* , HODGKINSON, T. and JAMES, M. (2007). Expert evidence: law and practice. Civil Justice Quarterly, Westlaw**:** 267-269

[13] EDIS, A. (2007) "Privilege And Immunity: Problems Of Expert Evidence." *Civil Justice Quarterly*, 40-56

[14] BEZAK, E. M. (1991-1992) "DNA Profiling Evidence: the need for a uniform and workable evidentiary standard of admissability." *Valparaiso University law Review* **26**, 595-638

2.4 Qualifications of an expert

The first discussion point that appears in national discussions related to expert evidence in criminal matters, is deciding who qualifies as an expert. Walsh argues that problems with (assessing) expert evidence are not so much related to interpreting what expert brings to court, but are related to deciding who can be an expert to bring anything to court in the first place. Much of the difficulty encountered by courts when facing scientific evidence is said not to lie in a lack of understanding of the underlying science, but in the task of choosing between competing scientific explanations tendered by individuals who seek to wear the mantle of experts.[15] Quality assurance is of utmost importance and the selection of experts should be subject to careful scrutiny. Therefore it is worrying that not all member states have a legal framework for quality control and quality advancement of experts in criminal matters.[16]

It is clear that a common understanding between member states on how to decide on who qualifies as an expert is of vital importance to accept the admissibility of foreign expert evidence. The question at hand is whether experiences at EU level can bring useful input in this discussion and the elaboration of tangible solutions.

According to the authors, experience can be drawn from the recent initiatives related to the qualifications of interpreters in court. With respect to interpreters, it is agreed that there should be some form of standardisation in their education and training and that a central repository of qualified interpreters should be set up. The Reflection Forum on Multilinguism and Interpreter Training has adopted a series of recommendations to ensure high quality for legal interpretation. A similar solution could be elaborated for experts. Most member states have already a system like this in place. A national repository of so-called judicial experts often exists. However, because of the limited knowledge on how these repositories are being composed, how experts are selected, what training they have received and the potential differences between the member states – for example in the duration for which a person is included as an expert in the national register[17] – it is difficult for the member states to commit to trusting each other and to accept each other's expert evidence. Simple knowledge on how these lists are composed would already make it possible for member states to assess whether the differences are too significant to accept each other's experts. If this turns out to be the case, than it can still be used as a basis to start discussions on common minimum standards.

In any event, it is strongly advised to use common qualification standards and a centralised (or at least mutually accessible) database(s) for experts. The existence thereof can open the

[15] WALSH, J. T. "The evolving standards of admissibility of scientific evidence." *The Judges' Journal* 1997, p 33-37

[16] GROENHUIJSEN, M. S. "Deskundigen in de aanval. Het strafrecht in de verdediging?" *DD* 2008, 2008 afl. 9/65, p 929-941

[17] GROENHUIJSEN, M. S. "Deskundigen in de aanval. Het strafrecht in de verdediging?" *DD* 2008, 2008 afl. 9/65, p 929-941

discussion on whether the further horizontalisation in cooperation should also entail that assignments can be directly directed to the experts. Further horizontalisation is an important feature of the current instruments on international cooperation. In order to speed up cooperation red tape is avoided as much as possible and direct communication between the competent authorities is stimulated. The question that arises here is whether the competent authority from one member state could give an assignment to an expert in another member state, without the authorities of the latter to intervene. This kind of progress can of course never be achieved as long as there is no common understanding of who qualifies as an expert and no common system is developed to make information on qualified experts available for the authorities in the other member states. Touching the discussion on the possibility to appoint experts in other member states, brings us to the discussion on the competence to appoint an expert in the first place.

2.5 Appointing an expert

At domestic level there are a number of discussions on who is entitled to appoint an expert, in which circumstances and for what kind of expertise. In order to ensure the objectivity of the experts, it is commonly suggested that the expert should not be appointed by any of the litigating parties, but should rather be appointed by the judge. The differences between the member states are also linked to the differences in the criminal justice systems and more specifically to the differences in the *assignment* of the investigators. Where it is an obligation to collect evidence both *à charge* and *à décharge*, the appointment of an expert is not as controversial as in criminal justice systems where the investigation is only directed towards the gathering of evidence *à charge*. Furthermore, differences are also linked to the nature of the expertise involvement and whether coercive measures (e.g. taking of a tissue sample) are involved or not.[18] In some member states it is required for an investigative judge to intervene, whereas in other member states the police can give the order and appoint an expert and move ahead with carrying out the coercive investigative measure.

The authors are convinced that this part of the domestic discussions related to expert evidence should be linked in with the EU discussion on enhancing the stringency in international cooperation in criminal matters and more specifically with reducing the number of incompatibility issues that can be raised by the member states. As a general rule, inconsistencies *ratione auctoritatis* are no longer accepted as a refusal ground in mutual recognition based international cooperation. It should no longer be an issue to execute a order

[18] MEESE, J. "De tegensprekelijkheid van het deskundigenonderzoek in strafzaken." *Tijdschrift voor Milieurecht* 1999, p 220-222, CHRISTIAENS, A. and HUTSEBAUT, F. "Hoofdstuk 5 Deskundigenonderzoek en de verjaring in strafzaken." *BHDO* 2009, afl. 11, p 99-100, CHRISTIAENS, A. and HUTSEBAUT, F. "Hoofdstuk 7 Het al dan niet tegensprekelijk karakter van de (uitvoering van) het deskundigenonderzoek in strafzaken." *BHDO* 2009, p 107-122

nor to accept evidence, in case the authority involved would not have this particular competence in the other member state. This means that police authorities from one member state can give valid orders to the authorities of another member state, even where the police authorities of the latter member state would not have such competences. Because the abandonment all together of the possibility to call on inconsistencies *ratione auctoritatis* is most likely not acceptable for the member states, it is important to start a discussion on the identification of "reserved competences" for which a proper judicial authority should intervene. Furthermore, the definition of which authorities qualify as a such judicial authority has not been finalised. Whenever international cooperation instruments refer to a judicial authority, it is left to the member states to decide which of their domestic authorities qualify as a competent judicial authority to operate in the context of that specific international cooperation instrument. Therefore, there is no EU level common understanding of which authorities qualify as judicial authorities in the sense that orders from them can be accepted if the intervention of a judicial authority is deemed to be required.

2.6 Remuneration of an expert

The third obstacle that often appears in domestic discussions is closely linked to the appointment of the expert and relates to remuneration of experts.

The independence of experts is traditionally closely linked to whoever pays the expert. Therefore, in most member states, it is suggested not to let the litigating parties appoint nor pay the experts not to jeopardise his or her independence.

The EU or cross-border element in this discussion is of course who pays for the expert (and the expert investigation carried out) when the assignment was issued by a foreign member state.

Most member states have fixed tariffs for experts and they differ between member states. To avoid risking the fair and equal remuneration between the experts in one member state, it is advised to use national tariffs regardless of the member state for which the expertise is being conducted. However, the question arises which member state is to pay that expert fee and cover the costs that are linked to the expert investigation. It is highly regrettable that this issues was never properly addressed in international cooperation instruments even though it cannot be denied that conducting expert investigations upon the request of another member state can highly impact on a member state's financial capacity. Furthermore, as of the current MLA instruments explicitly provide for a general refusal ground for reasons of financial capacity, the impact of international cooperation in general and more specifically cooperation related to expert evidence may not be underestimated.

Traditionally and generally, the financing of mutual legal assistance is settled on mutual terms i.e. each party pay its own expenses. This means that the issuing member state covers the costs that have occurred on its territory, and likewise the executing member state covers the costs that have occurred on its territory. Art. 5 ECMA Second Protocol states that parties shall not claim from each other the refund of any costs resulting from the application of the ECMA or its Protocols. The article further provides for some specific exceptions to the general rule of 'covering your own expenses'. An example of a such exception to the general rule is that costs of substantial or extraordinary nature in the execution of requests for MLA may be claimed back. In the EU MLA Convention reference is made to financial capacity and financial implications of MLA in two specific articles, relating respectively to refunding (which may be waived) of certain costs that the execution of requests for hearings by video conference can entail (Art. 10, 7) and the mandatory payment by the requesting member state of telecommunication interception costs (Art. 21).

The principle according to which each member state is to cover the expenses that have occurred on its territory, is already under review in general international cooperation in criminal matters, because the introduction of mutual recognition and thus the obligation to execute the orders of the issuing member state, could significantly impact on the financial capacity of the other member states.

In this respect it is advised to draw from the parallel that has been introduced in the context of confiscation where it is agreed that the revenues of the confiscation are split between the issuing and the executing member state. The most interesting article for the analysis of monetary consequences of the execution of MLA requests or orders, is Art. 16 of the framework decision on the mutual recognition of confiscation orders. It has introduced the splitting of revenues from the execution of confiscation orders surpassing the amount of 10.000 EUR on a 50/50 basis between executing and requesting member state. Only if the revenues are not very significant, i.e. below or equivalent to 10.000 EUR, they will accrue to the executing member state, as in traditional scenario's of transfer of execution of confiscation. This article may not seem directly relevant for the analysis of financial issues that executing requests or orders for expert evidence can entail. However, the possibility of broadening the new approach embedded in the confiscation framework decision as to the 50/50 division of profits to a possible future 50/50 division of substantial costs in executing requests or orders related to expert evidence, deserves further reflection. If such a split can be agreed upon for the revenues of cooperation, it is only logical to also agree on a split of the costs of cooperation.

2.7 Fields of expertise

A fourth and final domestic discussion with regard to the organisation of expert evidence in criminal matters is related to the sciences and technology that is accepted to produce expert evidence. Furthermore, not all member states have rules on how an expertise is to be conducted and how it should be reported on. Most member states rely on the professional rules and the scientific and technological state of the art. However, in relation to cross-border use of evidence, this approach does not guarantee successful cooperation. Significant differences exist between the manner in which distinction is made between exact sciences and more social and behavioural sciences.[19] Some authors argue that not all scientific evidence, or evidence that results from the use of a scientific technique should be screened before being introduced as evidence in court. It is argued that in some cases, the science is so well established that the judges can rely on the fact that the admissibility of evidence based on it has been clearly recognised by the courts in the past.[20] Considering that these latter sciences are not as 'exact' as 'exact sciences', rules on the way the expertise is carried out and a code of professional conduct are more important.[21] Furthermore, classifying the sciences in exact and non-exact categories is not straightforward either. Whereas some states accept the evidence from a polygraph or blood pressure test, other member states consider it to be totally unreliable and therefore unacceptable to be used as evidence in court.

It is strongly recommended that discussions on scientific methods are conducted at European level. Unless there are professional associations or boards, not a single form of supervision is available to ensure that the expertise is conduced according to the latest scientific standards. Not all member states have for example a Code of Ethics or Code of Conduct for conducting a forensic analysis.[22] Besides agreeing on minimum standards to conduct an expertise (be it or not under reference to the guidelines of a professional association or board), a literature review suggests that it is already an international legal trend to apply a scientific methodology to evaluate the reliability and validity of all expert evidence, which could in turn affect the admissibility and probative value of evidence.[23] In this respect, it is important that

[19] DE RUITER, C. "Forensisch gedragsonderzoek in strafzaken." *justitiële Verkenningen* 2000, 1/04, p 50-59

[20] ROBERTS, A. "Drawing On Expertise: Legal Decision-Making And The Reception Of Expert Evidence." *Criminal Law Review* 2008, p 443-462

[21] CASSWELL, D. G. "Through the admissibility of evidence maze: an attempt at a purposive structuring." *Alberta Law Review* 1991, XXIX, p 584-616-584, BUBELA, T. M. (2004) "Expert evidence: the ethical responsibility of the legal profession." *Alberta Law Review*, 853-870 , ROBERTS, P. (2004) "Towards the principled reception of experts evidence of witness credibility in criminal trials." *The International journal of Evidence and Proof*, 215-232 , HEFFERNAN, L. and COEN, M. "The Reliability of Expert Evidence: Reflections on the Law Commission's Proposals for Reform." *J. Crim. L.* 2009, p 488-507, SHAW, K. (2009) "The Quasi-expert Witness: Fish or Fowl?" *The Journal of Criminal Law*, 146-152

[22] BUBELA, T. M. (2004) "Expert evidence: the ethical responsibility of the legal profession." *Alberta Law Review*, 853-870 , WEBB, J. "Law, Ethics and Complexity: Complexity Theory & the Normative Reconstruction of Law." *Cleveland State Law Review* 2005, 52, p 227-242

[23] MEINTJES-VAN DER WALT, L. "Expert evidence: Recommendations for future research." *Afr. J. Crim. Just.* 2006, p 276-302

prosecutors, defence councils and judges be educated in respect of this basic scientific validation methodology in order for them to competently evaluate the admissibility and probative value of evidence in a criminal litigation.

3 Conclusion

In a European Union context, the development of one single area of freedom, security and justice, is placed high on the political agenda. There is a clear growing EU interest in cross-border gathering and use of evidence in criminal matters to achieve the aforementioned goal. However, the debates on the future of European evidence gathering and the possible introduction of free movement of evidence are too narrow to grasp the entirety of the practical problems caused by the differences between the European criminal justice systems. Not only should national discussions on the position of expert evidence in criminal cases be incorporated in the European debate to ensure the acceptability of mutual admissibility of evidence, the experiences in related fields should be incorporated and analysis should review the entirety of cooperation in criminal matters.

More concretely this means that first, the experience with the elaboration of quality standards for interpreters in criminal justice should be used to its full potential. It should be carefully reviewed to what extent the solutions in that context are viable in an expert evidence context.

Second, principles that are being developed in a more general context of international cooperation in criminal matters should be further developed and applied in thematic instruments. The limitations in the possibility to call upon inconsistencies ratione auctoritatis should also play a role in this expert evidence context. Accepting that differences in the division of competences to order an investigation and appoint an expert no longer hinder cross-border gathering and use of expert evidence, may require that minimum standards with regard to the competent authorities are agreed for certain types of expert investigations.

Third, parallels should be drawn from solutions in other international cooperation instruments. If a split of revenues can be agreed in the context of confiscation it is only logical that a mirroring agreement is reached with regard to the costs.

Fourth and final, a discussion should be initiated with respect to the fields of expertise that are accepted and subject to mutual admissibility. The ongoing debates on the reliability of certain branches of science and technology, are reflected in the national discussions on the fields of expertise and the acceptability of certain techniques (e.g. polygraph tests).

Only this kind of debate and thorough reflection can lead to the adoption of a successful instrument on the cross-border gathering and use of evidence.

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