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With financial support from the Criminal Justice  
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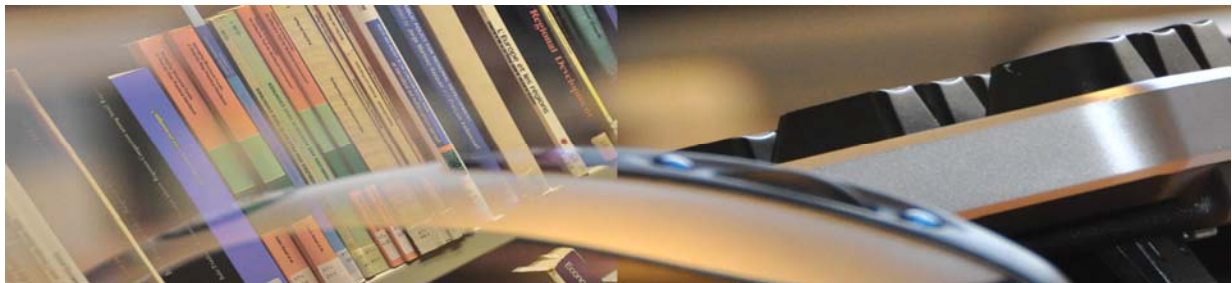


# Seminar 3: Collecting Evidence throughout the European Union I: Joint Investigation Teams

**Tallinn (EE), 28-29 March 2012**

Specific Grant Agreement JUST/2010/JPEN/AG/FPA/001  
Framework Partnership Agreement JLS/2007/JPEN-FPA/017

Improving Judicial Cooperation in Criminal Matters in the area of Freedom, Security and Justice,  
Institutional Processes and Topical Areas



## ***Overview of the EU Criminal area, pre-trial measures and collecting evidence***

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*This publication has been produced with the financial support of the Criminal Justice Programme of the European Commission. The contents of this publication are the sole responsibility of the author Petra Jeney and can in no way be taken to reflect the views of the European Commission".*



## Overview of the EU Criminal Justice area, pre-trial measures and collecting evidence

*Petra Jeney*



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## Institutional framework before the Lisbon Treaty

- **Third pillar of the EU police and judicial cooperation in criminal matters (TEU 29-42)**
  - intergovernmental pillar, not 'Community method'
- **decision-making**
  - Unanimity in Council, limited involvement of the EP, MS right to initiate
- **form of legislative acts**
  - EU law as opposed to Community law, framework decision, decisions, international conventions
- **legal effect of acts adopted**
  - no direct effect, no supremacy
- **jurisdiction of the Court of Justice of the European Union**

## EU criminal law

- **Mutual recognition and criminal procedure**
- **Criminal jurisdiction, coordination and prosecution**
- **Substantive criminal law**

## Mutual recognition and criminal procedure

### ▪ Basic principles of mutual recognition

- 1999 Tampere conclusions principle of mutual recognition
- 2000 mutual recognition work programme
- features of the principle of mutual recognition
  - replace or supplement CoE Conventions
  - form: Framework Decisions
  - terminology: issuing and executing state (instead of requesting and requested state)
  - traditional grounds of refusal have been abolished: dual criminality (32 offences), political crime, military offences
  - remaining grounds of refusal: territoriality, de minimis rules, ne bis in idem, age of criminality, lapse of time, lis pendens, immunity, amnesty
  - standard clause for human rights
  - technical rules for processing requests



## Legislation adopted – criminal procedure

- Extradition and the European Arrest Warrant
- Pre-trial measures
- Post-trial measures



## Pre-trial measures

- **Movement of evidence**
  - Mutual assistance in criminal matters
  - European Evidence Warrant
  - (European Investigation Order)
  - Criminal records
- **Freezing orders**
- **Recognition of pre-trial supervision orders**



## Movement of Evidence

- **Mutual assistance in criminal matters**
  - 1959 European Convention on Mutual Assistance in Criminal Matters
    - covers all criminal offences, except for military offences
    - no sentencing threshold
    - no double criminality requirement (except for search and seizure)
    - exception for political and fiscal offences
    - 'ordre public'
  - 1978 First Protocol
    - removes the exception of fiscal offences
  - 2001 Second Protocol



## Movement of Evidence

### ▪ Mutual assistance in criminal matters

- Schengen Convention
  - contains rules on judicial assistance
    - require MS to abolish the fiscal offences exception
    - widen the scope of proceedings in which assistance can be requested
    - allows for direct contacts between national authorities
    - provides for posting procedural documents directly to other MS
- EU 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
- EU 2001 Protocol to Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union



## Mutual assistance in criminal matters

### ▪ EU 2000 Convention

- Schengen provisions on posting documents and contacting other judges directly has become the general rule
- the State where the evidence is located must normally comply with the procedures and formalities required by the home State
- the home State may request that a State with custody over a person transfer that person (possibly without his/her consent) to be a witness in the trial in the home States
- the home State may request a hearing by videoconference with a witness, an expert, or suspect in the territory of the host State; a summons to such a conference will be mandatory for a witness or an expert (MS may opt-out of the provision on videohearings with the suspect)



## Mutual assistance in criminal matters

### ▪ **2001 Protocol**

- financial crime
- requests on bank account details, bank transactions, monitoring bank accounts,
- obligation of the requested authority to provide information to the requesting authority on their investigations, forwarding additional requests for mutual assistance
- waiver of banking secrecy
- abolition of fiscal exception
- dispute settlement

### ▪ **other mutual assistance rules in the form of Joint Actions**



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## Mutual assistance in criminal matters

- **prosecuting MS asserts de facto authority over persons and evidence in another MS, in an indirect manner through the acts of the requested MS's authorities**
- **position of the defendant under these rules is problematic i.e. no rules on cross examination of witnesses, limited standards applicable to cross border hearings, no express right to counsel**



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## European Evidence Warrant

- **Framework Decision adopted in 2008, was to be applicable from 2011**
- **does not apply to all movement of evidence**
- **collection of an already existing evidence**
- **two stage step for replacing mutual legal assistance with mutual recognition**
  - EEW was meant to be the first step
  - EEW was meant to co-exist with the mutual legal assistance instruments at least for a transitory period
- **EEW can only be issued if the evidence sought is necessary and proportionate and if such evidence could be obtained under the national law of the issuing state**



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## (European Investigation Order)

- **Draft directive, MS proposal, still negotiated with the EP**
- **to replace the existing regime**
- **place the obtaining of evidence in EU cross border criminal cases under the auspices of the principle of mutual recognition**
- **issuing Member State could order the executing Member State to carry out an investigative measure**
- **the executing Member State is obliged to recognise and execute the investigation order, and treat it as if it was issued by its own authorities**



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## Criminal records

- Objectives
- Functioning
- Legislative instruments
  - Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States
  - Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA
- Pilot project
- Future challenges



## Freezing orders

- 1990 CoE Convention
- 2003 Framework Decision, mutual recognition instrument
- MS must recognize and enforce a freezing order from another MS
  - dual criminality abolished in 32 cirma types
  - optional grounds for non-execution
  - remedies
- inadequate national implementation
- if adopted, EIO replaces this instrument



## Evaluation

- **fragmented legislation**
- **mutual assistance and mutual recognition both present**



**Do You Have  
Any Questions?**

**We would be happy to help.**