

# ASSESSMENT OF EVIDENCE OBTAINED ABROAD: THEORETICAL PROBLEMS AND SLOVENIAN COURT PRACTICE

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## 1. INTRODUCTION

The main problem with the exchange of cross-border evidence is that the evidence systems of different countries are quite different. Many of the differences exist even among EU member states, and these differences are even greater when compared with countries outside that circle. The categories of investigative activities are different (some states for example do not even practise certain investigative activities), as are the methods of obtaining evidence (i.e. by which investigative actions certain types of evidence can be obtained), and the probative value of certain types of evidence (informal information, ‘semi-proof’, real proof), and ways of undertaking certain investigative actions, and above all the conditions and procedures under which it is permitted to carry out a specific investigation (order type, issuer of the order, the contents of the order, previous or subsequent inconsistencies).<sup>1</sup> Equally different are the criteria according to which various countries assess whether particular evidence is allowed to be used in criminal proceedings (admissibility). The issue is the assessment of whether the evidence has been obtained in a proper manner, in accordance with legal norms and legislative procedure, and whether a legal system allows it to be used as the basis for a verdict. The key question that arises in the use of evidence from abroad is what criteria for assessing admissibility must we or may we use in the evaluation of such evidence.<sup>2</sup> This article will try to address these questions.

## 2. THE PROBLEMS OF ‘IMPORT’ AND ‘EXPORT’ OF EVIDENCE

In this process, it is not possible to distrust generally another system just because it contains different legal solutions: each national system can be completely balanced and harmonious, the rationale between the functions of the

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<sup>1</sup> Van Hoek, A.A.H.; Luchtman, M.J.J.P., *Transnational cooperation in criminal matters and the safeguarding of human rights*, Utrecht Law Review, 1(2005), p. 15-16.

<sup>2</sup> For the purposes of this article the term admissibility (admissibility) of evidence for the evidence will be used, which has this feature, to have passed the assessment of the Court to be allowed as a basis for the verdict, or the phrase ‘illegal evidence’ for all the evidence that the assessing state has assessed as illegal or improperly obtained and therefore not be used at trial.

criminal proceedings may be so distributed within the system that evaluation of evidence is a complete reflection of the mentality and legal tradition of the individual country.<sup>3</sup> Each of these systems may eventually lead to a just conclusion: fair judgment. Major problems can occur where, in one system, only a fragment of another system is used: in our example, evidence that comes from a different legal order.<sup>4</sup> According to Orie, each of the national systems can be fully compliant with the requirements of the European Convention, but problems arise when the two systems combine.<sup>5</sup> Difficulties arise when importing evidence because two different and important phases of proof occur in two different States: (1) the phase of obtaining evidence is in one country and (2) the evidence assessment phase, which usually takes place during the trial, is in the other country.

### 3. THE QUESTION OF THE SCOPE OF THE JUDGE'S POWERS

The first question which arises when assessing evidence obtained abroad, is whether the judge of the country where the evidence obtained abroad would be used in a trial is allowed to evaluate the admissibility of such evidence.<sup>6</sup> If the answer to that question is no, then we come to the first, narrowest option. (1) According to this solution, the judge should not assess the admissibility of the evidence from abroad, or ask whether it is legally obtained, but would have to assume so.<sup>7</sup> That would require absolute trust in the other system.

If the answer to the above question is positive, and the judge of the country where the evidence that has been obtained abroad would be used at trial should or even must evaluate the admissibility of such evidence, the question arises of the scope of judicial control of such evidence and the criteria by which a judge assesses such evidence. (2) The judge may assess the evidence according to the law of the state in which it was obtained (*locus regit actum*). In this situation,

<sup>3</sup> Joubert, C., *Judicial Control of Foreign Evidence in Comparative Perspective*, Rozenberg Publishers, Amsterdam, 2005, p. 13-14.

<sup>4</sup> For a similar view see Gless, S., *Mutual Recognition, Judicial Inquiries, Due Process and Fundamental Rights*, in Vervaele, J.A.E. (ed.), *European Evidence Warrant*, Antwerpen, Intersentia, 2005, p. 121-129.

<sup>5</sup> This creates a gap between the two systems. Van Hoek, A.A.H.; Luchtman, M.J.J.P., *Transnational cooperation in criminal matters and the safeguarding of human rights*, *Utrecht Law Review* 1(2005), p. 15.

<sup>6</sup> The wide range of possibilities are also shown in Gane, C.; 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*, (2)1996, p. 98-119.

<sup>7</sup> Some countries, though few, such as Spain use this solution. On the problem of the »rubber stamping« of evidence from abroad Gane and Mackarel have warned, Gane, C.; 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*, (2)1996, p. 108.

evidence that has been legally obtained and allowed abroad would have to be considered legitimate, regardless of whether the same evidence has been obtained in the country. In doing so, the question is how to determine whether the evidence was obtained legally because the judge usually does not know the law of other countries.<sup>8</sup> (3) It is possible to evaluate the evidence in accordance with the law of the state that presents such evidence at the trial. In doing so, the key issue is the scope of judicial control: either the judge, during assessment, would be considering both legal and constitutional criteria, or different criteria could be applied. (4) We must not forget the fourth option - the assessment of evidence obtained abroad according to certain 'external objective' criteria. Such criteria could be the European Convention on Human Rights or the practice of the European Court of Human Rights. There is of course also a fifth option (5) which is a combination of different approaches.<sup>9</sup>

Regardless of the width of the scope of judicial control, there can be up to four different situations, where, of course, judicial review of such evidence is allowed. (1) The evidence was lawfully obtained in the first state and considered legal in another state. In this situation, neither the first nor the second state has a problem with such evidence. The first had obtained it in accordance with its own rules and the other has it accepted as legal and presented it at the trial. (2) The evidence was lawfully obtained in the first state, but the court in the other state, which assesses the admissibility of evidence, has deemed it inadmissible. In this situation, the state in which the trial takes place has a problem with such evidence, since such evidence cannot be adduced at the trial. (3) The evidence was illegally obtained in the first state, however the second state, which assesses its admissibility, has deemed it legal. In this situation, both countries can have a problem. The first because the evidence was obtained in an illegal way, and the second because it will need to consider this fact when assessing whether such evidence can be used as the basis for a verdict. In such a case, we have to distinguish between two situations: the second state may assess that such evidence could, in its system, if obtained under the same conditions and in the same way, be deemed legitimate, but it would still have to decide, given the fact it was illegally obtained in the state of origin, whether it can be used in a trial. The answer to that question may still be no. (4) And the last option: in the first state the evidence is obtained in an illegal way so the

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<sup>8</sup> In this, an instructive example is the difference between the German and English systems. In the English system the question of foreign law is seen as a matter of fact, and in the German system as a matter of law. This means that before the English courts the question of foreign law should be treated as a question of fact and it should be proven like any other question of fact. In Germany, the judge determines the question of foreign law *ex officio*, if such a question arises. As a rule, in both countries it is established and proven by experts. See Dannemann, G., *Establishing Foreign Law in a German Court*, <http://www.iuscomp.org/gla/literature/foreignlaw.htm>

<sup>9</sup> For example, the judge first checks the legality of evidence according to foreign regulations, and then checks the constitutionality of domestic legislation.

second state deems such evidence inadmissible. In this situation, the second state has less of a problem with the verdict; such evidence will not be used as the basis for the verdict. Of course, it will have more problems at the trial since it is not in the interests of the state that evidence obtained abroad cannot be used.<sup>10</sup>

The situation may be further complicated by adding a third factor: the question of whether evidence is obtained in accordance with international laws that guarantee human rights, in accordance with, say, the ECHR. In this case, a state must consider possible violations of the Convention by the second state. It can therefore happen that certain evidence lawfully obtained in the first country is deemed illegal by the other side, because of the requirements of the Convention.

#### 4. MUTUAL LEGAL SOLUTIONS

Aware of the problems of international crime and the problems of exchanging evidence between one jurisdiction and another, the international community first tried to address such problems through international cooperation in the form of so-called mutual legal assistance.<sup>11</sup>

One of the first solutions appeared in the Council of Europe in the form of the European Convention on Mutual Legal Assistance in Criminal Matters (1959) and its protocols.<sup>12</sup> The Convention was created taking into account the sovereignty of each state and is based on the principle of reciprocity. A request for assistance from the requesting state to the requested state is transferred through the ministry, which is a time consuming and unreliable procedure.<sup>13</sup> In such a situation, the requested state has a relatively wide range of reasons for which it may reject the request, including the exception of political offense, the exception of dual punishability and the so-called *ordre public* – hence, the ability to deny legal assistance if the requested state believes that providing the same could harm the sovereignty, security, public order and other fundamental interests of the state. For our discussion, it is crucial that the systems of mutual legal assistance are based on the principle of *locus regit actum*. This means that the relevant law for obtaining evidence is the law of the country in which the evidence was gathered. The legality of the evidence is therefore assessed in accordance with the law of the executing state.

<sup>10</sup> See Jouber, C., *Judicial Control of Foreign Evidence in Comparative Perspective*, Rozenberg Publishers, Amsterdam, 2005, p. 15-16.

<sup>11</sup> Veber Šajn, M.; Furlan, H., *Zbiranje dokazov v postopkih mednarodne pravne pomoči*, in Dvoršek, A.; Selinšek, L. (eds.), *Nekateri praktični problemi dokazovanja v kazenskih postopkih*, PF, FVV, Maribor, 2008, p. 101-112.

<sup>12</sup> Ur. L. RS, MP 25/99, 15. 10. 1999.

<sup>13</sup> Article 3 of the Convention specifies that it will meet any request for legal assistance in connection with criminal matters, which send the judicial authorities on the requesting party, to obtain or send material evidence, records or documents.

Mutual legal assistance has many shortcomings. It is implemented according on a 'case by case' basis, and includes only some offences, and it is the basis for the execution of only some investigative activities (it does not contain provisions on certain more recent investigative activities, such as videoconferencing, joint investigative activities and concealed investigative activities). The differences among the states (some states do not practise certain investigative activities) and the wide range of reasons for refusal are the reasons for the uncertainty and inefficiency of this mode of action.<sup>14</sup> The rule *locus regit actum* causes problems for the requesting state in relation to the admissibility of evidence.

Because of this, aspirations emerged for enhancing and simplifying the Convention processes. The initiative was taken up by the EU, which primarily, in a joint action with the Council, adopted the Good Practice of Mutual Legal Assistance in Criminal Matters (1998)<sup>15</sup>, which was followed by the Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the EU (2000).<sup>16</sup> The Convention's rationale was based on the principle of reciprocity, and the success of an application to obtain evidence from another Member State was dependent on many issues: on the specifics of the procedural and evidentiary law, the regulation of investigative activities in the Member State of execution, etc. Nevertheless, the Convention did introduce some important changes: collaboration takes place directly between judicial authorities (no more of the so-called 'political phase'), which certainly increases the efficiency of the process. The most important change is that the requesting state may require that the requested state adheres to certain requirements of procedural rules of the requesting state, which may be explicitly specified. This requirement may be refused only if compliance with such rules would be contrary to the fundamental principles of the legal system of the requested state. It is a fact that the Convention is trying to overcome the problem of international legal assistance in transferring evidence from one system to another such that it respects the right of the requesting state in obtaining evidence, and therefore the state that would eventually assess the admissibility of such evidence. It is more likely that the evidence obtained abroad would be deemed admissible if the gathering of such evidence had complied with the specifics of the law of the requesting state which will eventually evaluate the admissibility of the evidence. It is important to understand that the Convention has not replaced the previous system of mutual legal assistance, but only complements it; both conventions are applied at the same time.

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<sup>14</sup> See for instance Mangiaracina, A., *A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order*, *Utrecht Law Review*, 10(2014), p. 13, Allegrezza, S., *Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility*, *Zeitschrift für Internationale Strafrechtsdogmatik*, (9)2010, p. 571.

<sup>15</sup> OJ L 191, 7. 7. 1998.

<sup>16</sup> OJ C 197, 12.7. 2000.

The success of the only functional resource based on the principle of mutual recognition<sup>17</sup>, the European arrest warrant, encouraged the EU to find better ways for the efficient flow of evidence. The desire was to move away from the principle of reciprocity to the principle of mutual recognition. So at the end of 2008, the Council's framework decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings (OO EEW)<sup>18</sup> was adopted. The main objective of this document is to improve and simplify the obtaining of evidence in criminal matters involving more than one Member State.<sup>19</sup> OO EEW has not replaced the Convention (as in the area of extradition or surrender), but it exists in parallel therewith, which introduces additional confusion into the whole system. OO EEW has not yet taken off and most states have not implemented it, even though it was supposed to be implemented by 19 January 2011. We can conclude that with this document, the EU once again showed how seriously it thinks about the principle of reciprocal recognition and the 'free flow of evidence'.<sup>20</sup>

The EEW is a judicial decision of one of the states (state of issue) made with the intention that the other state (state of enforcement) obtain on its territory the objects, documents and data for use in criminal proceedings in the state of issue. The EEW can be issued to obtain any objects, documents or data.<sup>21</sup> The EEW therefore provides for a wide range of activities in obtaining evidence, and mostly on its basis can the search of a home, or the seizure of objects, be ordered.

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<sup>17</sup> For more on mutual admission see Peers, S., *Mutual recognition and criminal law in the European Union: Has the Council got it wrong?*, *Common Market Law Review*, 2004, p. 5-36.

<sup>18</sup> OJ L 350, 30. 12. 2008.

<sup>19</sup> For more on this see Vervaele, J.A.E. (ed.), *European Evidence Warrant*, Antwerpen, Intersentia, 2005 and de Hert, P.; Weis, K.; Cloosen, N., *The Framework Decision of 18 December 2008 on the European Evidence Warrant for the Purpose of Obtaining Objects, Documents and Data for Use in Proceedings in Criminal Matters: a Critical Assessment*, *New Journal of European Criminal Law*, 2009, p. 55-78.

<sup>20</sup> Mitsilegas, V., *EU Criminal Law*, Hart, Oxford, 2009.

<sup>21</sup> The EEW specifies the evidentiary material on which the warrant should not apply: (a) conduct of hearings and other forms of collection of statements from suspects, witnesses, experts and other witnesses of the proceedings; (b) the execution of searches of the body or obtaining evidence (including DNA samples and fingerprints) or biometric information taken directly from the body of any person; (c) obtaining the so-called evidence in real time, such as for example wiretapping, surveillance of bank accounts, etc.; (d) undertaking analysis of the obtained objects, documents or data; (e) obtaining information about the communication of the operators of the publicly available telecommunications resources. However, the order can refer to material that was collected, or was at the disposal of the judicial body of execution, before the EEW was released. Therefore, it is possible to issue an EEW for obtaining data on bank transactions, already existing records of the hearing or the results of previously conducted investigative activities. For more see Šugman, K., *Evropski dokazni nalog v kazenskih zadevah*, *Pravna praksa* 7/8(2009), p. 23-25.



It is crucial for our discussion that OO EEW transfers responsibility for the assessment of the legality and regularity of the warrant to the country of issue. This ensures that the EEW is only issued when the judicial body of the state of issue is certain that (a) such collection of evidence is necessary and proportionate to the purpose of obtaining the evidence and (b) that the objects requested by the EEW in similar situations could be legally obtained under the law of the country of issue, in the same situation in its territory, although different institutional processes might have been used. In other words: the state of enforcement must have confidence when assessing these issues in relation to the country of issue and should not indulge in evaluating the questions of whether it was possible to obtain the required evidence in the country of issue in a lawful manner. The state of execution (as a general rule) must obtain the evidence by means of suitable measures for the obtaining of evidence specified in the EEW, and in compliance with national law. For the execution of the EEW, the state of enforcement applies its national law and decides what investigative activities or restrictive measures to apply. This rule can again cause problems in the country of issue with the admissibility of evidence. It is true that OO EEW in Article 12 specifies that a body of the state of issue can specify certain formalities and procedures which the state of execution should comply with (unless they are contrary to the fundamental legal principles of the state of enforcement), but this can be problematic. The EEW refers to the evidence, and not to the investigative activities, so the state of issue in fact cannot exactly know which activities the state of enforcement might chose, and points to the difficulty of the formalities and procedures in the execution of these measures.

In December 2009, the Commission issued a so-called Green Paper<sup>22</sup> which proposed a new instrument - the European investigation order. In accordance with its proposals the Convention mechanisms, including the European evidence warrant, would be replaced with a single instrument based on the principle of mutual recognition. At the same time an instrument should be adopted that would also, in the field of the law of evidence, introduce the principle of the mutual recognition of evidence. In accordance with this idea, the member state would have to admit evidence that would be legally recognized in any member state. If such a proposal was adopted, it would shake the procedural foundations of national legislation, and in particular the law of evidence, which is why the proposal was highly criticized.<sup>23</sup> This is why, in April 2010, a

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<sup>22</sup> COM (2009) 624.

<sup>23</sup> Allegranza says that, like any other method, mutual recognition is not by itself neither good nor bad: it depends on the context and consequences of the use of that method. He convincingly concludes that the transition of evidence is not only an issue whose properties in the common market may be prescribed. In this situation, it is the result of a process, and therefore it is necessary to analyze its structure: the way in which it was obtained. At the epistemological level, it is possible to agree with the fact that the material aspect of the evidence can not be separated from the way in which it was obtained. For a crit-

group of member states (including Slovenia) prepared a more moderate version of the proposal of the Directive on the European Investigation Order (EIO)<sup>24</sup>, which is not based on the strict principle of mutual recognition of evidence. As stated in the proposal, this would be a way to create one effective and flexible instrument for obtaining all kinds of evidence in other member states. The main changes which the EIO would introduce are the simplification of the procedure by virtue of using one instrument, instead of all the existing instruments, in connection with obtaining evidence (including the Convention on Mutual Legal Assistance, the framework decision on insurance of property or evidence, and the EEW), and limiting the possibilities for refusal of enforcement and, of course, enhancing the procedure.<sup>25</sup>

The main difference between the EEW and EIO is that the evidence warrant focuses on evidence that needs to be obtained, while the EIO focuses on investigative activities that should be taken. In accordance with the principle of mutual recognition in the EIO, the body of issue is the one that decides on the type of investigative activities that should be executed. The body of execution would have to admit the EIO without further formalities and take all necessary measures for its execution in the same manner and under same conditions as if the investigation order was ordered by a body in its own state. The decision on undertaking investigative activities, and therefore the issue of an order, should be in accordance with the legislation of the state of issue, but the execution is performed in accordance with the law of the state of enforcement. In certain situations, the body of enforcement is given a choice of investigative activity (for example, where such an investigative procedure is unknown to the law of the state of enforcement). In order to avoid the problems of admissibility of evidence in the state of issue the proponents established the rule under which the state of issue of the EIO can indicate which formalities should be respected in order to ensure the admissibility of the evidence. The body of execution must respect such indicated formalities, provided they do not contravene fundamental legal principles of the state of enforcement. The reasons for the refusal of the EIO are significantly fewer than those of the European arrest warrant and the EEW. They do not allow the verification of double punishability, the evidential basis of the existence of legal requirements for the issue of a warrant (in the state of issue as well as in the state of enforcement), nor even the already classic reasons for rejection provided for in the OO EAW: *ne bis in idem*, the principle of territoriality, age limit, etc.

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ical analysis of this document Allegrezza, S., *Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility*, *Zeitschrift für Internationale Strafrechtsdogmatik* 9(2010), p. 572-573.

<sup>24</sup> COD/2010/0817.

<sup>25</sup> Heard, C.; Mansell, D., *The European Investigation Order: Changing the Face of Evidence Gathering in EU Cross-border Cases*, *New Journal of European Criminal Law* 2(2011), p. 353-367.



So it can be concluded that with the proposal of the EIO there was not realized the idea of the free movement of evidence, which would have meant that any proof, legally obtained in one country, should automatically be accepted in another state.<sup>26</sup> There was, however, a more moderate solution: some versions of the free flow of order for undertaking investigative activities. An order, lawfully issued in one country, must be, without further judicial control, recognized and executed in another member state. The Court of the member state issuing the warrant, however, always retains jurisdiction on assessing the admissibility of evidence obtained in such a way.<sup>27</sup> Both documents are based on different principles. The EEW is based on the principle of *locus regit actum*, which means that the activities of the state of enforcement are governed by its law. As stated above, this can cause problems in assessing the admissibility of evidence in the country of issue. However, the EIO is based on the principle of *forum regit actum*, so the state of enforcement in its activities must abide by the laws of the state of issue, unless this would be contrary to their fundamental principles. This principle takes into account more the law of the state of issue, and is trying to reduce the problem of the admissibility of evidence in that state. It is clear that the state of issue can best assess those investigative activities which are reasonable to carry out and in that way try to 'export' its law to another state. The execution of investigative activities should, as far as possible, be carried out in accordance with the formalities and procedural rules explicitly laid down by the state of issue – limited only by the fundamental legal principles of the state of enforcement.

In terms of international solutions regulating the area of transfer of evidence among states, it can be concluded that, despite numerous attempts, in the regulation of this area we haven't gone very far. Parallel Convention systems still apply: as of the Convention of the Council of Europe and so of the EU, and also the EEW. Not only that, but the last never came to life and is actually more of a 'dead letter on a paper', but it has not even made any substantial contribution to solving the problem of admissibility of evidence in the country of issue. The contents of the Convention, in turn, have many shortcomings: in the long term, it is ineffective, based on the broad possibilities of rejection of the application, and of uncertain outcome, and it also causes many problems with admissibility of evidence in the contracting state which requested legal assistance.

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<sup>26</sup> About whether the principle of mutual recognition will be appropriate in the area of proof, a lot has been written. For example, see Gless, S., *Mutual recognition, judicial inquiries, due process and fundamental rights*, in Vervaele, J.A.E. (ed.), *European Evidence Warrant, Transnational Judicial Inquiries in the EU*, 2005, p. 123.

<sup>27</sup> The difference between the EEW and the EIO is that the EIN can refer to numerous investigative activities taking place in so-called real time. These include secret investigative measures, such as interception of telecommunications, observation of places or persons and covert operations.

## 5. POSSIBLE SOLUTIONS TO THE PROBLEM OF ADMISSIBILITY OF EVIDENCE FROM ABROAD

Contact between two different national systems of the law of evidence always leads to a particular short circuit. As stated above, the problem is that one state obtains evidence, and the other one uses it. Because states have different law on evidence systems, in such an area there will always arise issues of admissibility of evidence obtained in accordance with different legal rules.<sup>28</sup> On a theoretical level, the number of solutions is limited. (1) First, and the most radical solution, would be automatic recognition of all evidence lawfully obtained in a foreign country. This way, the free flow of evidence, as appointed by the EU, would be extremely effective. The problem, of course, may be that some methods of obtaining evidence in other legal cultures are completely unacceptable (e.g., invasive intervention in privacy without a warrant and without specific evidentiary standards). This is exactly why we have not yet arrived at this solution even at the international level.<sup>29</sup> (2) Another way would be to establish some common standards for undertaking investigative activities and restrictive measures.<sup>30</sup> This solution seems the best, since it would ensure at least some agreement about which measures and guarantees for the accused must be established so that we can have confidence in the evidence of other states. This approach, however, does have limitations. The first is obvious: If such congruence could be potentially achieved within a certain circle of states (say the EU),<sup>31</sup> it would be impossible to achieve such a consensus in a wider

<sup>28</sup> As Alegrezza concludes, the uncontrolled introduction of foreign evidence authorizes the importation of potentially dangerous legal products for 'criminal legal consumers'. Alegrezza, S., *Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility*, *Zeitschrift für Internationale Strafrechtsdogmatik* 9(2010), p. 572.

<sup>29</sup> It's true that Gane and Mackerel, on the basis of an international analysis, concluded that despite the differences between the regulations, a pattern appears that indicates that in situations in which any evidence obtained abroad, the lowest possible standard of assessment of admissibility is used. Gane, C.; 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*, (2)1996, p. 116.

<sup>30</sup> As Heard and Mansell correctly point out, in a situation of greater flow of evidence, more equal standards for the conduct of investigative activities should be provided, and also more effective procedural rights of the defendant. Heard, C.; Mansell, D., *The European Investigation Order: Changing the Face of Evidence Gathering in EU Cross-border Cases*, *New Journal of European Criminal Law* (2)2011, p. 366-367. See also Perron, W., *Perspectives of the Harmonization of Criminal Law and Criminal Procedure in the European Union*, in Strandbakken, A.; Husab, E. J. (eds.), *Harmonization of Criminal Law in Europe*, Antwerpen, Intersentia, 2005, p. 5-22.

<sup>31</sup> This idea is at present utopian. If we recall the long history of negotiating on the joint document which should govern the minimum rights of the accused and which have lasted since 2004. Then the proposal of the framework decision on certain procedural rights in

range of countries. So criminal judges would always have to deal with the issue of the admissibility of the evidence from abroad. The second, and more important question, is the level at which to set standards. If the standards are minimum, it would be better not to have them. In this way, it lowers the level of protection, even in countries that have higher standards. Of course, this does not mean that common standards have to be set at the highest level, but it certainly should not be the lowest common denominator of all the EU countries. It would almost certainly prevent forum shopping, since the (potential) European public prosecutor will know that there can be no fundamental differences (lowering) among the standards for conducting investigative activities by member states. (3) The third option, which exists and seems most realistic, is letting the courts of each state decide what evidence and under what criteria, should be allowed at the trial.

Because international documents do not give us a clear answer to the question of the admissibility of evidence obtained abroad, each country must find a way to answer that question. One of the answers to the question of the kind of solutions other countries have adopted, has given us a comprehensive study entitled 'Cross-border gathering and use of evidence in criminal matters: Towards mutual recognition of investigative measures and free movement of evidence?'<sup>32</sup> by three Belgian authors.

The study however might be objected to on the grounds of some methodological weaknesses, one of the biggest being the relatively small sample, since the data was collected from only 10 of the 27 member states.<sup>33</sup> In the absence of complete data, however, it can be used to present some problems. The study, based on a detailed questionnaire about the law of evidence of the member states, came to some interesting conclusions. It has been concluded that, until now, no systematic collection of data has been organized, nor systematic assessment of the admissibility of evidence after a state's request for international legal assistance.<sup>34</sup> This means that the desire for the free movement of evidence is even less justified, because no one really knows what the actual situation is in the law of evidence of member states. Most states consider that, in assessing evidence obtained abroad, judges should first deal with the question of whether the evidence was lawfully obtained in the requested state.

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criminal proceedings throughout the European Union (COM 2004/0328) first appeared. After failed negotiations, the EU has tried to adopt a gradual approach and arrange groups of rights through separate documents. Thus, in 2009, a draft programme was adopted for strengthening the procedural rights of suspects and defendants in criminal proceedings (2009/C 295/01) within which have already been adopted individual documents ([http://ec.europa.eu/justice/criminal/criminal-rights/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm)).

<sup>32</sup> The study was financed by the EU. G. Vermeulen, W. De Bondt, Y. Van Damme, EU cross-border gathering and use of evidence in criminal matters: Towards mutual recognition of investigative measures and free movement of evidence?, IRCP series, Vol. 37, Maklu, 2010, <http://www.ircp.org/uploaded/evidence.pdf>

<sup>33</sup> Slovenia was also not among them. *Ibid.*, p. 43.

<sup>34</sup> *Ibid.*, p. 162.

Moreover, there are large differences between countries on issues of how to treat evidence unlawfully obtained abroad. Some states consider that such evidence should be treated the same as it would if obtained within domestic criminal proceedings;<sup>35</sup> some are, in the evaluation of this issue, more stringent, and some are more moderate.<sup>36</sup> The national legislation of 70% of the included countries contains rules by which unlawfully obtained evidence from abroad must be excluded.<sup>37</sup> *The view of the majority of states is that the evidence must be lawfully obtained in the requested state, and only then may the admissibility of such evidence by the domestic law be reviewed.* The experts based on the questionnaire came to the following conclusions: (1) *countries support the introduction of common minimum standards for the conduct of investigative activities* which all member states would comply with, which would facilitate the assessment of evidence from abroad; (2) *as long as it is not so, the member states want to reserve for themselves the final assessment of the admissibility of evidence* and the assessment on whether evidence has been obtained contrary to the fundamental principles of domestic law.<sup>38</sup>

According to the reviewed literature, it can be concluded that the practice of foreign countries regarding the evaluation of evidence from abroad, as confirmed by the research, is very different. In Spain there is a radical solution by which it is permitted to use any evidence from abroad, if it is lawfully obtained in the requested State.<sup>39</sup> This solution is interesting because Spain, like Slovenia, prescribes very strict rules on the exclusion of evidence, including the doctrine of the fruit of the poisonous tree. In the Netherlands, the practice is very diverse because there are no uniform rules nor uniform court practices on this issue. However, in some cases, the Court has dismissed evidence obtained in Belgium on the grounds of violation of the European Convention on Human Rights, because they the evidence was obtained at the expense of a Dutch citizen.<sup>40</sup> Also, the ECHR, in some cases, has taken the position that

<sup>35</sup> The national legislation of 80% of the member states recognizes the rules on the separation of evidence, of which 30% of them recognize the doctrine of the fruits of the poisonous tree. Again I emphasize that this statistic is not reliable because the sample is not representative for the whole EU. *Ibid.*, p.130.

<sup>36</sup> *Ibid.*, p. 163.

<sup>37</sup> *Ibid.*, p. 132. See an interesting discussion on the excursion in Greece, Giannouloupoulos, D., *The exclusion of improperly obtained evidence in Greece: putting constitutional rights first*, *The International Journal of Evidence and Proof* 11(2007), p. 181-212.

<sup>38</sup> Vermeulen, G.; De Bondt, W.; 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?*, IRCP series, Vol. 37, Maklu, 2010, p. 150-151.

<sup>39</sup> Spanish Supreme Court (Sala de lo Penal), judgment of 19.1.1995 – STS 13/1995. See Bachmaier Winter, L., *European investigation order for obtaining evidence in the criminal proceedings: Study of the proposal for a European directive*, p. 588, [http://www.zis-online.com/dat/artikel/2010\\_9\\_490.pdf](http://www.zis-online.com/dat/artikel/2010_9_490.pdf)

<sup>40</sup> van Hoek, A.A.H.; Luchtman, M.J.J.P., *Transnational cooperation in criminal matters and the safeguarding of human rights*, *Utrecht Law Review* 1(2005), p. 3.

the state can be held responsible for violations of the Convention (especially Article 6) if it would allow the use of evidence from abroad without taking into account the manner in which the evidence was obtained.<sup>41</sup> The truth is that, due to the fact that the Convention contains no explicit provisions on the exclusion of illegally obtained evidence, the European Court of Human Rights is reluctant to declare itself on issues relating to evidence gathered in such manner.<sup>42</sup>

## 6. DISTINGUISHING BETWEEN THE TWO TYPES OF EVIDENCE FROM ABROAD

In a further discussion it is necessary to distinguish the two types of evidence from abroad, because each category is concerned with different aspects of testing the admissibility of evidence.<sup>43</sup>

The first type includes *evidence obtained in a requested country with the participation of the requesting state*. This can relate to any form of legal assistance. Given the fact that there is a possibility that the requesting state affects the way in which the requested state obtains certain evidence, it is necessary that the admissibility of such evidence be assessed more strictly. The higher the possibility of influence in the way of obtaining evidence (e.g. the requesting state may require that the requested state, in obtaining the evidence, holds to certain formalities and procedural rules of the requesting state), the more strict must be the evaluation of the evidence. A Slovenian Court may thereby take into account the principle of proportionality – to take into account the intensity of the impact which the requesting state law has on the obtaining of evidence abroad. If a procedure abroad took place entirely in accordance with the requirements of the requesting state (in this case, Slovenia), then there's no reason that such obtained evidence should not be evaluated as if it were our own. It is then evaluated in accordance with all legal and constitutional, and of course, international criteria, as evidence would be if it was acquired in Slovenia.

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<sup>41</sup> P. V v. FRG, no. 11853/85, ECHRa, admissibility decision 13 July 1987, cited in van Hoek, A. H.; Luchtman, M.J.J.P., *Transnational cooperation in criminal matters and the safeguarding of human rights*, Utrecht Law Review 1(2005), p. 19.

<sup>42</sup> For criticism of ECHR's restraint about issues on evidentiary laws (especially about exclusion), see Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, p. 86-89.

<sup>43</sup> Such a distinction was established by Vermeulen, in his review paper *Free gathering and movement of evidence in criminal matters in the EU: Thinking beyond borders, striving for balance, in search of coherence*, Antwerpen, Maklu, 2011. And there he takes the radical view that we, in the future, within the EU should start to take into account the fact that it is not so important which body of criminal justice system carries certain investigative (or other) activities, but the evaluation of these activities should be only considered on the basis of the procedure by which they were carried out.

The second type is evidence obtained abroad *independently, without any participation of other states*. This refers to evidence collected for the purpose of criminal proceedings in another country, in accordance with its regulations. Of course, in such cases, nothing more or less can be expected from the foreign state but that it respects its laws. Therefore, the criteria for assessing the admissibility of such evidence should be considerably more moderate: it should include only an assessment of constitutionality and compliance with international standards (eg. ECHR).<sup>44</sup>

## 7. IN CONCLUSION

It is not possible to give a straightforward answer to the question of what kind of evidentiary value should be given to evidence from abroad; the decision is complex and difficult. First of all, this question is regulated by a variety of valid legal acts. That the situation is even more complex is evident from cases to which is added an international element. Especially complex are the cases where evidence has been obtained in several countries on the basis of the decisions of a number of different bodies, against different people, etc. This is why the answer to this question is always difficult. The case law of other countries points to different answers to this question, and it is possible to find different answers in the same state.<sup>45</sup> For challenging the validity of such evidence, no doubt, all legal means are allowed: legal, constitutional, even Convention solutions can be used. It should be stated that the decision on the admissibility of foreign evidence should always be the expression of the independent evaluation of an independent judiciary, and that the result is always uncertain, both for the prosecution and for the defence. With regard to the reviewed existing case law, one cannot give a unique answer to the question on how to evaluate such evidence.

What to recommend to the judge concerning the admissibility of evidence from abroad? First, he should ask himself whether the evidence was lawfully obtained in the country of origin. It is checked where a party (usually the defendant) argues that the evidence has been obtained illegally or, of course, if the judge suspects that something is wrong with the evidence. In the event that the Court finds that the evidence has been obtained illegally, most of the member countries of the EU are of the opinion that such evidence may not be used in proceedings. However, where legally, then comes the next question - whether the evidence was obtained in collaboration with a particular country (through international legal assistance, etc.) or not. If the answer is yes, then a more strict assessment is required, depending on how close the cooperation

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<sup>44</sup> See Šugman, K.; Gorkič, P., *Dokazovanje v kazenskem postopku*, GV Založba, Ljubljana, 2011, p. 317-323.

<sup>45</sup> Joubert, C., *Judicial Control of Foreign Evidence in Comparative Perspective*, Rozenberg Publishers, Amsterdam, 2005, p. 153.



was, or about how successfully the particular state ‘exported’ the rules of its legal order. Therefore, if it could completely affect how to obtain evidence (the state of execution has complied with all the requirements), that evidence should be treated as if it has been acquired in the territory of the requesting state. From here follows a further examination of whether the evidence was obtained in accordance with internal requirements (e. g. law on criminal procedure, Constitutions and international requirements (ECHR). If the influence of the requesting state was smaller, then the test is somewhat more moderate. However, if the evidence is obtained independently, regardless of participation, for the purposes of foreign criminal proceedings, the assessment test is even more moderate. For example, evidence can be assessed only as to whether it is been obtained in a manner that is consistent with the requirements of the Constitution and the international order.