



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

**Response of the ENCJ to the European Commission's Green Paper on Obtaining
Evidence in Criminal Proceedings.**

Introduction

The ENCJ is an organisation entirely constituted of national institutions of Member States of the EU which are independent of the executive and legislature, or which are autonomous, and which are responsible for the support of the Judiciary in the independent delivery of justice. The Ministry of Justice of Member States where such institutions do not exist may be granted observer status. The ENCJ's aim is to promote mutual understanding and trust between judges and judiciaries across Europe.

The ENCJ supports the aspiration set out in the Green Paper that it is important to foster effective co-operation in obtaining evidence in criminal matters so that the administration of criminal justice is not impeded by differences between the Member States' judicial systems or the lack of mutual recognition of judicial decisions.

The Green Paper deals with the two issues of obtaining evidence and securing admissibility. These are two separate issues and it may be too simplistic to reduce the aim of the consultation to one of "securing admissible evidence". Admissibility may often be related to the way evidence is obtained, but not always. Each Member State has its own national rules or practices which determine whether a piece of evidence is admissible - in the sense that it can be used by the judge, jury or court to come to its conclusion or determination in the legal proceeding in question. At present, these national standards or rules of evidence control the admissibility of evidence, however or wherever it has been obtained.

The ENCJ considers that there is every advantage in increasing the mutual recognition of judicial decisions and improving the cooperation in evidence gathering across the EU. Whilst the ENCJ accepts that it is a legitimate aspiration for the EU to aim for mutual admissibility of evidence in the courts across the EU, it is an aim which might involve such a change in national legal history and culture as to be practically impossible to achieve in the short term.

We answer the specific questions as follows -

5.1. Obtaining evidence

1. Would you in principle welcome a replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition covering all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination? Why?

In principle we would welcome the introduction of a single instrument. However, it should be implemented step by step by introducing and implementing rules and practices for types of evidence for which the need for such rules is shown. Whilst the replacement of the existing regime is preferable, we note that the European Evidence Warrant is not yet in force. There may be some advantage in allowing that to be implemented and to learn its strengths and weaknesses before finalising a single instrument.

We would like to see this single instrument in a form which would cover all types of evidence however and wherever obtained but we feel that in its initial operation its use should be restricted to certain types of evidence which are at present covered by existing instruments. The structure of the single instrument would then allow its expansion to include other forms of evidence.

The single instrument should not replace the existing instrument until it has been tested and proved to be effective.

2. In your opinion, would it be necessary to include specific rules for some types of evidence in the instrument? If so, which? Why?

Yes. Whilst there should be common standards and general rules applying to all types of evidence, there will need to be specific rules for certain types of evidence. We are happy to provide detailed examples in due course.

3. In your opinion, would it be inappropriate to apply the characteristics of mutual recognition instruments to all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination? If so, which types of evidence would deserve a specific treatment? Why?

It would not be inappropriate to apply the characteristics of mutual recognition to all types of evidence, provided that common standards are in place.

For example, in many countries the interception of communications is under judicial control; in one country it may be permitted for minor crimes but in another for serious crimes only. Thus a problem could arise with a judicial order made in one country which the judge of the receiving country would not wish to enforce under the rules of the receiving country. However, mutual recognition might compel the receiving judge to enforce it.

If the common standards were in acceptable form then the issuing judge would apply them and not compel a receiving judge to enforce an order which would otherwise be unenforceable in the receiving country.

4. In your opinion, would it be useful to supplement the instrument with non-legislative measures? If so, which? Why?

Because we advocate a step-by-step approach, we feel that this measure should evolve over time. We also see the need for evolution to be monitored. Therefore it is important that the judiciaries in different countries should receive proper training and that there should be mutual contact between judiciaries. There will also be judicial case law that will build upon the implementation and use of the instrument that will supplement its effectiveness.

5. In your opinion, are there any other issues which should be addressed? If so, which? Why?

The ENCJ wishes to emphasise that this instrument must at all times safeguard the interests and rights of the defence and must meet the common standards set out in the jurisprudence under Articles 6 and 8 of the European Convention of Human Rights.

5.2. Admissibility of evidence

6. Would you in principle welcome the introduction of common standards for gathering evidence? Why?

We welcome the introduction of common standards in the gathering and obtaining of evidence. However, as this question is under the heading of “admissibility” we would like to emphasise that we feel that questions of the admissibility of evidence are for national courts. Whilst we hope that through mutual trust and respect rules governing admissibility of evidence in the different countries of the EU would in due course align, at present the differences are such that this will take a long time.

We make the proposal that a country issuing a request for evidence to be gathered in another country could be obliged to frame that request –

- (i) in accordance with the common standards; and

- (ii) in compliance with the evidential rules applicable in the issuing country.

7. Would you prefer to adopt general standards applying to all types of evidence or to adopt more specific standards accommodated to the different types of evidence? Why?

We see the common standards as being minimum standards. There will need to be specific standards to apply to particular areas and to particular types of evidence.

8. If common standards should be adopted, which would you envisage? Why?

Common standards should be established for obtaining evidence in all cases but especially when fundamental rights can be affected. The standards can be established, taking into account the jurisprudence of the different national Courts and the European Court of Human Rights.

We list some of the standards which we feel should be included in the list of common standards -

- Defence statements, for the purpose of mutual legal assistance (right to be assisted by a lawyer, fair trial conditions to hear the accused person, especially when the person is under arrest, legal warnings, etc);
- Victim or witness statements (victim protection, fair trial conditions to hear the witness;
- Obtaining evidence from medical examinations (conditions for superficial bodily examination);
- Obtaining bodily materials, including DNA (conditions for obtaining bodily materials, proportionality, judicial decision, standards to protect the evidence and to ensure the authenticity of the evidence transmitted);
- Drugs analyses (methods, experts, samples for private analyses, etc);
- Intervention of communications (telephone, letters, e-mail (including standards to protect the evidences and to ensure the authenticity of the evidences transmitted, proportionality and judicial control);
- Search and seizure (including standards to protect the evidence and to ensure the authenticity of the evidence transmitted, proportionality and judicial control); and
- Obtaining data from computer files, and standards to ensure the authenticity of the data transmitted (including standards to protect the evidence and to ensure the authenticity of the evidence transmitted, proportionality and judicial control).

9. In your opinion, are there any other issues which should be addressed? If so, which? Why?

No, not at present.

Done in Brussels and London, 21 January 2010.