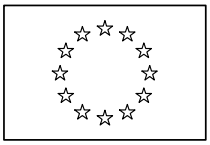

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.11.2009
COM(2009) 624 final

GREEN PAPER

on obtaining evidence in criminal matters from one Member State to another and securing its admissibility

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1. INTRODUCTION

One of the objectives of the European Union is to maintain and develop an area of freedom, security and justice, notably by facilitating and accelerating judicial cooperation in criminal matters between Member States. Faced with cross-border crime, the administration of justice must not be impeded by differences between the Member States' judicial systems and the lack of mutual recognition of judicial decisions. In this regard it is particularly important to foster effective cooperation on obtaining evidence in criminal matters.

A number of instruments are already in force, providing for mechanisms for a Member State to seek the collection of admissible evidence in criminal matters in a cross-border context. Closer cooperation in this field is key to the effectiveness of criminal investigations and proceedings in the EU, and the Commission therefore intends to take further action to promote such cooperation. The objective of the Green Paper is to consult Member States and all concerned stakeholders on a number of issues that are relevant in that respect.

2. BACKGROUND

Since the entry into force of the Amsterdam Treaty, a number of texts have clearly set out the necessity to facilitate the gathering of evidence in a cross-border context and to promote the admissibility of such evidence before the courts.

The Tampere Conclusions[1] identify mutual recognition as the cornerstone of judicial co-operation and state that enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. They also state that the principle of mutual recognition should apply to pre-trial orders, in particular to those which would enable competent authorities to quickly secure evidence and to seize assets which are easily movable, and that evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

The Programme of measures to implement the principle of mutual recognition[2] states that the aim, in relation to orders for the purpose of obtaining evidence, is to ensure that the evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case.

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1 European Council of 15-16 October 1999, Conclusions of the Presidency - SN 200/1/99 REV 1.

2 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJ C 12, 15.1.2001, p. 10).

The Hague Programme[3] states that further development of judicial co-operation in criminal matters is essential to provide for an adequate follow up to investigations of law enforcement authorities of the Member States and Europol. It also states that the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, which encompasses judicial decisions in all phases of criminal procedures, such as gathering and admissibility of evidence, should be completed and that further attention should be given to additional proposals in that context. The Action Plan implementing the Hague Programme[4] also foresees a proposal on minimum standards relating to the taking of evidence with a view to admissibility.

The Commission Communication "An area of freedom, security and justice serving the citizen"[5] foresees inter alia the establishment of a comprehensive system for obtaining evidence in cross-border cases. According to the Communication, this would require the replacement of the existing legal instruments in this area by a new single instrument. This instrument would be automatically recognised and applicable throughout the EU, thereby encouraging prompt and flexible cooperation between the Member States. It would also lay down deadlines for enforcement and limit as far as possible the grounds for refusal. This instrument could include rules on electronic evidence and a European order for bringing persons to court that takes account of the opportunities offered by videoconferences. In addition, minimum principles to facilitate the mutual admissibility of evidence between Member States, including scientific evidence, could be provided for.

3. EXISTING RULES ON OBTAINING EVIDENCE IN CRIMINAL MATTERS

Existing rules on obtaining evidence in criminal matters in the EU are of two different kinds. On the one hand, there are instruments based on the principle of mutual assistance. These most notably include the European Convention on mutual assistance in criminal matters[6], supplemented by the Schengen Agreement[7] and the Convention on mutual assistance in criminal matters[8] and its Protocol. On the other hand, there are instruments based on the principle of mutual recognition, which most notably include the Framework Decision on the European Evidence Warrant[9]. The mutual assistance instruments and their protocols cover

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3 The Hague Programme: strengthening freedom, security and justice in the European Union (OJ C 53, 3.3.2005, p. 1).

4 Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (OJ C 198, 12.8.2005, p. 1).

5 Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen - COM(2009) 262.

6 European Convention of 20 April 1959 on mutual assistance in criminal matters.

7 Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.9.2000, p. 19).

8 Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union (OJ C 197, 12.7.2000, p. 1).

9 Council 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 (OJ L 350, 30.12.2008, p. 72). Another instrument on this matter based on the principle of mutual recognition is the Council Framework Decision of 22 July 2003 on the execution in the EU of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45). However, the scope of this instrument is limited to the freezing of evidence located in another Member State. The subsequent transfer of the evidence between the Member States involved would be regulated by mutual assistance instruments or the Framework Decision on the European Evidence Warrant.

mutual assistance in general but also contain rules on specific forms of mutual assistance such as the interception of telecommunications or the use of videoconferencing. Requests for mutual assistance shall, as a general rule, be transmitted directly between the issuing and executing authority. Unless a relevant ground for refusal is invoked by the executing authority, the request shall be executed as soon as possible and if possible within the deadlines indicated by the issuing authority. In order to ensure the admissibility of the evidence obtained, the authorities of the requested State shall comply with the formalities and procedures indicated by the authorities of the requesting State provided that they are not contrary to fundamental principles of law in the requested State.

The Framework Decision on the European Evidence Warrant applies the principle of mutual recognition to judicial decisions for the purpose of obtaining evidence for use in proceedings in criminal matters. A European Evidence Warrant can be issued in order to obtain evidence that already exists and is directly available in the form of objects, documents or data[10]. It shall be issued in a standard form and translated into an official language of the executing State. The authorities of the issuing State must find that the evidence could also be obtained under national law in a similar case and that the evidence sought is necessary and proportionate for the proceedings in question. It shall be recognised and executed within a fixed deadline unless a relevant ground for refusal applies. The execution of a European Evidence Warrant shall not be subject to verification of dual criminality if it is not necessary to carry out search or seizure or if the offence is punishable by a custodial sentence of at least three years and is mentioned on a list of offences in the Framework Decision. In order to ensure the admissibility of the evidence obtained, the authorities of the executing State are obliged to comply with the formalities and procedures indicated by the authorities of the issuing State provided that they are not contrary to fundamental principles of law in the executing State.

4. FUTURE PROSPECTS

4.1. Obtaining evidence

As mentioned above, the existing rules on obtaining evidence in criminal matters in the EU consist of a number of co-existing instruments based on different underlying principles, namely that of mutual assistance and that of mutual recognition. This makes the application of the rules burdensome and may cause confusion among practitioners. This can also result in situations where practitioners do not use the most appropriate instrument for the evidence sought. Ultimately, these factors may therefore hinder effective cross-border cooperation. Furthermore, instruments based on mutual assistance, may be regarded as slow and inefficient given the fact that they do not impose any standard forms to be used when issuing a request for obtaining evidence located in another Member State or any fixed deadlines for executing the request. Instruments based on mutual recognition may also be regarded as unsatisfactory in that they only cover specific types of evidence and that they provide for a large number of grounds for refusal to execute the order.

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[10] Because of this limited scope of application, a European Evidence Warrant cannot be issued for the purpose of for example interviewing suspects or witnesses or obtaining information in real time, such as interception of communications or monitoring of bank accounts, as these types of evidence – although directly available – do not already exist. Nor can a European Evidence Warrant be issued for the purpose of for example conducting analyses of existing objects documents or data or obtaining bodily material, such as DNA samples or fingerprints, as these types of evidence – although already existing – are not directly available without further investigation or examination.

As set out in the Communication "An area of freedom, security and justice serving the citizen", the most effective solution to the above mentioned difficulties would seem to lie in the replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition and covering all types of evidence. Compared with the scope of application of the Framework Decision on the European Evidence Warrant, this new instrument would also cover evidence that – although directly available – does not already exist, such as statements from suspects or witnesses or information obtained in real time, such as interception of communications or monitoring of bank accounts. It would also include evidence that – although already existing – is not directly available without further investigation or examination, such as analyses of existing objects documents or data or obtaining bodily material, such as DNA samples or fingerprints. The present consultation is aimed at confirming the validity of this approach.

It also needs to be examined whether specific rules for particular types of evidence should be included in the instrument. This has been done in the current mutual assistance instruments which, in addition to the general provisions applying to all types of evidence, contain detailed rules on requests for certain specific forms of mutual assistance, such as interception of telecommunications or hearing by videoconference.

In addition, it needs to be examined whether it would be appropriate to apply the typical characteristics of mutual recognition instruments (such as the use of orders instead of requests for assistance, standard forms for issuing the order, fixed deadlines for executing the order and direct contact between the competent authorities) to all types of evidence. For example, it may not be appropriate to introduce standard forms for hearing of witnesses or fixed deadlines for setting up a joint investigation team. Furthermore, grounds for refusal provided for in mutual recognition instruments may no longer be necessary in relation to evidence that can be obtained without using coercive measures.

Finally, it needs to be examined whether it would be appropriate to supplement any existing or future instrument with non-legislative measures. This could include initiatives aimed at raising awareness of the instrument(s) among practitioners, such as drafting guidelines or providing training to practitioners on their application. This could also include initiatives aimed at ensuring that the instrument is implemented correctly, such as the setting up of monitoring and evaluation systems.

4.2. Admissibility of evidence

As mentioned above, the existing instruments on obtaining evidence in criminal matters already contain rules aimed at ensuring the admissibility of evidence obtained in another Member State, i.e. to avoid evidence being considered inadmissible or of a reduced probative value in the criminal proceedings in one Member State because of the manner in which it has been gathered in another Member State. However, these rules only approach the issue of admissibility of evidence in an indirect manner as they do not set any common standards for gathering evidence. There is therefore a risk that the existing rules on obtaining evidence in criminal matters will only function effectively between Member States with similar national standards for gathering evidence.

As set out in the Communication "An area of freedom, security and justice serving the citizen", the best solution to this problem would seem to lie in the adoption of common standards for gathering evidence in criminal matters. The present consultation is also aimed at confirming the validity of this approach.

It also needs to be examined whether, in the affirmative, it would be best to adopt general standards applying to all types of evidence or to adopt more specific standards accommodated to the different types of evidence. Given the characteristics of the different types of evidence, the former approach would be limited to agreeing on general principles while the latter approach would allow for more specific approximation rules.

5. QUESTIONS TO MEMBER STATES AND ALL CONCERNED STAKEHOLDERS

In order to identify the best way for the Commission to proceed, Member States and all concerned stakeholders are kindly requested to answer the following questions:

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?

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

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?

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

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

5.2. Admissibility of evidence

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

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?

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

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

6. DEADLINE FOR REPLYING

Member States and concerned stakeholders are kindly requested to submit their replies to the Green Paper by 22 January 2010 at the latest. The replies should be sent to the following address:

By mail:
European Commission
Directorate General Justice, Freedom and Security
Attn: Mr Anders AAGAARD
MO59 03/096
B-1049 Brussels
Belgium

By e-mail:
JLS-CRIMINALJUSTICE@ec.europa.eu

Contributions will be published on the Internet. It is important to read the specific privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with. Professional organisations are invited to register in the Commission's Register for Interest Representatives (http://ec.europa.eu/transparency/regrin). This Register was set up in the framework of the European Transparency Initiative with a view to provide the Commission and the public at large with information about the objectives, funding and structures of interest representatives.