

Evidence and Legal Privileges

The ECBA View

Vânia Costa Ramos

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How to bring justice into evidence gathering?

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

ECBA View – General

Rejection of the replacement of the existing laws and rules on MLA in criminal matters and on mutual recognition of evidence in criminal proceedings by a single instrument on the basis of the principle of MR:

- 1) No binding and enforceable safeguards
- 2) Feasibility issues
- 3) Necessity ?
- 4) Step-by-step approach
- 5) Training

Immunities and privileges – Study

“the refusal ground of immunity or privilege under the law of the executing member state was assessed. The introduction of this ground for refusal or non-execution is a step backwards, compared to traditional MLA. Surprisingly, when tested, there was significant support among member states for keeping or even introducing the ground for non-execution concerned.

Notwithstanding this empirical result, the project team strongly suggests redeliberation on the issue, for objectively it would be a step backwards to keep or further introduce the ground for non-execution throughout future (MR based) MLA.”

EEW – recital 17

“It should be possible to refuse an EEW where its recognition or execution in the executing State would involve breaching an immunity or privilege in that State.

There is no common definition of what constitutes an immunity or privilege in the European Union and the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions [...]”.

(not applicable to banking secrecy)

EEW - Article 13 (d)

“Grounds for non-recognition or non-execution

1. Recognition or execution of the EEW may be refused in the executing State:

[...]

(d) if there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EEW [...]”

National Rules

Portuguese example – Law on Mutual Cooperation in Criminal Matters

(Law 144/99, of 31.08 <http://www.gddc.pt/legislacao-lingua-estrangeira/english/lei144-99rev.html>)

Article 11

Protection of confidentiality

1. In implementing a request for international co-operation submitted to Portugal, the provisions of the Code of Criminal Procedure and supplementary legislation concerning grounds of refusal to testify, seizure of property, telephone tapping, professional or State secrets, or any other cases in which confidentiality is protected, shall apply.
2. The provisions of the preceding paragraph shall apply to any information that according to the request, ought to be given by persons not involved in the foreign criminal

Practical example

Case 56/06.2TELSB-B.L1-9 (www.dgsi.pt)

Decision of 15-04-2010

Lisbon Court of Appeals (Tribunal da Relação de Lisboa)

Inadmissibility of seizure of lawyer's documents
(correspondence) on grounds of violation of professional
secrecy (lawyer was not previously suspected of having
committed a crime, nor had he been declared "arguido")

Case with international links – What if it was a seizure ordered
by foreign EEW?

Cornerstones of MR of evidence in criminal proceedings – legal privileges

ECBA View

- The executing Member State shall only enforce a EEW if and insofar as a similar warrant could be issued under its law (*principle of dual legality of the collection of evidence*).
- Exclusionary rules – from issuing and executing MS – based on recognised privileges and immunities must be respected (*the principle of most favourable treatment on immunities and privileges*).

Cornerstones of MR of evidence in criminal proceedings – legal privileges – ECBA View

- Effective legal remedy against the execution of a EEW in the executing MS.
- The legal remedy must allow *at least* the review of the dual legality of the collection of evidence and the respect for the principle of most favourable treatment on immunities and privileges.
- The legal remedy must prevent the transfer of the evidence to the issuing Member State pending decision.

Green Paper

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

Green Paper

http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0004_en.htm

ECBA Reply

<http://www.ecba.org/extdocserv/ECBA2010onGreenPaperonEvidence.pdf>

Study on cross-border gathering and use of evidence in criminal matters

http://www.ecba.org/extdocserv/projects/ps/StudyonProcedRights_EU.pdf

ECBA - EUROPEAN CRIMINAL BAR ASSOCIATION

An association of European defence lawyers

25 Bedford Row

London

WC1R 4HD

United Kingdom

Tel.: ++ 44 20 70 67 15 36

Email: secretariat@ecba.org

To become a member of the ECBA, please visit our website at:

www.ecba.org



Thank you for your attention.

Vânia Costa Ramos

vcr@advogados.in

