



BUNDESRECHTSANWALTSKAMMER

Statement

**by the German Federal Bar on the Green Paper
on obtaining evidence in criminal matters from one Member State to another
and securing its admissibility presented by the Commission of the European
Communities, Brussels, 11-11-2009 – COM(2009) 624 final**

drafted by the

German Federal Bar's Criminal Law Committee

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Executive Summary

- I. The German Federal Bar **welcomes** the Commission's approach to enter into a period of fundamental reflection on mutual recognition of evidence in criminal proceedings. In order to avoid redundant work in Member States, the German Federal Bar suggests deferring tentatively any further implementation of Council Framework Decision 2009/978/JHA of 18 December 2008 on the European Evidence Warrant.

- II. **For the time being**, the German Federal Bar **objects** to replacing the existing legal regime on mutual assistance and on mutual recognition of evidence in criminal matters by a single instrument based on the principle of mutual recognition.
 1. Any further extension of the principle of mutual recognition requires that mandatory, binding and enforceable **procedural guarantees of suspected or accused persons in criminal proceedings** in the European Union have entered into force. Only after the "step-by-step approach" initiated by the Swedish presidency has led to substantial results, mutual recognition may be broadened and deepened.
 2. In particular, mutual recognition of evidence in criminal proceedings requires **mandatory, binding and enforceable procedural guarantees on obtaining and admitting evidence** in the European Union. These include the presumption of innocence, the *nemo tenetur se ipsum accusare* principle, and the honouring of immunities and privileges. Only after such guarantees have entered into force, evidence may be recognized mutually.
 3. The German Federal Bar **doubts** "a single instrument" to be **feasible**. There are too many differences between the many types of evidence. National criminal procedures provide for the legitimacy and integrity of individual pieces of evidence by different means and in different stages of the proceedings. This causes serious problems to transfer individual pieces of evidence to another criminal justice system. Furthermore, the two modes of transferring evidence already obtained and obtaining new evidence not yet in possession of criminal justice actors have to be distinguished on a fundamental level.
 4. The German Federal Bar **doubts** the **necessity** of an instrument as contemplated in the Green Paper. It has not been substantiated that the transfer of evidence in criminal matters in the European Union suffers from significant deficiencies. The Convention on Mutual Assistance in Criminal Matters of 29 May 2000 has already been ratified by 23 member states. The German Federal Bar has no information on any deficiencies relating to the transfer of evidence based on this Convention. The German Federal Bar calls upon the Commission to submit authoritative empirical studies on alleged or real deficiencies and to reflect on their findings.

5. If deficiencies are to be found, they should be addressed by focused and practicable individual instruments. In this spirit, the German Federal Bar suggests to also endorse a “**step-by-step approach**” in the field of mutual recognition of evidence in criminal matters.

III. The German Federal Bar considers the following to be **indispensable corner stones** for the mutual recognition of evidence in criminal matters:

1. Issuing a Evidence Warrant

A European Evidence Warrant must be based on a national evidence warrant that has been issued by a **judge or a court** – and not by other judicial or even police authorities.

2. Obtaining of Evidence

- a) The executing State only executes a European Evidence Warrant if and to the extent to which an Evidence Warrant is permissible in its own legal order (**principle of dual legality of obtaining evidence**).

- b) In the course of obtaining new evidence, all immunities and privileges as foreseen both in the issuing and in the executing State must be honoured (**principle of the most-favoured treatment of immunities and privileges**).

- c) The **rights of suspects and defendants** as well as the **rights of uninvolved but affected third parties** must also be honoured in the executing State.

- d) The execution of a European Evidence Warrant must be rejected if **fundamental European legal principles** such as the requirement of probable cause or the proportionality principle were violated in the issuing phase. The same holds true in case of an **abuse** of a European Evidence Warrant.

- e) The suspect or defendant as well as defence counsel must be able to file for a European Evidence Warrant in the same manner as the prosecuting authorities (**principle of equality of arms**).

- f) The executing State must provide for an **effective legal remedy** against the execution of a European Evidence Warrant. In this proceeding, at least compliance with the dual legality of obtaining evidence as well as the honouring of the most-favoured treatment of immunities and privileges must be reviewable.

3. Transfer of Evidence

Before evidence is transferred to the issuing State, the **legality, fairness and integrity** of each piece of evidence must be reviewed *ex officio* by an independent judge or court in the executing state. Principally the suspect or accused or concerned person have the right to be heard before the final court decision.

4. Admissibility of Evidence

In principle, only evidence shall be admissible in the issuing State which was obtained and transferred **lawfully** and according to the principles spelt out above. Exceptions are only permissible if either the fairness of the specific obtaining of evidence, the fairness of the whole proceeding or the integrity of the evidence was not impaired.

Explanatory Statement

The Explanatory Statement is only included in the German version.