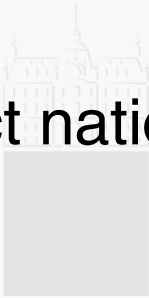


*(How) does the EIO Directive impact national rules on exclusion of illegally obtained evidence?*



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# *Three options*

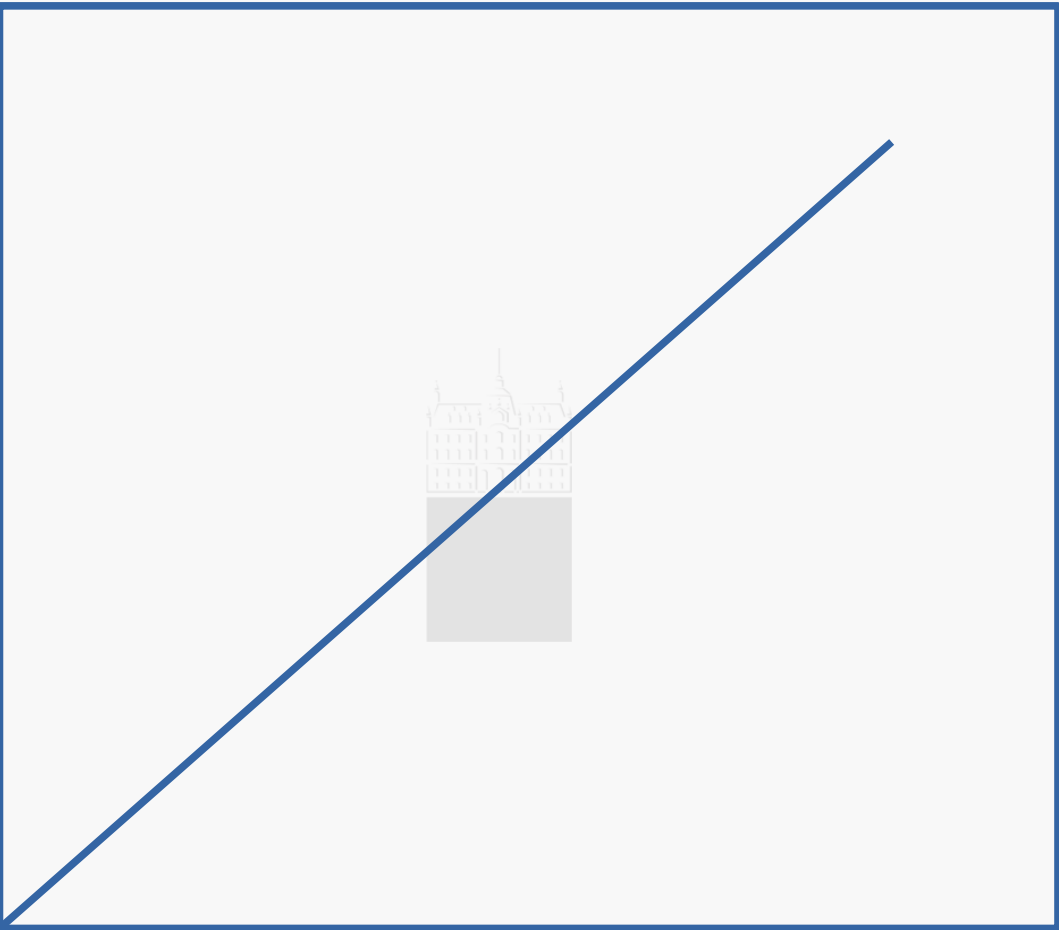
- EIO Directive **does not** impact (national) rules on exclusion of illegally obtained evidence
- EIO Directive **fails to** impact national rules on exclusion of illegally obtained evidence 
- EIO Directive **indirectly** impacts the (application of) national rules on exclusion of illegally obtained evidence.

# *Outlining the exclusionary rule*

- Step 1: a violation of rules of evidence?
  - Amplified by **divergence** between lex fori (issuing MS) and lex loci actus (executing MS)
- Step 2: does the exclusion apply?
  - **Mandatory** exclusion vs. **balancing** approach

divergence

convergence



balancing

mandatory

# *A) No (ambition to) impact...*

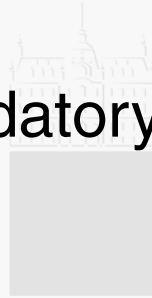
- No ambition to establish minimum rules, no reference to Art. 82(2)a TFEU:
  - »2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions /.../ the European Parliament and the Council may /.../ establish minimum rules. /.../ They shall concern:  
(a) **mutual admissibility of evidence between Member States**; /.../
- No Art. 37 of the EPPO R:
  - »1. Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.«
- Σ1: EIO remains substitute to / upgrade of MLA.
- Σ2: Locus regit actum principle applies (Art. 9(1) EIO D).
- Σ3: Issuing MS rules on exclusion apply.
- Σ4: EIO fails to tackle the lex fori - lex loci actus divergence.

## *B) Failure to impact*

- Recital 24, mod.: »*EIO [does not] establish[es] a single regime for obtaining evidence /.../«*
- Evidence obtained is not evidence allowed.
- To facilitate »free transfer of evidence« further, minimal rules on admissibility required.

## *C) Indirect impact*

- a) ... by reducing the divergence / promoting convergence of *lex fori*, *lex loci actus*?
- b) ... by modifying the mandatory / balancing approach to exclusionary rule?



## ... *convergence-promotion*

- Applying the forum regit actum principle, Art. 9(2) EIO D.
  - »The executing authority **shall comply with the formalities and procedures expressly indicated by the issuing authority** unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.«
- Legacy of Art. 4(1) MLA 2000 Convention.
- Modification of lex loci actus. Departure from locus regit actum principle. Limited application when evidence already in possession of executing auth.
- Facilitates evidence admissibility.



...

- ... obligation of issuing auth. to indicate formalities/procedures,  
to facilitate national rules of evidence and human rights law
- ... obligation of executing auth. to respect indicated formalities,  
procedures,  
to facilitate judicial cooperation beyond mere execution of  
EIO, by applying foreign rules of evidence,  
to facilitate the rule of law as a principle common to all MS.

## ... *divergence-reduction*

- Refusing recognition/execution of EIO by applying rules of evidence of the executing auth. on...
  - ... immunity/privilege.
  - ... national security interests/classified information.
  - ... obligation to respect Art. 6 TEU/Charter.
- Similar domestic case rule.
- De facto substitution of lex fori with the law of the executing MS.
- Paradox? No issue of (illegally) obtained evidence arises before the issuing MS court.

...

- ... obligation of the executing auth. to refuse recognition / execution?
  - ... to secure national law enforcement
  - ... to secure respect for human rights
- ... no option for the issuing auth. but to respect the refusal
  - ... effectively recognising rules of evidence of the executing MS.



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