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Intelligence on e-evidence



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THE ADMISSIBILITY OF
ELECTRONIC EVIDENCE IN COURT
CYBEX INITIATIVE

THE NEED OF A EUROPEAN LEGAL FRAMEWORK CONCERNING ELECTRONIC EVIDENCE

Council of Europe

1 April 2008 – Strasbourg, France



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Cybex

Presentation's Goal

Introduction

Definition of Electronic Evidence in Europe

Legislation

Proceedings and the Admissibility of Electronic Evidence in Court

Improvement Guide

CYBEX



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- **Cybex is the leading firm in Spain working on fraud in virtual environments.**
- **Since its founding in 2000, Cybex has been the pioneer of electronic evidence management and the admissibility of such evidence before a court.**
- **Cybex provides specialised solutions in electronic evidence for the prevention, discovery and research of fraud in a virtual environment to Public Institutions, law firms, corporations, companies and governments, as well as to Law Enforcement Groups.**

GOAL



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- **MUST WE CREATE A WORKING GROUP EVALUATING THE NEED OF A EUROPEAN LEGAL FRAMEWORK CONCERNING ELECTRONIC EVIDENCE?**

INTRODUCTION



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- **New technologies have increased exponentially the creation of electronic documents in the organizations**
- **More than 3 trillion of emails are sent in the world every year**
- **More than 90% of the documents in an organization are electronic**
- **Less than 30% are finally printed**
- **The use of the digital means and the virtual environment is not exempt from dishonest use**

- **Traditional evidence is moving from paper support to a virtual environment**
- **In the context of electronic evidence, management procedures and admissibility criteria are changing with regard to traditional evidence**
- ***Electronic Evidence* is gaining more and more relevance in legal procedures**
- ***Electronic Evidence* is the best mean to prove that certain types of crime have been committed through the new technologies. It could be defined as:**

ANY KIND OF INFORMATION OBTAINED FROM A DEVICE OR DIGITAL MEANS THAT AIMS FOR HAVING CONVICTION ON THE TRUTH OF A FACT.

ADVANTAGES

- **Information:** accurate, complete, clear, precise, true, objective, new and neutral
- **Evidence:** solid, useful, reliable, feasible, relevant to prove certain crime that were impossible to prove before.
- **Manipulation:** Easy obtaining, usage, conservation and storage.
- **Electronic mail:** together with the electronic signature make the electronic commerce easier, safer and quicker. Email makes mail cheaper.

DEFINITION



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- In the legislation of the studied countries there is **no specific definition on *electronic evidence***
- The legislative references are related to:

Traditional evidence
Electronic document
Electronic signature
Means of evidence



They can be applied by
analogy to the electronic
evidence

THERE IS NO SPECIFIC DEFINITION ON ELECTRONIC EVIDENCE

LEGISLATION & CASE LAW



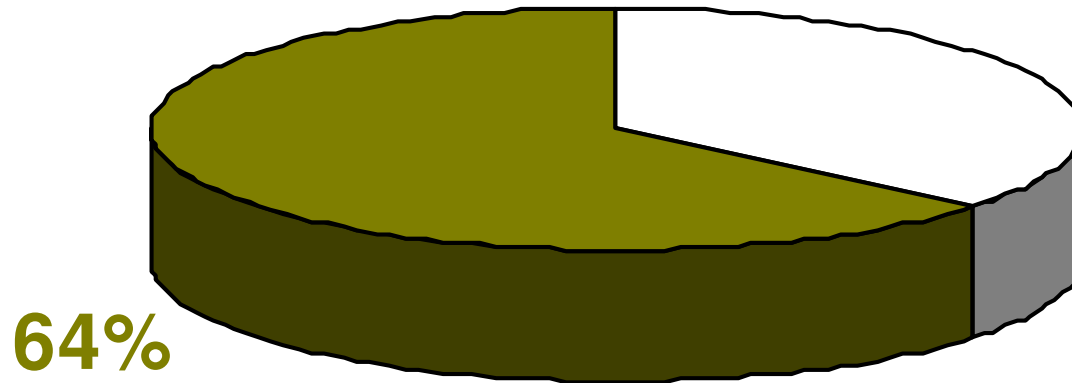
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- There is no specific regulation on *electronic evidence* in Europe.
- The *electronic evidence* is regulated by interpreting analogically the traditional evidence.

Laws regulating the *electronic evidence* by analogy

Total analyzed laws: 78



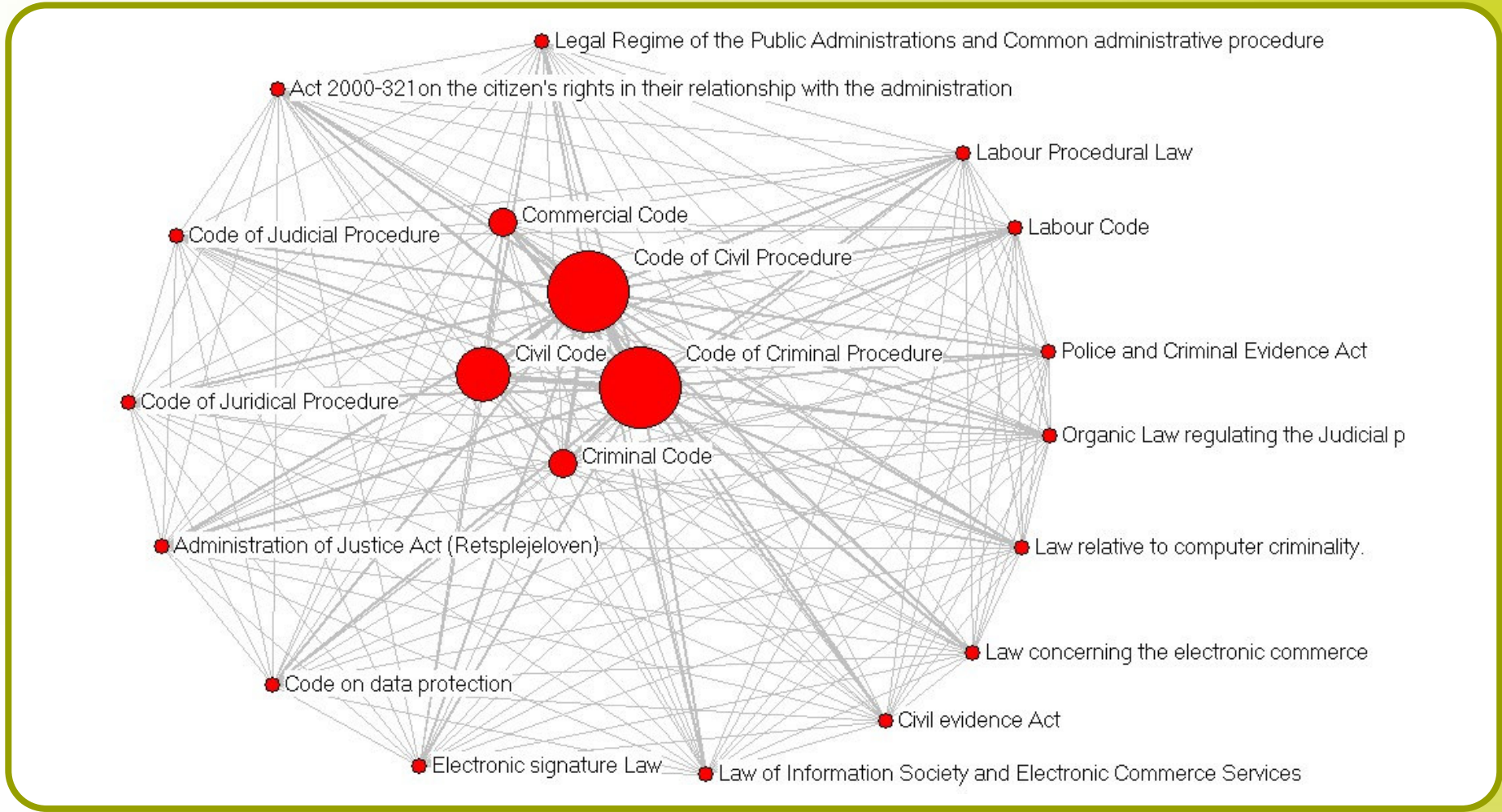
Data source and processing: AEEC's team.

Legislation and Case Law

LEGISLATION ON THE ELECTRONIC EVIDENCE : Specific rules

LEGISLATION

- The rules regulating electronic evidence by analogy are basically:



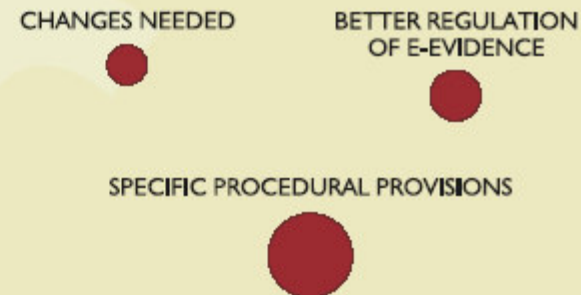
Data source and processing: AEEC's team.

- General changes to be introduced, according to **European jurists:**

IMPROVEMENTS

- ADAPT THE LAW TO REALITY
- BETTER COMMUNICATION BETWEEN INVOLVED ACTORS
- BETTER REGULATION ON COMMUNICATION LAW
- BETTER COOPERATION BETWEEN LAW ENFORCEMENT AUTHORITIES
- BETTER COLLABORATION BETWEEN ELECTRONIC SERVICE PROVIDERS
- BETTER REGULATION ON THE ACCESS TO DATA
- BETTER EXCHANGE BETWEEN STATES
- BETTER REGULATION ON E-COMMERCE
- BETTER IMPLEMENTATION OF THE LAW
- MORE E-ARCHIVING
- CLARIFY CROSS-BORDER RULES
- CLARIFY THE TELECOMMUNICATION LAW
- TO ALLOW JUDGES TO INTERPRETE

THE MOST CLAIMED



LEGISLATION

- SPECIFIC LABOUR PROCEDURE
- SPECIFIC EUROPEAN REGULATION ON THE MATTER
- SIMPLE RULES
- STANDARDS
- INTERNATIONAL REGULATION
- IMPLEMENTING EUROPEAN DIRECTIVES
- REGULATING THE USE OF DIGITAL SIGNATURES
- IMPLEMENTING THE BUDAPEST CONVENTION
- COMMON STANDARDS ON E-SIGNATURE
- CREATING A PROCEDURE IN LABOUR LAW WHEN NO CRIMINAL BACKGROUND
- GENERAL RULES
- STANDARDS FOR E-DOCUMENTS
- SPECIAL DIRECTIVES
- EUROPEAN HARMONIZATION
- WORLD WIDE MINIMUM STANDARD
- INTERNATIONAL DATA REGULATION

OTHERS

- IN THE FUTURE
- RECORDS ON E-SERVICES
- RELIABILITY OF THE INFORMATION TRANSMITTED
- COMPENSATING THE SLANDERED PERSON
- COOPERATION BETWEEN STATES
- CONTROL OF E-COMMUNICATIONS
- INTERNATIONAL MUTUAL ASSISTANCE
- CHANGING FORMALISMS
- TO CHANGE THE PROCEDURES, NOT THE LAW
- SPECIALIZATION OF JUDGES AND POLICEMEN

Data source and processing: AEEC's team.

**DO THE
INTERVIEWEES
CONSIDER
NECESSARY A
EUROPEAN LEGAL
FRAMEWORK?**

yes

no



**Prosecutors
justification**

- **Because of the trans-national dimension of the matter**
- **As far as the States regulate the admissibility according to their national law**
- **It would facilitate the international cooperation between judges**
- **It would provide with a bigger uniformity between national regulations**

**DO THE
INTERVIEWEES
CONSIDER
NECESSARY A
EUROPEAN LEGAL
FRAMEWORK?**

yes

no



**Lawyers
justification**

YES

- Proceeding for collecting electronic evidence must be standardized
- It will facilitate the international cooperation
- It will harmonize data protection issue

NO

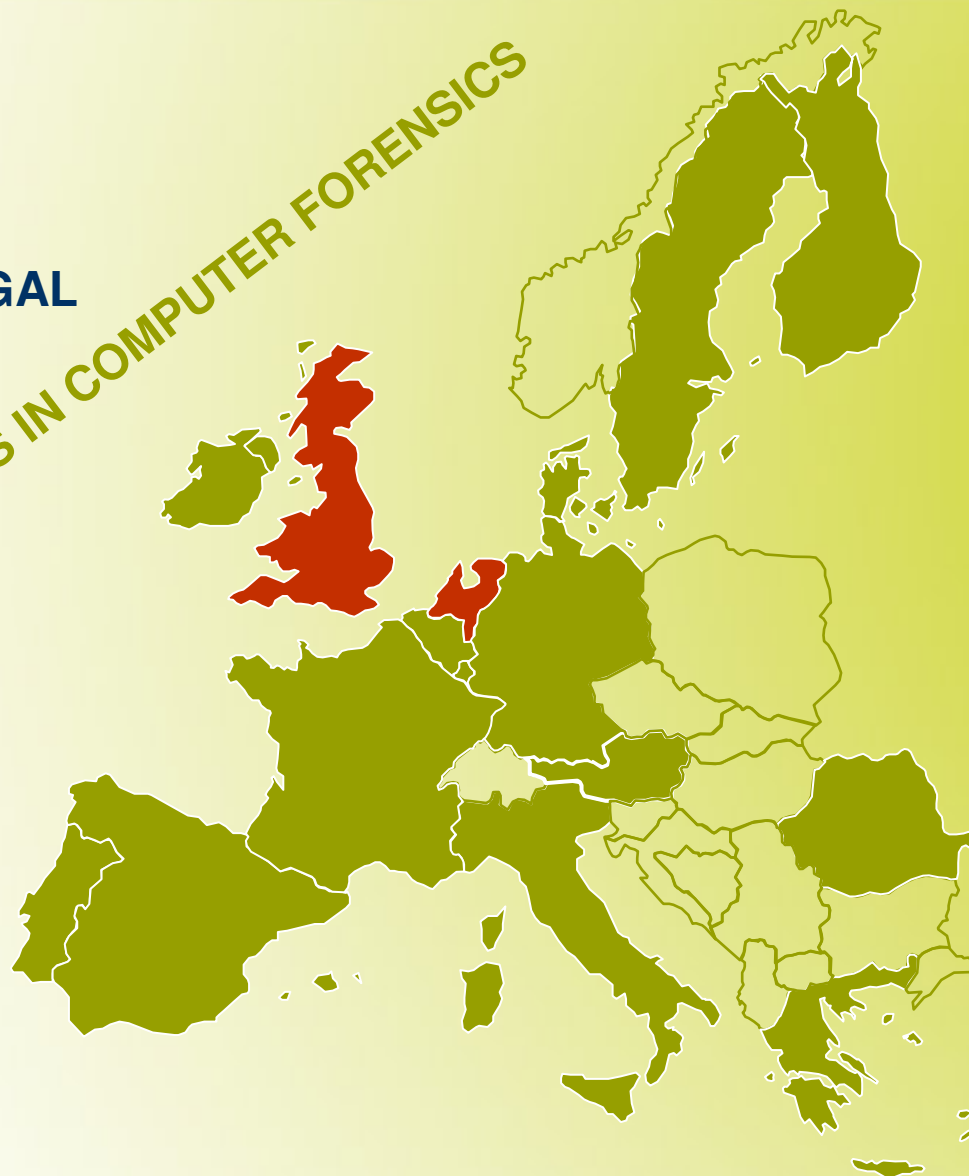
- National regulations are enough

**DO THE
INTERVIEWEES
CONSIDER
NECESSARY A
EUROPEAN LEGAL
FRAMEWORK?**

yes

no

EXPERTS IN COMPUTER FORENSICS



**Experts
justification**

YES

- Cooperation between countries, International Cooperation and standardization

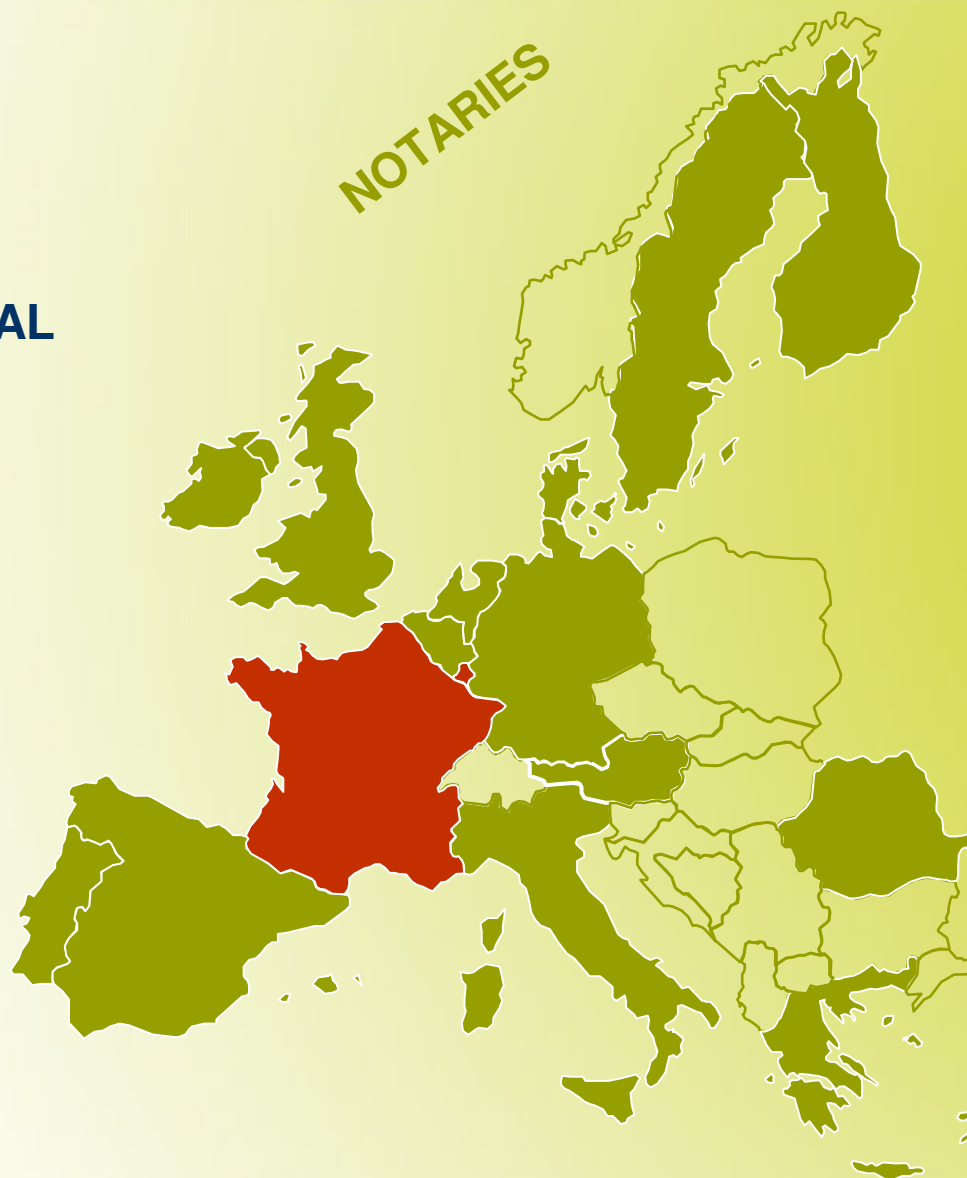
NO

- There is no difference between the electronic evidence and the traditional evidence
- They consider that it just will carry more red tape
- Admissibility must be kept at national level. It will involve more cost

**DO THE
INTERVIEWEES
CONSIDER
NECESSARY A
EUROPEAN LEGAL
FRAMEWORK?**

yes

no



Notaries justification

YES

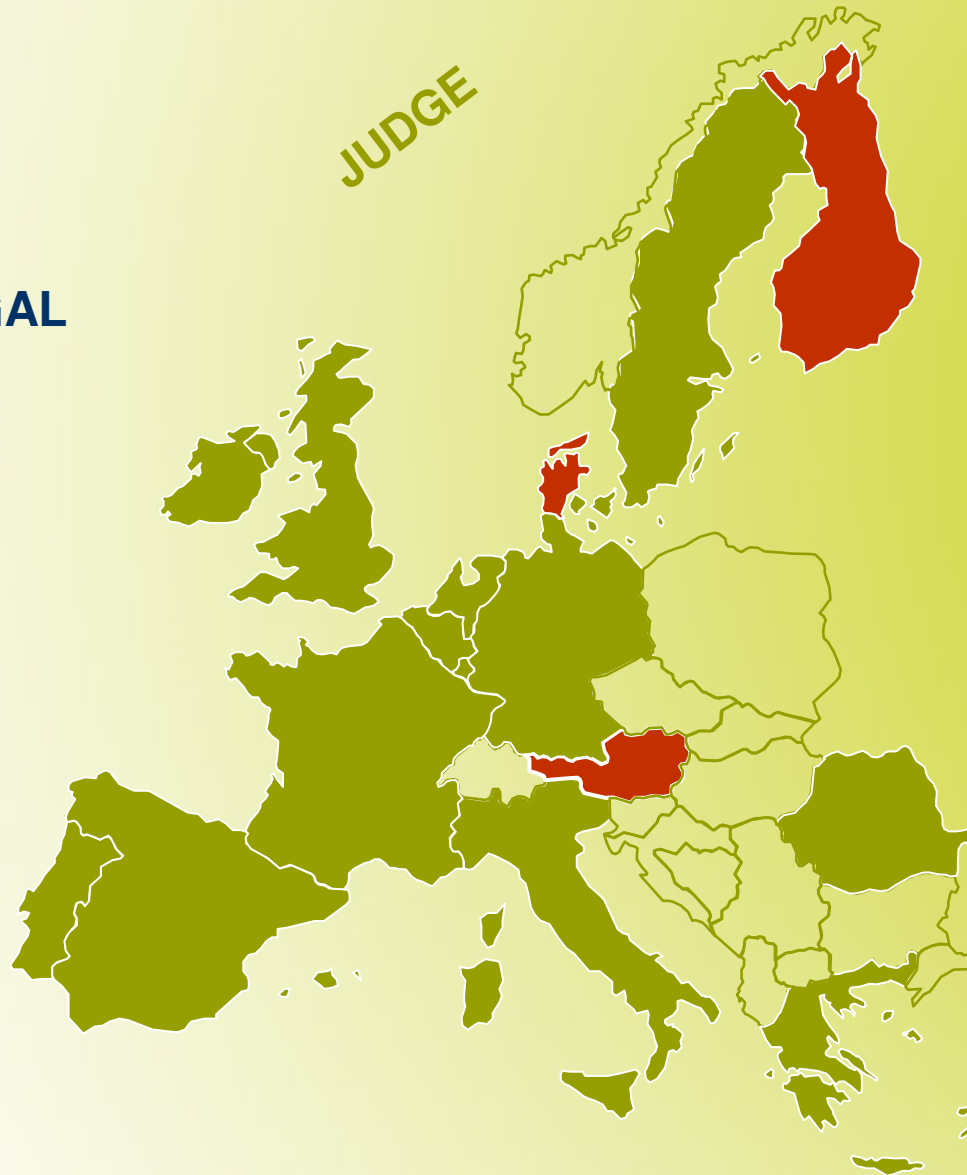
- Will help the States to implement the existing laws
- It will help the free movement of documents at European level
- It will help to develop the freedom and security area
- It will allow the set up of a European register

NO

- They consider the situation is over-regulated

**DO THE
INTERVIEWEES
CONSIDER
NECESSARY A
EUROPEAN LEGAL
FRAMEWORK?**

yes **no**



**Judges
justification**

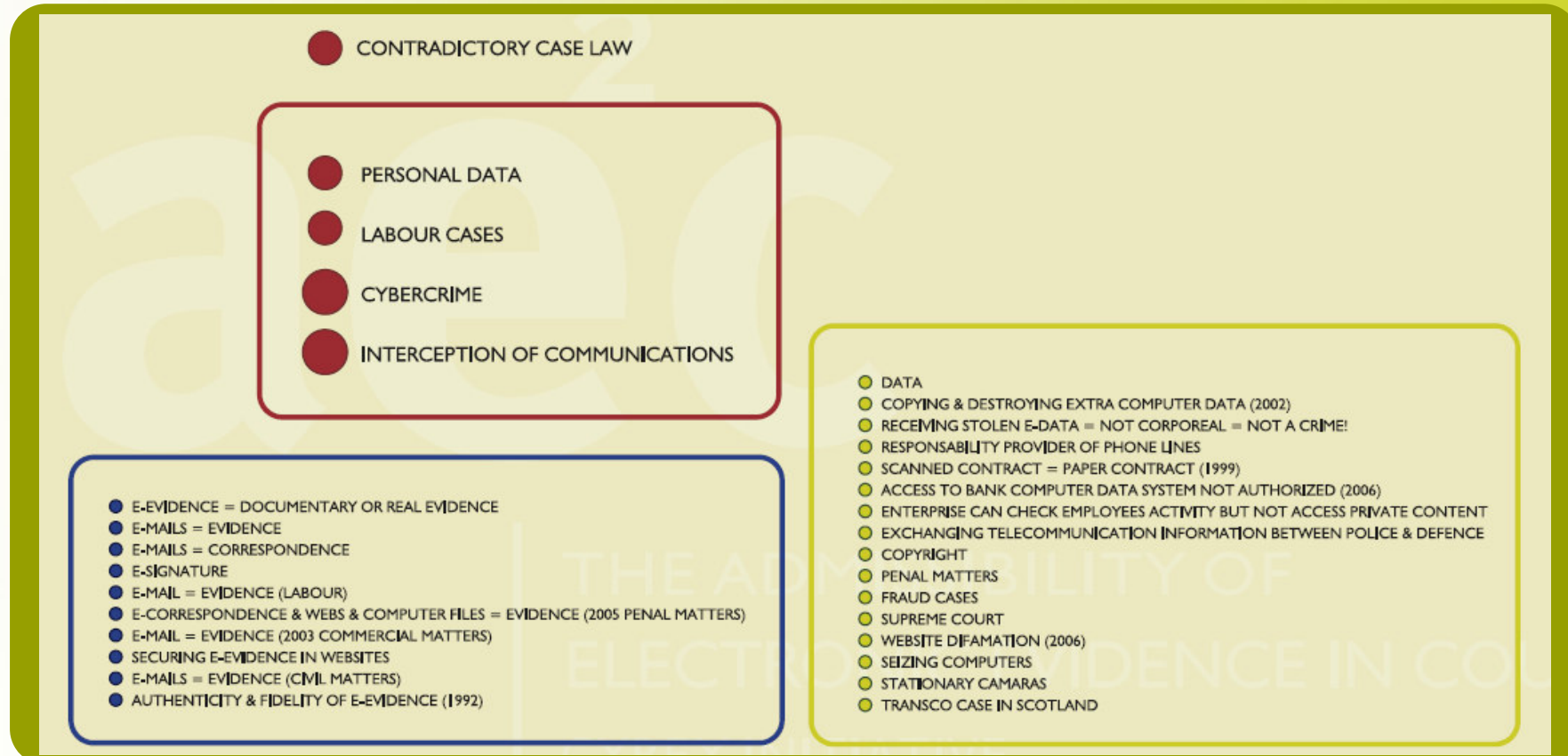
- YES**
- It will help national regulation to be developed
 - It will be very useful to obtain evidence when there are different countries involved
- NO**
- Denmark and Finland: they think it is irrelevant and that it is not convenient
 - Austria: does not say its arguments



WHY DO THE INTERVIEWEES CONSIDER NECESSARY A EUROPEAN LEGAL FRAMEWORK?

- ***A EUROPEAN FRAMEWORK ON ELECTRONIC EVIDENCE WILL HELP WITH THE LEGAL NATIONAL DEVELOPMENT OF THE ISSUE***
- ***IT WILL HELP TO DEVELOP IN A UNIFORM WAY THE LEGISLATION***
- ***IT WILL FACILITATE THE INTERNATIONAL COOPERATION BETWEEN JUDGES***

Viewpoint of **jurists** on the cases in which *electronic evidence* is relevant:



Data source and processing: AEEC's team.

**DIVERGING CASE LAW IN THE SAME COUNTRY
LACK OF HOMOGENEITY**

PROCEEDINGS & ADMISSIBILITY OF ELECTRONIC EVIDENCE IN COURT

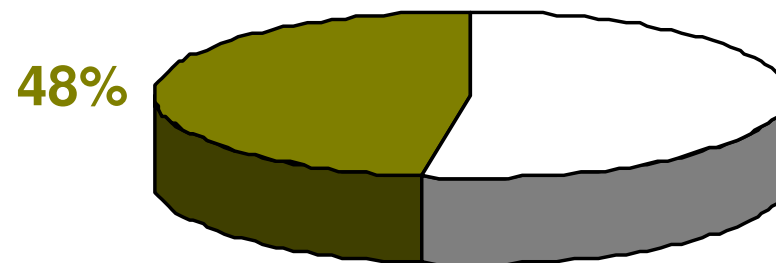


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- There is no specific procedure in the studied countries for the obtaining, analysis and presentation of *electronic evidence*.
- Sometimes, the evidence's general proceeding is applied, other times the proceeding established for a traditional means of evidence is applied by analogy – e.g. documentary evidence.
- In the United Kingdom, Belgium and Rumania have national rules allowing to obtain evidence from computers: *Police and Criminal Evidence Act*, *Loi relative à la criminalité informatique* and *Law on measures to ensure transparency in the exercise of public dignity, in the business environment, to prevent and sanction corruption*, respectively.

**Laws containing proceedings to apply to
electronic evidence by analogy.**

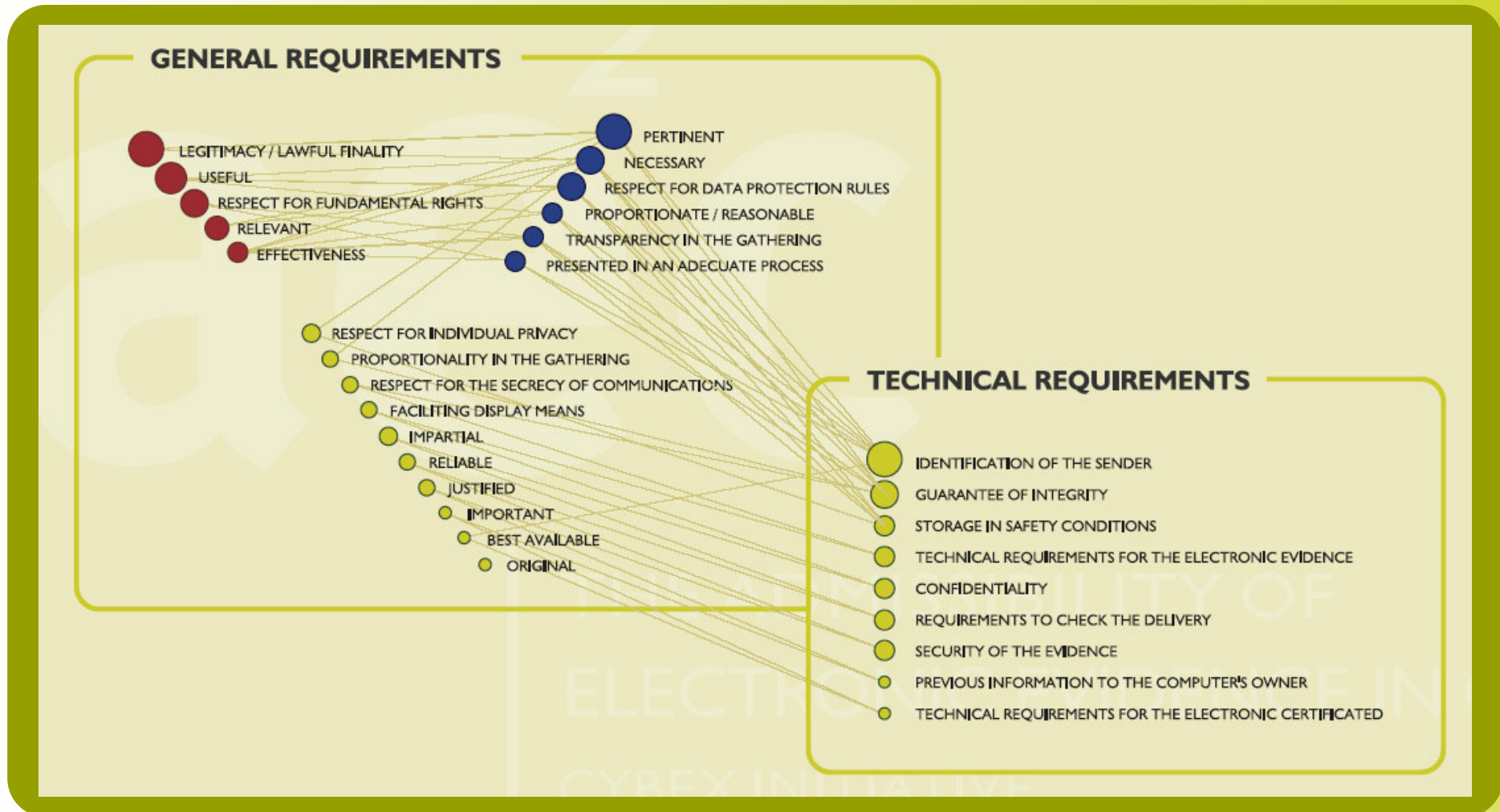


The Admissibility of the electronic evidence in Court

LEGAL REQUIREMENTS FOR THE ADMISSIBILITY

LEGISLATION

Legal requirements of the electronic evidence to be accepted in a trial



Data source and processing: AEEC's team.

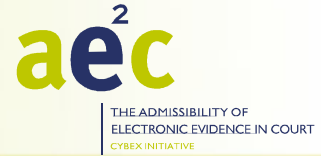
Viewpoint of the jurists on the legal requirements which are usually overlooked

- **Respect for fundamental rights**
- **Right to data protection**
- **Respect to the Law of Telecommunications**
- **The chain of custody**
- **Lack of measures related to the authenticity of evidence**
- **The absence of electronic signature in the documents**

The Admissibility of the *electronic evidence* in Court

INFLUENCE OF LEGALITY GUARANTEES ON THE ADMISSIBILITY

PRACTICE



DO THE GUARANTEES OF LEGALITY INFLUENCE THE ADMISSION OF *ELECTRONIC EVIDENCE*

yes no



Lawyers justification

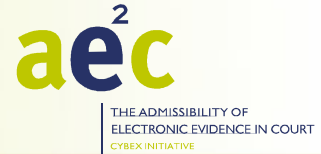
NO

- Denmark:
The material truth is what counts here
- Finland:
A fair trial is the most important thing

The Admissibility of the electronic evidence in Court

INFLUENCE OF LEGALITY GUARANTEES ON THE ADMISSIBILITY

PRACTICE



DO THE GUARANTEES OF LEGALITY INFLUENCE THE ADMISSION OF *ELECTRONIC EVIDENCE*

yes no



Judge justification

no

- Denmark:
It would only affect in case one of the parties objects in relation to the respect to the guarantees of legality

The Admissibility of the electronic evidence in Court

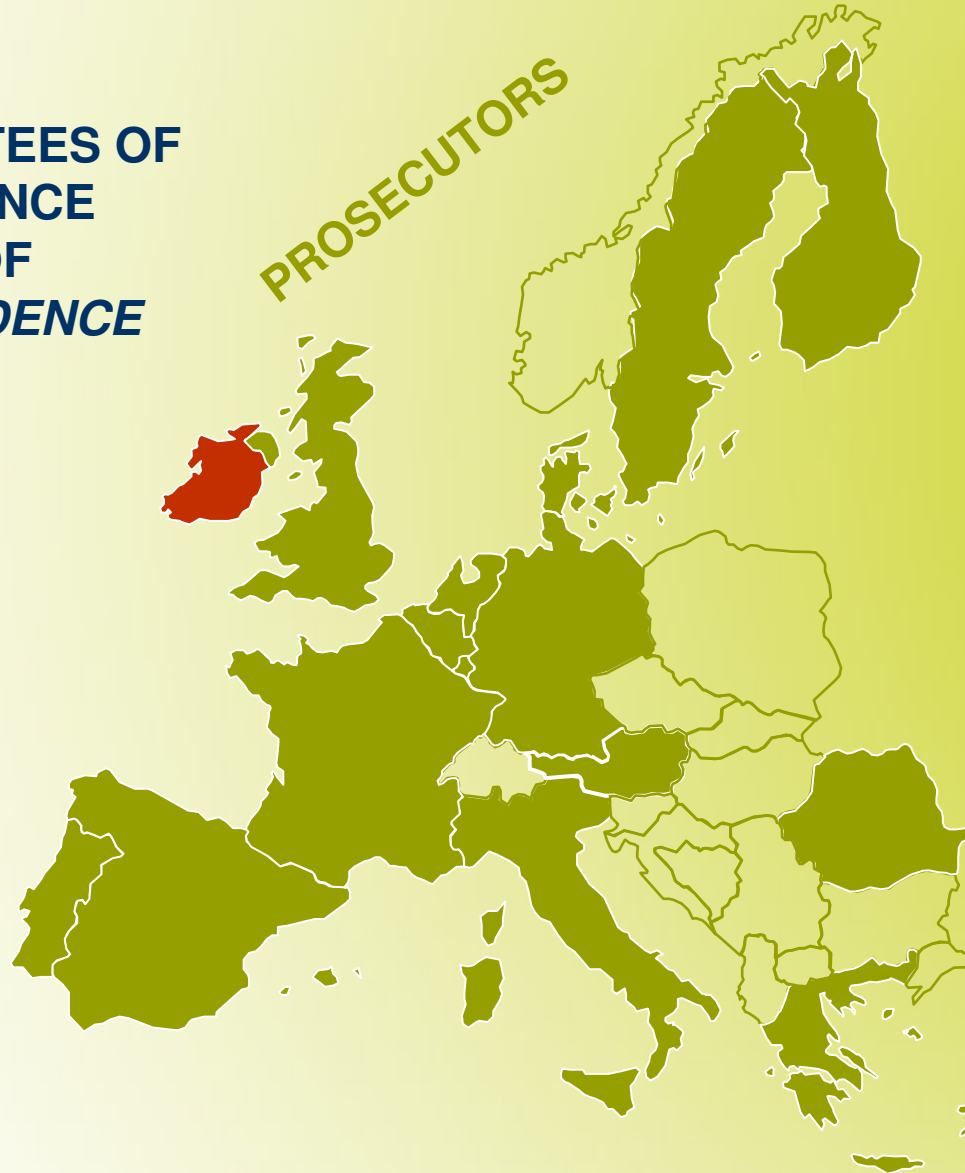
INFLUENCE OF LEGALITY GUARANTEES ON THE ADMISSIBILITY

PRACTICE

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THE ADMISSIBILITY OF
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DO THE GUARANTEES OF
LEGALITY INFLUENCE
THE ADMISSION OF
ELECTRONIC EVIDENCE

yes no



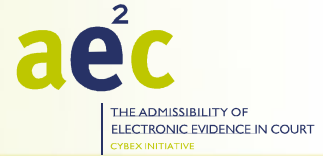
Justification
Prosecutors

no

- Ireland:
In case of illegality
in the obtaining of
the evidence, the
judges must take
into account the
seriousness of the
crime

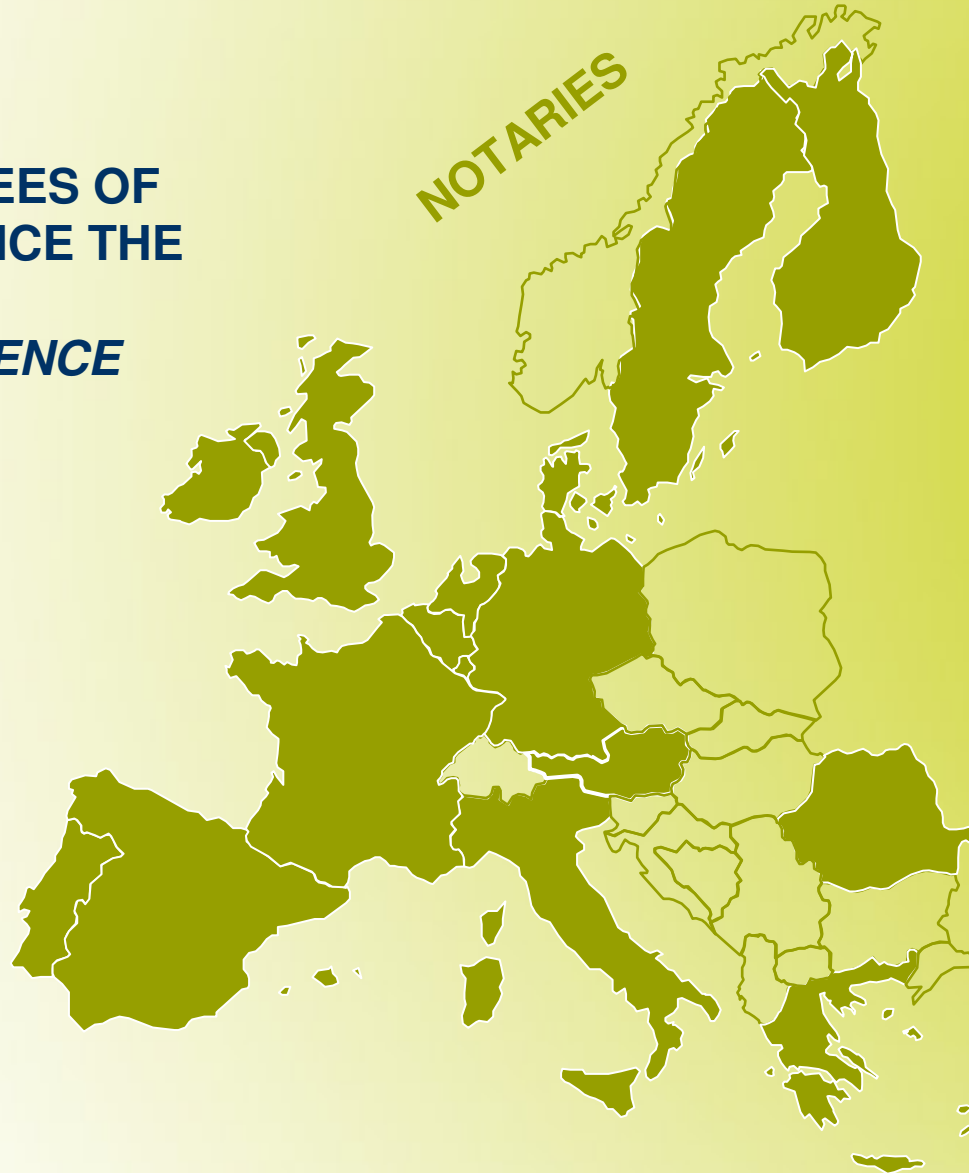
The Admissibility of the electronic evidence in Court
**INFLUENCE OF LEGALITY GUARANTEES ON THE
ADMISSIBILITY**

PRACTICE



**DO THE GUARANTEES OF
LEGALITY INFLUENCE THE
ADMISSION OF
ELECTRONIC EVIDENCE**

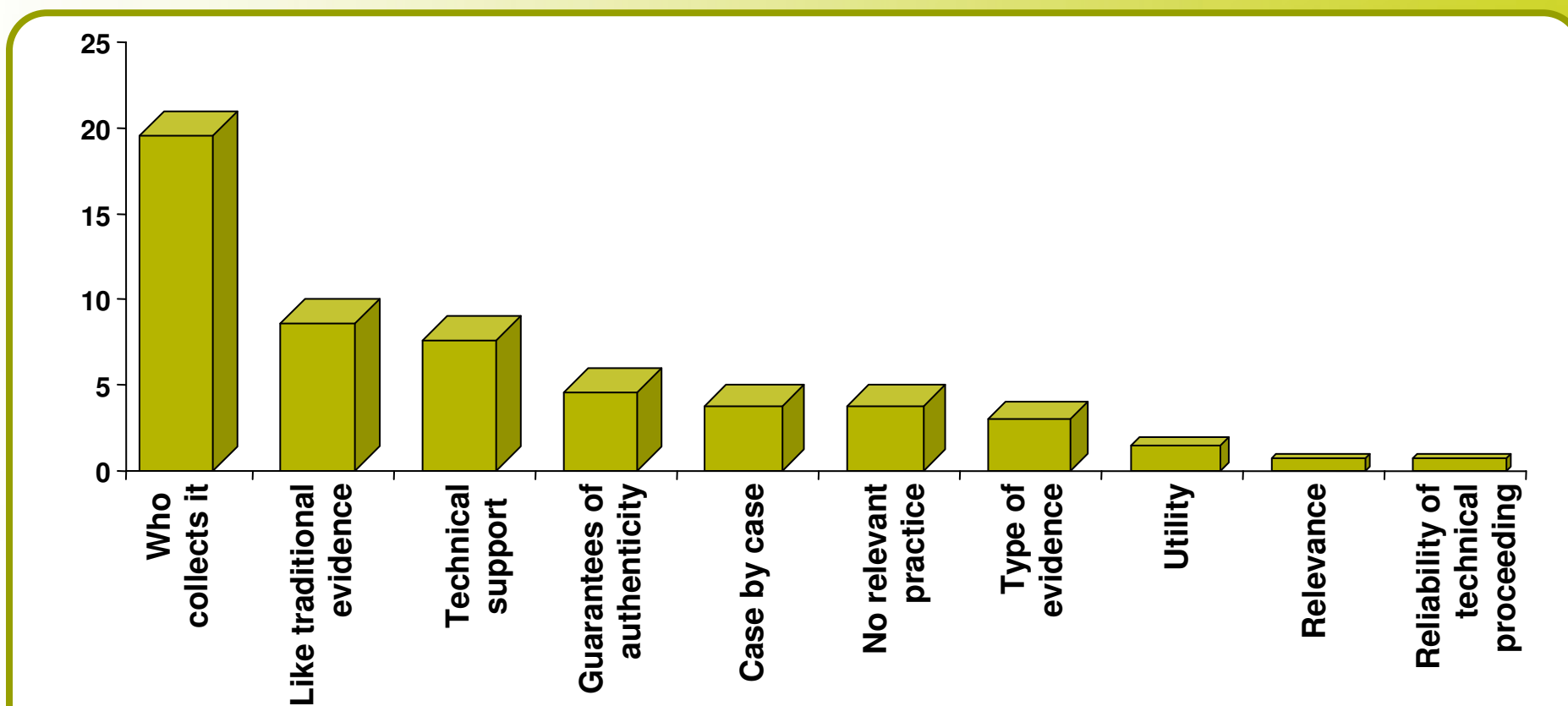
yes **no**



The Admissibility of the electronic evidence in Court VIEWPOINT ON THE PROBATORY VALUE

PRACTICE

Viewpoint of **the jurists** on the factors providing the best probative value to electronic evidence:



THE PERSON WHO OBTAINS THE ELECTRONIC EVIDENCE IS THE FACTOR PROVIDING THE BEST PROBATORY VALUE .

Data source and processing: AEEC's team.

IMPROVEMENT GUIDE

Based on the European professionals' perceptions and subject views



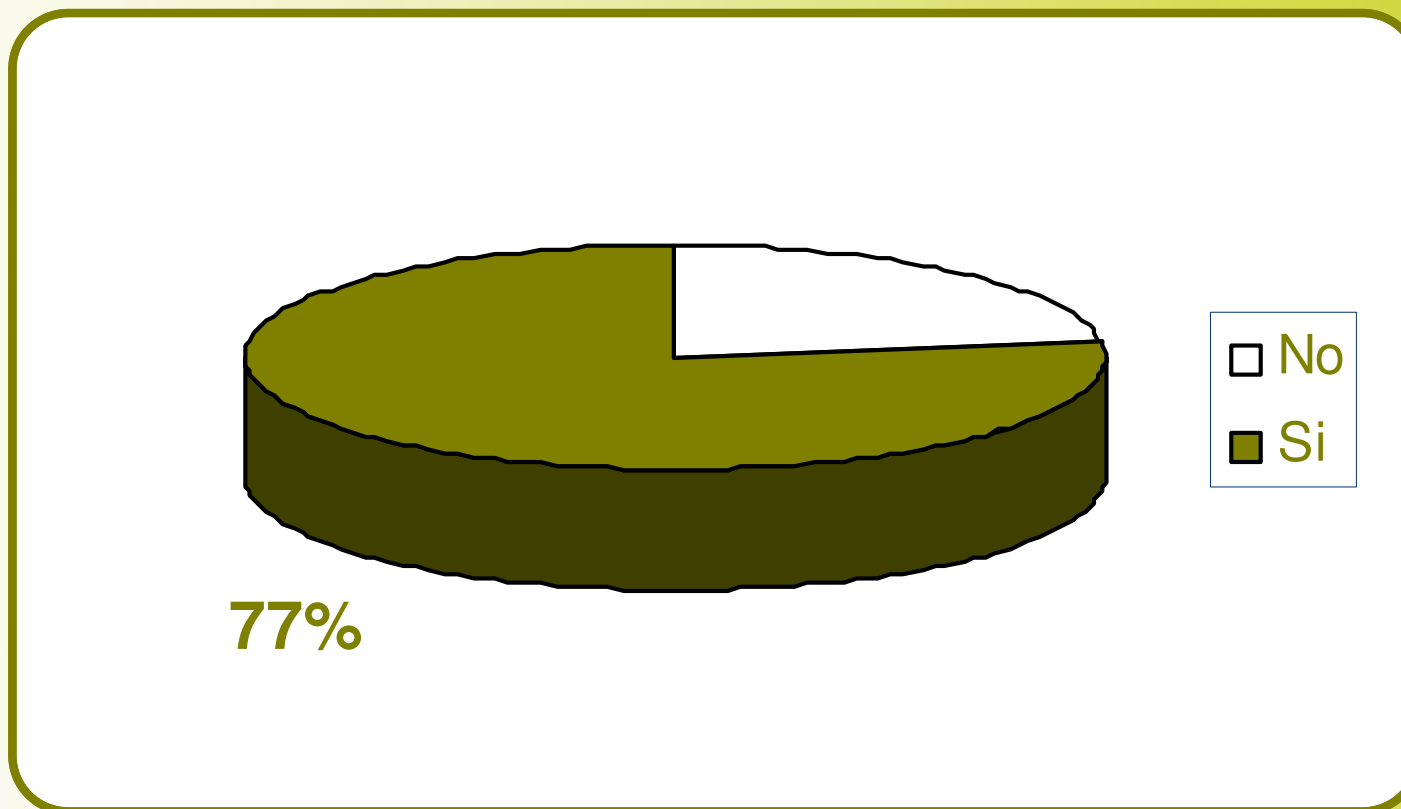
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DO YOU THINK ELECTRONIC EVIDENCE IS ENOUGH / WELL REGULATED?

- **There is no common criteria in Europe (contradictions)**
- **The general trend: electronic evidence is not well regulated**

- Are European **jurists** for the changes?



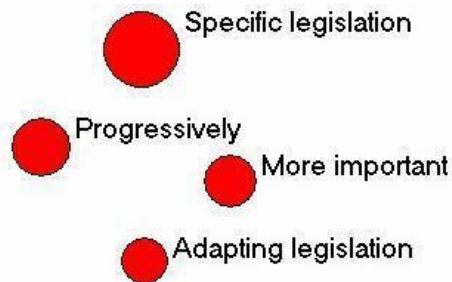
Data source and processing: AEEC's team.

- **Suggested changes are:**

- **Better regulation for the *electronic evidence***
- **Specific provisions for the electronic evidence**
- **In compliance with the Cybercrime Convention from the Council of Europe**
- **Homogeneous policy in security matters**
- **Better protection of personal data**

• How the future of the *electronic evidence* is perceived in Europe?

- Judges will decide
- Guarantees for e-signature
- Implementing the law
- Regulated at European level
- Balanced with individual rights
- Protecting 3rd parts
- Tools to serve the legal system
- According to the Budapest Convention



- Not regulated in the future
- Long time evolution
- Slowly to common guidelines
- No problems=no changes
- e-evidence=paper documents

- According to the practice
- More private investigation
- More measures for the praxis
- Providing education & training
- Reliable evidence
- Technology develops faster than legislation

Data source and processing: AEEC's team.

- **Judges are the key actors in admitting electronic evidence and police experts hold the main position in gathering evidence.** *Let us act on these two types of actors.*
- **Legislation has the effect of positively influencing the perceptions of security held by different social agents.** *Let us adapt the current legislation.*
- **Confidence in the experts related to the collection, analysis and conservation of electronic evidence.** *Let us follow the technical procedures of the experts.*
- **Training, knowledge and experience are the necessary and indispensable elements that experts must satisfy.** *Let us work on the training.*
- **Improvement in communication between the actors related to electronic evidence, at the national, European and international level, is a unanimously prized and desired asset.** *Let us improve understanding between judges and technicians.*



Thank you for your attention

QUESTIONS TIME

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