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The European Investigation Order

Legal Analysis and Practical Dilemmas of International Cooperation

Edited by

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and MIHA ŠEPEC (Eds.)

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With Assistance of

Luca Petersen

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In cooperation with the Göttingen Association for Criminal Law, Criminal Justice and Criminology and their Application

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Preface

This monograph is the last and final part of the project 'European Investigation Order – legal analysis and practical dilemmas of international cooperation – EIO-LAPD' within the framework of the EU Justice Programme. It presents a contribution to the Europe-wide discourse on how to enhance the effectiveness and the practical implementation of the EIO. Its objective is to equip target groups with specialised knowledge about the cross-border evidence gathering procedure described in the Directive 2014/41/EU. Unlike other parts of the project, this monograph is targeted at the legal community, students of law, NGOs and the interested public. Its goal is to achieve a greater inclusion of dilemmas connected with the practical application of the Directive into the legal and public discourse.

The partners of the project were chosen according to the following criteria: (a) only institutions where the members of the applicant's department for criminal law personally know and vouch for at least one person to participate in the project were considered; (b) institutions which previously successfully cooperated with the applicant or members of its department for criminal law in EU funded projects were given priority; (c) institutions which do not have sufficiently experienced personnel or connections with the relevant State institutions to perform the project activities were not considered.

We would like to thank, first and foremost, all authors from the project partners who contributed to this monograph. Our special thanks goes to Jan Stajnko and his team for his efficient and smooth coordination of the project and the assistance in communicating with authors and project partners; to Luca Petersen for his assistance, and to Julian Vornkahl for his assistance in copy-editing the manuscript.

Göttingen and Maribor, July 2023

Kai Ambos,
Alexander Heinze,
Peter Rackow,
Miha Šepec

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List of Abbreviations

AICCM	Act on International Cooperation in Criminal Matters
AJCEU	Act on Judicial Cooperation in Criminal Matters with Member States of the European Union
AO	Abgabenordnung (Fiscal Code of Germany)
ARHG	Auslieferungs- und Rechtshilfegesetz
Art.	Article
Arts.	Articles
Assoc.	Associate
AVIDICUS	Assessment of Video-Mediated Interpreting in the Criminal Justice System
BGBl.	Bundesgesetzblatt
BlgNR	Beilage(-n) zu stenographischen Protokollen des Nationalrates
BT-Drs.	Bundestagsdrucksache
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
Cass. Pen.	Cassazione penale
CCMMSEUA	Act Amending the Cooperation in Criminal Matters with the Member States of the European Union
CFR	Charter of Fundamental Rights of the EU
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
Corte cost.	Italian Constitutional Court
CPA	Croatian Code of Criminal Procedure/Slovenian Code of Criminal Procedure
CPP	Codice di procedura penale (Italian Code of Criminal Procedure)/Código de Processo Penal (Portuguese Code of Criminal Procedure)
Dir. Pen. Cont. online	Diritto penale contemporaneo online
Dir. Pen. Proc.	Diritto penale e processo
Dir. Un. Eur.	Il diritto dell'Unione Europea
Doc.	Document
DRB	Deutscher Richterbund
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
e-CODEX	e-Justice Communication via Online Data Exchange
ECtHR	European Court of Human Rights
EEA-VStS-G	Federal Act on the European Investigation Order in Administrative Criminal Matters (Austria)
eEDES	e-Evidence Digital Exchange System
EEW	European Evidence Warrant
EIO	European Investigation Order

EIO Directive	Directive 2014/41/EU regarding the European Investigation Order in Criminal Matters
EIO-LAPD	European Investigation Order – Legal Analysis and Practical Dilemmas of International Cooperation
EJN	European Judicial Network
EU	European Union
eucrim	European Criminal Law Associations' Forum (Journal)
EU-FinStrZG	Federal Law on Cooperation in Financial Criminal Matters with the Member States of the European Union (Austria)
EU-JZG	Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (Austria)
Eurojust	European Union Agency for Criminal Justice Cooperation
EVIDENCE2e-CODEX	Linking EVIDENCE into e-CODEX for EIO and MLA procedures in Europe
EXEC	Electronic Xchange of e-Evidences
FD	Framework Decision
FinStrZG	Federal Act on Financial Criminal Cooperation with the Member States of the European Union
GIP	Giudice per le Indagini Preliminari (Italian Judge for preliminary investigations)
GP	Gesetzgebungsperiode (Austria)
GSC	General Secretariat of the Council
IP	Internet Protocol
IRG	Gesetz über die international Rechtshilfe in Strafsachen (German Act on International Cooperation in Criminal Matters)
IT	Information Technology
Italian Decree	Italian Legislative Decree no. 108 of 21 June 2017
JHA	Justice and Home Affairs
JI	Justiz und Inneres (Justice and Home Affairs)
MLA	Mutual Legal Assistance
mn.	marginal number(s)
MS	Member State
n.	footnote
Nice Charter	Charter of Fundamental Rights of the European Union (7 Dec. 2000)
OJ	Official Journal of the European Union
OJ C	C-Series of Official Journal of the European Union
OJ L	L-Series of Official Journal of the European Union
OWiG	Ordnungswidrigkeitengesetz (German Administrative Offences Act)
PGR	Procuradoria-Geral de República (Portugal)
RB	Rahmenbeschluss (Framework Decision)
Report on legal implementation	Slovenian Report on legal implementation and practical application of the EIO
RiVASt	Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten (Germany)
RL EEA	Richtlinie Europäische Ermittlungsanordnung
RV	Regierungsvorlage
Sec.	Section
SMMP	Sindicato dos Magistrados do Ministério Público (Portugal)

SPSA	State Prosecution Service Act
StAG	Staatsanwaltschaftsgesetz
StPO	Strafprozessordnung (Code of Criminal Procedure)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TREIO	TRaining on European Investigation Order
WKStA	Wirtschafts- und Korruptionsstaatsanwaltschaft (Public Prosecutor's Office for Combatting Economic Crime and Corruption) (Austria)
ZfiStW	Zeitschrift für Internationale Strafrechtswissenschaft (Journal)
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik (Journal; since 2022 ZfiStW)

Introduction*

Directive 2014/41/EU on the European Investigation Order in Criminal Matters of the European Parliament and of the Council of 3 April 2014 (EIO) was to be transposed into national law by the Member States by 22 May 2017. As is well known, the basic concern of the idea to create a European Investigation Order was to convert traditional mutual legal assistance (in evidentiary matters) to the principle of mutual recognition.[1] The idea of (consistently) converting this complex area to the principle of mutual recognition (principally) held potential for quite profound changes to the *status quo*. Nevertheless, the EIO-Directive, in the form in which it finally entered into force, remarkably follows the principles and structures of traditional mutual assistance in essential elements.[2] For instance, having been a key issue during the drafting negotiations, the Directive allows Member States to retain requirements for authorisation by a judge (to use the German term, *Richtervorbehalt*) without any restrictions.[3] This is probably an indicator that the conversion of the heterogeneous area of mutual legal assistance to a consistently understood principle of mutual recognition (still) poses greater difficulties than the application of the recognition principle in other areas. Against this background, it is noteworthy that the European Court of Justice (ECJ) ruled that the requirements for a judicial authority under the European Arrest Warrant (EAW) cannot be transposed to the field of the EIO, which ultimately amounts to an affirmation that there is at least no such thing as a one-size-fits-all principle of mutual recognition.[4] The fact that the principle of mutual recognition in the

* The content of this publication represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

[1] Cf. Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility of 2009 (COM(2009) 624 final), p. 5 ('… most effective solution … 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') that initiated the development leading to the EIO.

[2] Cf. in this respect, for example, *Ambos*, European Criminal Law, 2018, p. 456 ('to a large extent following the principles of traditional mutual assistance'); *Daniele*, Evidence Gathering in the Realm of the European Investigation Order, New Journal of European Criminal Law ('NJECL'), 6 (2015), 179, 183 ('hard core of the Directive is composed of provisions often comparable to those contained in previous European regulations').

[3] Cf. below Part I, contributions of *Genschel/Schalk-Unger/Kulundžija* and *Ambos/Rackow/Heinze*, Part II contribution of *Ambos/Rackow.*

[4] ECJ, Grand Chamber Judgment of 8 December 2020 – C-584/19, para. 74: 'In the light of the textual, contextual and teleological differences noted in the foregoing considerations between Framework Decision 2002/584 and Directive 2014/41, the Court's interpretation of

area of mutual legal assistance in evidentiary matters indeed seems to have reached its limits, is probably related to the fact that the criminal law systems of the Member States or, more specifically, the respective rules on the gathering and use of evidence differ considerably from each other. Furthermore, it is likely to play a role that an EIO – in contrast to an EAW in particular – can be understood less well as a kind of completed product of a Member State's criminal proceeding that can be subjected to the principle of mutual recognition, as it were, like a commodity. An EIO, on the other hand, is more akin a part of an ongoing process whose outcome is by no means fixed.[5]

In light of the fundamental questions it raises, the EIO is of great interest from both a theoretical and policy-perspective. Furthermore, fundamental questions on the implementation on the principle of recognition in the area of mutual assistance in evidentiary matters impact several issues revolving around the application practice of the EIO. This concerns, for example, the question of the extent to which there can be any room for a proportionality test in the executing State in mutual recognition proceedings,[6] and the aspect of ensuring adequate means of defence.[7] The contributions collected in this volume stem from the EU-funded project EIO-LAPD (Legal Analysis and Practical Dilemmas of International Cooperation).[8]

The focus of this project, which involved research institutions from six countries,[9] was not only and not primarily the academic perspective. For after several years of practical experience with the EIO in the Member States, the overriding question from the practitioners' point of view has been how the EIO proves itself in practice. Another issue is the application practice of the EIO and the combination of its improvement with the improvement of the Defence in the corresponding cross border investigations. Thus, the practical perspective was to be integrated with the theoretical. Accordingly, the essential element of the project was the collection of assessments from prosecutorial and judicial practice as well as from the Defence. For this purpose, practitioners from or based in Austria, Croatia, Germany, Italy, Slovenia and Portugal were surveyed on their experience with the EIO and their assessments and evaluations by means of standardised questionnaires. On the basis of these surveys,

Article 6(1) of Framework Decision 2002/584 in the judgments of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau) (C-508/18 and C-82/19 PPU, EU:C:2019:456), and of 27 May 2019, PF (Prosecutor General of Lithuania) (C-509/18, EU:C:2019:457), according to which the concept of 'issuing judicial authority', within the meaning of that provision, does not cover the public prosecutor's offices of a Member State which are exposed to the risk of being subject to individual instructions from the executive, is not applicable in the context of Directive 2014/41'.

[5] *Ambos*, European Criminal Law, 2018, p. 451 with further references.

[6] Cf. below Part II contribution *Scomparin/Cabiale.*

[7] Cf. below Part II contribution *Scomparin/Peloso.*

[8] Cf. <https://lapd.pf.um.si/materials/>, accessed 16 December 2022.

[9] Univerza v. Mariboru (Maribor, Slovenia); Jožef Stefan Institute (Ljubljana, Slovenia); Universidade Portucalense (Porto, Portugal); Georg-August-Universität (Göttingen, Germany); Karl-Franzens-Universität (Graz, Austria); Università degli Studi di Torino (Turin, Italy); Sveučilište u Zagrebu (Zagreb, Croatia).

which not least reaffirmed that the devil is in the detail, as demonstrated for instance by the fact that quite often changes and improvements to the EIO form were suggested by the interviewed practitioners, the project teams compiled reports on the practical application of the EIO. These are included in the National Reports (Part I) on the participating Member States alongside reports on legal implementation. The (abridged) national reports form the core of this Volume. They are supplemented by a Comparative Summary of the National Reports compiled by Miha Šepec, Anže Erbežnik, Jan Stajnko and Tamara Dugar.

Furthermore, in seven contributions, experts involved in the project addressed specific questions concerning the acceptance and future of the principle of mutual recognition in the field of mutual assistance in evidence (Kai Ambos and Peter Rackow, and also Anže Erbežnik and Marin Bonačić), the neuralgic aspect of the degree of harmonisation of relevant criminal offences in the EU (Miha Šepec and Lara Schalk-Unger), the principle of proportionality (Johanna Waldner and, separately, Andrea Cabiale and Laura Scomparin), the interception of telecommunications (Caroline Peloso and Oscar Calavita) and the the protection of the rights of the Defence within the scope of the EIO (Caroline Peloso and Laura Scomparin). This Volume thus provides some unique insights into the Member States' implementation of the EIO and the related application practice in important Central and South or South-Eastern European Member States. In line with the project's aim of bringing together practice and academia, blog posts on current developments relevant to practice have appeared on the project website. Six of these posts on the ECJ rulings in the *Gavanozov I* and *II* cases[10] as well as on *Parquet de Lübeck*[11] and its implications for the EIO sector,[12] which are central to EIO application practice, have also been included in this Volume.

[10] ECJ, Judgement of 24 October 2019 – C-324/17 and ECJ, Judgement of 11 November 2019 – C-852/19.

[11] ECJ, Grand Chamber Judgment of 27 May 2019 – C-584/19 and C-82/19 PPU.

[12] See above n. 8.

Part I

National Reports

The European Investigation Order – National Report Austria

By *Charlotte Genschel, Lara Schalk-Unger* and *Nikolina Kulundžija*

The European Investigation Order (EIO) was established on the initiative of seven European Union (EU) Member States (MS) among them – Austria.[1] *The following chapter will outline the transposition of the EIO into Austrian law and highlight several formal and substantive aspects of the law. Finally, this chapter will give insights into the EIO from a practical perspective, outlining results from questionnaires answered by practitioners.*

I. Transposition of the Directive into Austrian Domestic Law

In 2010 Austria was among the seven initiators to establish the EIO. The aim was to ensure effectiveness of judicial cooperation in criminal matters by replacing the system in place[2], which was deemed rather fragmented and thus detrimental to its efficiency. Against this background, it is rather odd that Austria had been late in transposing the EIO Directive[3] into domestic law. Following the delay, the European Com-

[1] 'Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of … regarding the European Investigation Order in criminal matters', 2010/C 165/02 (24. June 2010), Official Journal of the European Union (OJ) C 165/22 ff., available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:165:0022:0039:EN:PDF>, accessed 20 July 2022.

[2] 'Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and evidence', 2 Aug. 2003, OJ Legislation (L) 196/45 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003F0577&from=EN>, accessed 20 July 2022; 'Council Framework Decision 2008/978/JHA 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', 30 Dec. 2008, OJ L 350/72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0978&from=EN>, accessed 20 July 2022; 'Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty of the European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union', 2000/C 197/01 (12 July 2000), OJ C 197/1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2000/197/01&from=DE>, accessed 20 July 2022.

[3] 'Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters', 1 May 2014, OJ L 130/1,

mission sent Austria a formal notice according to the procedure laid down in Art. 256 TFEU. As an interim solution the Ministry of Justice sent out a decree to all authorities concerned, stating that EIOs should be interpreted as classic requests for legal assistance. Finally, the EIO was transposed into national law in mid-2018 and the new regulations came into force on 1 July 2018, thereby showcasing a considerable delay in the transposition.[4]

The EIO Directive is implemented in three separate acts. Based on the government proposal[5], most provisions of the EIO Directive were implemented into the Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG).[6] Here, provisions of the EIO are incorporated into one Chapter together with provisions on mutual legal assistance and other cooperation in criminal matters within the European Union.

All provisions regarding cooperation in financial criminal matters, or more precisely administrative fiscal and criminal proceedings, were implemented in the Federal Act on Financial Criminal Cooperation with the Member States of the European Union (FinStrZG).[7] The proposed amendment to the Federal Law on Cooperation in Financial Criminal Matters with the Member States of the European Union (EU-FinStrZG) is intended to adapt the implementation of the Framework Decision 2006/960/JI (Swedish Initiative)[8] and implement the EIO Directive for the administrative financial criminal proceedings. Besides, the scope of the law is to be extended to cooperation with third countries, provided that corresponding international agreements are in place, thus creating a uniform legal framework for the area of administrative responsibility.

Several provisions were also implemented in the Austrian Code of Criminal Procedure 1975 (StPO).[9] The provisions include minor adjustments which affect the

pp. 1 – 36, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041&from=EN>, accessed 12 Jan. 2022.

[4] A reason for the delayed transposition could be the lack of resources in regard to legal personnel in the Austrian Ministry of Justice, as a task force was set to work on the establishment of the European Public Prosecutor, the work on the transposition of the EIO was postponed.

[5] Regierungsvorlage (RV) 66 BlgNR 26. Gesetzgebungsperiode (GP).

[6] 'Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union' (EU-JZG), Bundesgesetzblatt (BGBl.) I Nr. 36/2004 in der Fassung (i. d. F.) BGBl. I Nr. 94/2021.

[7] 'Bundesgesetz über die internationale Zusammenarbeit in Finanzstrafsachen (Finanzstrafzusammenarbeitsgesetz – FinStrZG) (Finanzstrafgesetz – FinStrZG.)', BGBl. Nr. 105/2014 i. d. F. BGBl. I Nr. 227/2021.

[8] 'Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union', 18 Dec. 2006, OJ L 386/89, pp. 1 – 12, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006F0960&from=EN>, accessed 20 July 2022.

[9] Strafprozeßordnung 1975 (StPO), Nr. 631/1975 i. d. F. BGBl. I Nr. 243/2021.

competence of the Central Prosecutor's Office for the Prosecution of Economic Crime and Corruption (Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption or WKStA) and the provisions on controlled delivery.[10]

In matters regarding administrative criminal law, the procedure for issuing and executing an EIO is regulated in a separate federal law, the Federal Act on the European Investigation Order in Administrative Criminal Matters (Bundesgesetz über die Europäische Ermittlungsanordnung in Verwaltungsstrafsachen or EEA-VStS-G).[11] It comprises five rather short and concise sections regulating the scope of application and general definitions (Section 1), the execution of an Austrian EIO in another Member State (Section 2) and vice versa, the execution of an EIO from another member state in Austria (Section 3), as well as special investigative measures such as questioning by video conference or other audio-visual transmission and by way of a conference call (Section 4).

II. A Digest of Austrian Transposition Laws

1. Issuing Authorities

Depending on the case, different authorities can be authorised to issue an EIO. In financial matters, the fiscal authorities can issue EIOs, whereas in administrative cases, administrative authorities or administrative courts issue EIOs. In all other cases that fall into the scope of application of the EU-JZG, the EIO shall be issued by the Public Prosecutor's Office during the investigation procedure and shall not require judicial authorization. In the case of a judicial taking of evidence (Sec. 104 StPO) or after the indictment has been brought, the EIO shall be issued by the competent court.

2. Executing Authorities

According to Sec. 55c(1) EU-JZG, the public prosecutor is responsible for proceedings for the enforcement of an EIO. Local jurisdiction is to be determined according to the district prosecutor's office, in which the measure specified in the EIO is to be carried out.

Sec. 55c(2) EU-JZG contains special rules for cross-border surveillance and controlled delivery, for which the public prosecutor's office in whose district the border is likely to be exceeded or from whose district the observation or controlled delivery is to start is to be responsible. In the case of observation in an aircraft flying to Austria, however, the public prosecutor's office is responsible, in whose area the landing site

[10] Sec. 20a(3) and Sec. 99(5) StPO.

[11] Bundesgesetz über die Europäische Ermittlungsanordnung in Verwaltungsstrafsachen (EEA-VStS-G), BGBl. I Nr. 50/2018 i. d. F. BGBl. I Nr. 14/2019.

is located. In cases where the responsibility cannot be determined according to para. 2, the Viennese Public Prosecutor's Office shall have the responsibility. Contrary to para. 1 and 2, para. 3 stipulates cases in which the court is the executing authority, e. g. in cases where the EIO is aimed at transmitting information about the main trial or if an indictement has already been filed and the execution of the EIO is connected with the domestic proceeding.

In cases that fall into the scope of application of the FinStrZG (i. e. financial criminal cases), the financial penalty authority decides on the execution of an EIO within 30 days. Furthermore, Sec. 1(1) no. 2 EEA-VStS-G provides for a catch all-provision, as it stipulates that in cases which do not fall within the scope of application of the EU-JZG, nor the FinStrZG, the administrative authorities and courts can act as executing authorities.

3. System of Validation

If an investigative measure is requested that requires judicial authorization in accordance with the StPO, this must be obtained before the EIO is issued. Moreover, Sec. 8a(2) EU-FinStrZG stipulates that the EIO must be validated. In case that the EIO cannot be executed because it is incomplete, contradictory, or otherwise obviously incorrect, the issuing authority is to be requested to correct it by setting a deadline.

Similarly, under the EEA-VStS-G, the validation (or more precisely, verifying whether the requirements for issuing the EIO in accordance with the EIO Directive were adhered to) should be carried out by the administrative courts.

4. EIOs that Require a Court Order

The requirement for some investigative measures to be approved by the court is in practice very important in Austria. An approval is required, for example, if the EIO asks for information about bank accounts and banking transactions or instructs a search of a credit- or financial institution, as well as house searches, physical examinations, seizure of letters, and optical or acoustic surveillance.

In many cases, judicial approval is related to the constitutional concept of the requirement of judicial authority (*Richtervorbehalt*). The underlying premise here is that if the desired investigative measure requested by the Austrian Public Prosecutor's Office requires a judicial authorization, then this is also required if the order comes from another Member State. References to Sec. 104, 105 StPO in Sec. 55e(2) EU-JZG explicitly underline this concept.

However, the question arises how the court can verify the requirements if a form is available with only the information that is necessary for a swift and firm decision. The truth is that the court will review the form and, in 99 % of the cases, issue a judicial

license to the prosecutor's order, which already includes a pre-printed license stamp. An in-depth, substantive review of the requirements is not possible with the form.

5. Procedure if the Requested Investigation Measure is not Provided for by Austrian Law

Generally, Austria must carry out all investigative measures instructed by the EIO. However, it is still unclear what is to be done if it becomes apparent that the desired investigative measure does not exist under the StPO. Here different scenarios can be differentiated. Firstly, according to Sec. 55a(1) lit. 1 in connection with Sec. 12 EU-JZG in tax, customs and currency matters, the execution of an EIO by an Austrian judicial authority may not be refused on the grounds that Austrian law does not impose similar taxes or does not contain similar tax, customs and currency provisions as the law of the issuing State. In this case, an EIO can still be executed. However, the execution of the EIO is deemed inadmissible if the facts on the case are not legally punishable under Austrian law.

According to Sec. 8b(2) no. 3 EU-FinStrZG in combination with Sec. 8c(1) EU-FinStrZG, another investigative measure has to be used if the measure required in the EIO is not provided for by Austrian law; or if it should not be ordered in a comparable case, for example, because it is only applicable to cases that reach a certain threshold of severity. Hence if another investigation measure is less intrusive and can reach the same results, this measure is to be ordered.

Nonetheless, if a coercive investigative measure is requested, and the requested measure does not exist in the StPO, or if no similar measure would give the desired result, the execution of the EIO has to be effectively rejected (Sec. 55b(3) EU-JZG).

6. The Principle of Proportionality in Austrian Criminal Law

In principle, all investigative measures requested in the EIO must be carried out. The executing state has no room for manoeuvre in this respect, for example, whether, in its opinion, a search of premises would be more useful than the questioning of a witness.

However, if the rights of the person concerned are less impaired by another measure and if this measure leads to the same result, the Austrian judicial authority may use this other investigative measure, as it is considered to be more proportionate.

As mentioned above, according to Sec. 55b(1) lit. 1 EU-JZG another investigative measure must be used if in a comparable case, measures ordered by the EIO cannot be executed, as according to Austrian law, it is only intended for criminal offenses of a certain severity.

In cases when Austria is the executing state and examining whether the execution of the investigative measure ordered would be possible in comparable cases, the pro-

portionality is checked implicitly. The authorization by the judge serves this purpose. It is disputed whether Sec. 55a(1) lit. 7 EU-JZG, which encompasses the ground for refusal if there is a violation of Art. 6 TFEU or the rights granted by the Charter of Fundamental Rights, also grants the right to refuse the execution of an EIO due to a lack of proportionality.[12]

When issuing the EIO, the competent authority must always make sure that the requirements of Sec. 5 StPO regulating proportionality are fulfilled. It should be pointed out that an Austrian authority responsible for issuing the order cannot use the EIO to circumvent existing "hurdles" and in this way request from another Member State to carry out investigative measures that would be prohibited under Austrian domestic law. Sec. 56(2) EU-JZG stipulates that the EIO does not require judicial approval; however, this only means that the basic issuing of an EIO can be decided autonomously by the Public Prosecutor's Office and does not have to be approved by the court. If an investigative measure is requested that requires judicial authorization in accordance with the StPO, this must be obtained before the EIO is issued.

It should be noted that the extent to which the fundamental rights non-recognition ground should also include the lack of necessity and proportionality of the measure should be referred to the Court of Justice of the European Union (CJEU) by way of preliminary ruling proceedings.

7. Grounds for Rejection of an EIO under Austrian Law

The main reasons for rejecting an EIO can be found in Art. 11(1) lit. a to h EIO Directive and were implemented in Sec. 55a(1) EU-JZG. Art. 11(1) lit. c EIO Directive was not adopted as a separate reason for rejection in the EU-JZG, because it is fully covered, on the one hand, based on the proposed determination of responsibility (Sec. 55c) and, on the other hand, due to the rejection ground provided in Sec. 55a(1) lit. 4 EU-JZG. If the desired investigative measure is not available under domestic law for the act specified in the EIO or if the desired investigative measure is not provided for under domestic law at all, the EIO can be rejected. Art. 11(1) lit. c EIO Directive is therefore fully implemented because, according to its wording, this reason for rejection only allows rejection if the investigative measures are inadmissible in a comparable domestic case.

Following the principle of determination, the reasons for rejection should be mandatory, which also corresponds to the applicable system of the EU-JZG.[13]

The enumeration includes not only the fundamental grounds for the rejection of an EIO as listed in Art. 11 EIO Directive, but also additional non-recognition grounds provided for in Art. 22 to 31 EIO Directive.

[12] *Unger*, Die Europäische Ermittlungsordnung – Ausgewählte Poblemstellungen, in: Urban (ed.), Wissenschaft – Praxis – Studium (Vienna: LexisNexis, 2021), 39, 41.

[13] See also Sec. 6 to 11, 40, 47, 52a EU-JZG.

Art. 22 and 23 of the EIO Directive have been implemented in Sec. 55a(1) no. 10 EU-JZG. It should be underlined that the detained person's lack of consent does not constitute grounds for refusal based on this provision, because the cooperation should not be made dependent on the consent of the person concerned. In general, any fundamental rights concerns are to be examined in the context of Sec. 55a(1) no. 6 EU-JZG.

Furthermore, Sec. 55a(1) no. 11 EU-JZG implements Art. 24(2) lit. a EIO Directive. Art. 24(2) EIO Directive mentions two cases in which the execution of an EIO could be rejected, namely: (1) if the suspect or accused does not agree to the interrogation by means of a video conference or (2) if the execution of this investigative measure in a specific case would be contrary to the essential principles of the law of the executing state. However, the Austrian legislator did not deem it as necessary to implement lit b, because this ground has already been covered by other, fundamental non-recognition grounds.

Lastly, Sec. 55a(1) no. 12 EU-JZG implemented Art. 28(1) EIO Directive which provides that an EIO aimed at carrying out a controlled delivery should not only be rejected on the basis of the general reasons for rejection specified in Art. 11(1) EIO Directive, but also if the measure would not be approved in a comparable domestic case. In the end, a controlled delivery means a delay in criminal investigations. However, the requirements of Sec. 99(4) StPO must be fulfilled.

8. Objections to Measures Ordered by an EIO

If an EIO of an EU Member State is to be executed by an Austrian judicial authority, the person concerned can lodge an objection for an infringement of the law (Sec. 106 StPO) or, if the EIO has been authorised by a court, a complaint (Sec. 87 StPO). However, legal grounds for issuing the EIO can only be assessed by the issuing country (Sec. 55e(4) EU-JZG).

Contesting an EIO by the individual is, however, not straightforward. Besides financial aspects, there is also a structural problem: the person concerned only becomes aware of the EIO if it is currently being carried out (e. g. search of premises) or has already been carried out (e. g. message monitoring). Although the person concerned has a possibility to contest the measure, gathered evidence could already be on the direct route to the issuing state. At least Sec. 5l(4) EU-JZG provides some remedy: If an appeal is filed, the court has to postpone the transmission until the decision is made, either *ex officio* or on the application, unless the urgency of the procedure in the issuing state or the protection of subjective rights of others outweighs the interest of the person appealing.

III. The EIO in practice

The evaluation of the EIO in practice is based on the surveying of twelve public prosecutors from Public Prosecutor's Offices in Graz and the WKStA. In the bigger Public Prosecutor's Offices in Austria, *e. g.* in Graz, specialized sub departments ("Sonderreferate"; see Sec. 5 Staatsanwaltschaftsgesetz (StAG)[14]) for the execution of incoming EIOs are established, so not every prosecutor working in the Public Prosecutor's Office acts as an executing authority. On the other hand, every prosecutor can act as an issuing authority regarding EIOs if necessary. In the smaller Public Prosecutor's Offices especially in rural areas, there is no need for a specialized sub department because the number of incoming EIOs is low, so every prosecutor can act as an executing and issuing authority.

The evaluation of the questionnaire has shown that the EIO is frequently used by prosecutors during the investigation phase, and most of the times the issued and received EIOs can be executed without problems and are considered a simple and quick way to gather evidence. However, practical problems could arise regarding the EIO form, non-recognition/non-execution grounds, electronic evidence and the time frame.

1. The Practical Experience with Non-Recognition/ Non-Execution Grounds

In general, the questioned prosecutors did not have a lot of experience with the use of non-recognition or non-execution of EIOs neither as the issuing nor as the executing authority. Almost all the incoming and outgoing EIOs were executed without any bigger problems.

All of the prosecutors with experience in executing an EIO stated that they would invoke the *ne bis in idem* non-recognition ground because this is a mandatory ground for refusal in the Austrian implementation legislation (Sec. 55a(1) lit. 3 EU-JZG). If the procedure was stopped at the investigative phase the prosecutors would in general also invoke the non-recognition ground but would in cases of doubt request further information from the issuing authority on the kind of circumstances under which the trial was stopped. The prosecutors stated that Austria closely follows the case law of the CJEU to Art. 54 of the Convention Implementing the Schengen Agreement (CISA) in such instances.

All the questioned prosecutors would use proportionality as a non-recognition ground, but there was little experience with such cases. Two prosecutors stated that they had experience with a German EIO requesting a house search in a bank to obtain documents. In these cases, they requested – in accordance with the proportionality principle – information on bank accounts and financial transfers instead.

[14] Bundesgesetz über die staatsanwaltschaftlichen Behörden (StAG), BGBl. I Nr. 164/1986 i. d. F. BGBl. I Nr. 32/2018.

Some prosecutors encountered issues regarding double criminality in cases where an offence was only punishable under administrative law and not criminal law (e. g. driving without a license or speeding violations). Most prosecutors did not experience any problems in this regard though.

2. Practical Problems with the EIO Form

Most of the practical problems that arise related to the EIO concern the EIO form. The executing prosecutors stated that sometimes there are problems with the information the issuing state provides in the form especially regarding the inaccurate description of the facts of the case and consequently also the examination of double criminality. In such cases the consultation procedure provided in Art. 11(4) EIO Directive is frequently used. Prosecutors also use the consultation procedure to further inquire about the requested investigation measure. In some instances, comprehension problems arise due to unclear wording and translations. In these cases, the prosecutors usually do not use the formal consultation procedure but informal enquiries like phone calls or emails to specify. However, until now none of the answering prosecutors encountered problems with the EIO form that caused them to refuse to execute the issued EIO. Only shortly after the EIO entered into force some states erroneously used the old Mutual Legal Assistance (MLA) procedures to request the gathering of evidence. The states in question were requested to issue an EIO instead.

Most of the issuing prosecutors also encountered problems with the EIO form. One of the main problems that prosecutors criticized is that the form is too long and confusing because it was created for all investigation measures and cannot be narrowed down for specific ones. A lot of problems occur regarding the translation into the language of the executing state because the translation agencies tend to translate the whole form instead of just the filled in parts even though translations of the form itself are available in all languages of the Member States. Some translation agencies also refuse to just translate the filled in parts which creates a cost issue. Problems also occur regarding the formatting of the form especially when longer passages from other documents are copied into the form. Text passaged disappear or move while filling out the form, sometimes the line breaks create empty pages which cannot be removed. Another issue that came up was that it is not possible to input more than one accused person into the form. Although the form is complicated to handle and takes a lot of time to fill out, none of the prosecutor experienced a refusal of the issued EIO due to problems with the form.

3. Experiences with the Time Frame

Most prosecutors stated that the time frame is generally appropriate for recognition and execution of an EIO, especially compared to the old MLA regime. Regarding the execution of some specific investigation measures (for example obtaining infor-

mation related to bank accounts and house searches) the time frame can be too short. Some prosecutors experienced rare problems with the time frame as an issuing authority because some executing authorities exceed the time frame or take significantly longer to execute an investigative measure than others. Especially the eastern neighbouring countries are quick to execute EIOs. Only one of the questioned prosecutors had experience with an urgency request, which was not handled accordingly by the Italian executing authority.

4. Specificities Regarding Digital Evidence in Practice

The prosecutors did not encounter any specific problems regarding digital evidence. Most prosecutors said that they would not issue an EIO to order the disclosure of traffic telecommunication data that was gathered through data retention because the EIO cannot be used to bypass national laws especially bans on evidence. The Austrian Constitutional Court considered the use of data retention as an investigation measure as unconstitutional.[15]

In general, the Austrian systems allows to use evidence transferred under an EIO for other purposes. In practice this is controversial, because the EIO Directive does not contain a specialty rule. Concerning the evidence gathered by interception of telecommunication the evidence is only allowed to be transmitted to the issuing state if it is not going to be used in another trial (Sec. 55l(3) EU-JZG).

IV. Summary

In summary, the EIO is a frequently used tool in criminal investigations. Most of the times the issued and received EIOs can be executed without problems and are considered a simple and quick way to gather evidence by prosecutors. Practical problems that arise concern mainly the EIO form and the time frame. In light of practical use, it should be considered whether the form could be shortened and simplified or if different forms for different kinds of investigation measures should be created. In addition, the digital version of the form should be updated to fix the described technical problems that arise while filling out the form. Furthermore, it should be considered whether the allotted time frame should be extended for certain, more time intensive investigation measures such as searches of premises.

[15] VfGH 27 June 2014, G 47/2012-49, BGBl. I Nr. 44/2014.

European Investigation Order in Croatia – Normative Framework and Practical Challenges

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I. Introduction

At the time when the European Investigation Order was proposed in 2010 as a new innovative tool for judicial cooperation in criminal matters in the EU, Croatia was still undertaking EU accession negotiations. By the time of the adoption of the 'Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters',[1] Croatia joined the EU on 1 July 2013. This was a challenging period as the Croatian judicial authorities still had to learn how to use existing tools of EU cooperation in criminal matters, such as the European arrest warrant. The transposition of the Directive was done by passing an Amendment[2] to the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (AJCEU), which entered into force on 26 October 2017,[3] five months after the deadline.[4] In an early study of the first effects of the EIO implementation in Croatia, *Karas* and *Pejaković*

[1] 'Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters', 1 May 2014, OJ L 130/1, p. 1 – 36, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0041, accessed 13 January 2023.

[2] Zakon o izmjenama i dopunama Zakona o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske Unije [Act amending the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union], Official Gazette 'Narodne Novine', No. 102/2017 (18 Oct. 2017).

[3] This was the fourth amendment of the AJCEU, which also had a purpose to revise some of the provisions concerning the European arrest warrant and implement the 'Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty', 6 Nov. 2013, OJ L 294/1, pp. 1 – 12, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>, accessed 13 January 2023.

[4] According to Art. 36 of the Directive 2014/41/EU, the deadline for transposition into national law was 22 May 2017.

Đipić found no negative consequences in the application of this novel tool of cross-border evidence gathering.[5]

The Amendment introduced a new Chapter II.A in the AJCEU on 'The European Investigation Order'. The Chapter is divided into two headings, namely: Heading I. titled 'General Provisions' and Heading II. titled 'Special Provisions for Individual Evidence Proceedings', including temporary transfer of detained persons, examination by video conference or telephone connection, collection of information on bank accounts or bank accounts transactions, collection of evidence in a certain period of time, the use of covert investigators, the surveillance of telecommunications with the technical assistance of another Member State, and the temporary seizure of items that will serve as evidence.

Other provisions of AJCEU have also been amended to comply with the Directive. Furthermore, a new article was added in the introductory provisions prescribing the principle of the protection of fundamental rights, which was affirmed as one of the basic principles of judicial cooperation in the case-law of the European Court of Justice and the new European Union legislation, and certain provisions on the European arrest warrant were also amended.

As presented in Table 1, according to the official State Attorney's Office data,[6] in the year when the amendments entered into force Croatia experienced very few cases of issuing (15) and executing (13) European investigation orders. This is expected as the transposition was in force for just 67 days in that year. According to the rates we calculated, we see an increase of 136.2 % in 2018 in the EIO rate (issued and executed annually per 100,000 people). Then in 2019, we see another increase in the EIO rate of 63.1 % (in comparison with 2018). According to this statistical analysis, as well as information retrieved from our interviews with practitioners, we can expect a further increase of issued and executed EIOs in Croatia.

[5] *Karas*, Ž./*Pejaković Đipić*, S., 'Evaluation of the Results of the European Investigation Order', ECLIC, 3 (2019), 492, 503.

[6] Državno odvjetništvo Republike Hrvatske, Izvješće Državnog odvjetništva Republike Hrvatske o radu državnih odvjetništava u 2019. godini (Zagreb: 2020), p. 176, available at <https://dorh.hr/sites/default/files/dokumenti/2020-05/izvjescedorhza2019.pdf>, accessed 5 January 2022.

Table 1

European Investigation Orders Issued and Executed in Croatia According to the Official Data of the State Attorney's Office of the Republic of Croatia[7] (Population Data for Calculating the Annual Rates were Retrieved from the Croatian Statistical Bureau).

CROATIA	2017		2018		2019	
	Issuing	Executing	Issuing	Executing	Issuing	Executing
EIOs	15	13	111	248	222	361
Total	28 (annual equivalent 153)		359		583	
EIO rate	3.73		8.81		14.37	

Apart from the aforementioned statistical data, the bedrock of our analysis is desk research of transposition of the EIO-Directive and interviews with practitioners. The originally planned method was to interview at least thirty practitioners (judges, State attorneys, and attorneys) who had experience with the EIO. First, we contacted 20 potential interviewees from a list of contact points of the European Judicial Network, legitimately expecting that these are the persons who had previous experience with EU cross-border tools (although not necessarily with EIO). The plan was to cover practitioners from different parts of Croatia and to do snowball sampling to obtain more interviews. Of these potential interviewees, ten responded that they had experience with EIO, seven stated they had no experience with EIO, and three failed to respond. Then we proceeded with structured one-on-one interviews, of which only one was in person and all others were conducted via phone or audio-video call due to the COVID-19 pandemic. Before each interview, the interviewees were informed that their responses shall be anonymized. During each interview, the interviewer took notes and typed up the transcript within 24 hours after the interview. The snowball sampling resulted in only nine more contacts who had previous experience with EU cross-border tools (although not necessarily with EIO), of which 6 were willing to be interviewed. This suggests that still very few practitioners have rich experience with the usage of EIO in Croatia. We managed to interview a total of sixteen practitioners: nine prosecutors, six judges, and only one attorney. In the end, a qualitative analysis of their responses was conducted and it is presented in this report.

The research for this chapter is part of a larger comparative study funded by the European Union's justice programme titled 'European Investigation Order – Legal Analysis and Practical Dilemmas of International Cooperation' (EIO-LAPD). In the course of this project we prepared a National Report,[8] which contains all the data we collected for this research. In this chapter, however, we provided an analysis

[7] *Ibid.*

[8] *Ivičević Karas*, E., et al., National report on legal implementation and practical application of the EIO in Croatia (Zagreb, October 2020 (unpublished)), available at <https://lapd.pf.um.si/materials/>, accessed 13 January 2023.

of the most important data, which may have a broader impact in understanding this novel tool of judicial cooperation in the EU.

The chapter is structured as follows. First, we analyse the practical implementation of the EIO-Directive in Croatia as the issuing State, including the scope of application, issuing authorities and validation procedure, principle of proportionality as precondition to issue an EIO. Then we proceed with analysis of Croatia as the executing State, including the executing authorities in Croatia, recourse to a different type of investigative measures, and grounds for non-recognition and non-execution. The next topic of our analysis is the cooperation procedure, which includes channels of communication, language, formalities and procedures, and time limits. After that we discuss the position of the defence and EIOs issued by the defence, including the legal remedies. Finally, we shall give conclusions based on our empirical research and legislative analysis.

II. Croatia as the Issuing State

1. Scope of Application

In the Croatian legal system, the EIO applies to the cross-border gathering of evidence, and as it can be concluded from its legal definition, it replaced all traditional forms of international legal assistance, with exception of delivery of letters, transfer and take over of criminal prosecution,[9] and joint investigation teams.[10] The EIO may be issued in criminal and misdemeanor matters, and at all stages of the proceedings, under the rules of domestic criminal and misdemeanor procedural law. Although administrative bodies, such as tax authorities, can impose misdemeanor sanctions, they are not entitled to issue an EIO. They can, however, propose to the competent misdemeanor court who has the authority to issue an EIO (Art. 6(2) and 42.b(1) AJCEU). The EIO may be issued with regard to all evidentiary actions prescribed in the Criminal Procedure Act[11] (CPA).[12] Finally, Croatian law allows granting EIOs against both, physical and legal persons. Croatia introduced criminal responsibility of

[9] *Crnčec*, I./*Mišerda*, T., 'Novela Zakona o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije', Hrvatski ljetopis za kaznene znanosti i praksu, 24 (2017), 525, 537.

[10] *Hržina*, D., 'Novela Zakona o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije', Pravosudna, academija (2018), pp. 17–18, <http://pak.hr/cke/obrazovni%20materijali/Priru%C4%8Dnik%20za%20polaznike%20Novela%20ZPSKS-EU.pdf>, accessed 4 January 2022.

[11] Zakon o kaznenom postupku [Criminal Procedure Act], Official Gazette 'Narodne Novine', No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19.

[12] *Hržina* (n. 10), p. 19.

legal persons in 2003 by passing the *Act on the Responsibility of Legal Persons for Criminal Offences,* which entered into force in 2004.[13]

As concerns possible other tools of judicial cooperation that could potentially be used as alternatives to the EIO in certain circumstances, the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union[14] could be pointed out as relevant. The research conducted through interviews with practitioners showed that a great majority of State attorneys (eight out of nine) are familiar with the existence of the Framework Decision, which has been implemented in Croatia through the Act on the Simplification of the Exchange of Information.[15] However, although they are almost all familiar with this Framework Decision, only a minority of interviewed State attorneys (two out of eight) used it in practice. All those familiar with it actually do not consider it an alternative to an EIO, because the Framework Decision can be used only for the exchange of information, which cannot be used as evidence before the court, while the primary purpose of the EIO is to gather evidence which can be used before the court. On the other side, only one interviewed judge stated familiarity with the Framework Decision. However, none of the interviewed judges have ever used it in practice. Hence it can be concluded that the Framework Decision does not offer a mechanism of cooperation in evidence gathering that could in some cases be used as an alternative to the EIO.

2. Issuing Authorities and Validation Procedure

In Croatian law, according to Arts. 6(2) and 42.b(1) AJCEU, the issuing authority can be a court or a State Attorney's Office that is conducting the proceedings in the concrete case in which an EIO is needed. The cited legislation does not specify for which evidentiary actions the EIO may be issued by the State attorney, and for which by the court. This is criticized in literature since Croatian criminal procedural law clearly distinguishes the competencies of the court and the of the State attorneys

[13] Zakon o odgovornosti pravnih osoba za kaznena djela [Act on the Responsibility of Legal Persons for Criminal Offences], Official Gazette 'Narodne Novine', No. 151/2003, 110/07, 45/11, 143/12.

[14] 'COUNCIL FRAMEWORK DECISION 2006/960/JHA of 18 December 2006 on simplyfing the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union', 29 Dec. 2006, OJ L 386/89, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006F0960&from=EN>.

[15] Zakon o pojednostavljenju razmjene podataka između tijela država članica Europske unije nadležnih za provedbu zakona [Act on the Simplification of the Exchange of Information between the bodies of the Member States of the European Union responsible for law enforcement], Official Gazette 'Narodne novine', No. 56/2015 (22 May 2015).

in obtaining evidence,[16] primarily depending on the more or less repressive nature of the specific evidentiary action.[17] On the other side, in misdemeanor proceedings, only the court may be the issuing authority. Hence the competent misdemeanor court shall issue an EIO upon the proposal of the administrative authority that is conducting the misdemeanor proceedings.

The part of the research conducted through interviews with practitioners showed that the answer to the question who issues the EIO in the concrete case primarily depends on the phase of the process. From the answers given by the interviewed State attorneys, it can be concluded that the EIO is mostly used in the investigation (or simplified investigation) phase. Sometimes the EIO is also used in the preliminary investigation phase (i. e. phase of inquiries in terms of CPA). In this phase of the proceedings (i. e. during inquiries which are then followed by investigation or simplified investigation), the State attorney is the one who is conducting the proceedings and therefore is competent to issue an EIO. In the later phases of proceedings, i. e. at the trial, the court is conducting the proceedings and is therefore competent to issue an EIO. Some of the State attorneys stated that the EIO is however rarely used in the trial phase of the proceedings.

As regards interviewed judges, all six reported that they use the EIO in the trial phase. At the county court level, judges of the investigation also can use the EIO in the investigative phase of the proceedings. Yet, municipal court judges, since they are not conducting investigations, can use EIO only in the trial phase.

Therefore, it may be concluded that in Croatia, only the State attorney and the court, which are conducting the proceedings and depending on the phase of the process, have the authority to issue the EIO (Art. 6(2) AJCEU). It should be added that the legislation does not provide any form of validation procedure. This means that, though the police authorities are competent to conduct certain investigative measures, especially in the case of urgency, and independently of the State attorney or the court, the power to issue an EIO, which could then be subsequently validated by the State attorney or the court, has not been given to the police. In the same sense, in cases of misdemeanor proceedings, when the administrative authorities are conducting the proceedings, such authorities are not competent to issue an EIO. If they need an EIO to be issued, they must address the court which is in charge to conduct the misdemeanor proceedings, and which has the authority to decide whether to issue an EIO in the concrete case or not. Thus, neither in misdemeanor proceedings there is a validation procedure provided by law.

[16] *Primorac*, D./*Buhovac*, M./*Pilić*, M., 'Europski istražni nalog kao novi instrument pravosudne suradnje država članica u kaznenim predmetima s posebnim osvrtom na hrvatsko pravo', Godišnjak Akademije pravnih znanosti Hrvatske, Vol. X No. 1 (2019), 353, 357–358.

[17] *Krapac*, D., Kazneno procesno parvo. Prva knjiga: Institucije (Zagreb: Narodne Novine, 2015), pp. 110–111.

3. Principle of Proportionality as a Precondition to Issue an EIO

The Croatian legal system also ensures that the condition of proportionality is respected before issuing an EIO. Generally, the principle of proportionality is regulated among the common provisions concerning the protection of human rights and fundamental freedoms in Art. 16(2) of the Croatian Constitution,[18] which guarantees that '*[a]ny restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case*.' The constitutional principle of proportionality is applied in criminal proceedings, as well as in all proceedings in which measures of procedural coercion may be applied to individuals.[19]

The principle of proportionality is primarily implemented in Art. 3.a(1) and 42.c(1) of the AJCEU. Both provisions oblige the competent authorities to issue the EIO only if the issuing of this order is necessary and in proportion to the designated purpose in each case. The principle of proportionality is to a certain extent also implemented in other provisions regulating the EIO, but the proclamation within the introductory provisions should serve as guidance in applying and interpreting concrete norms.[20]

III. Croatia as the Executing State

1. General Rules on Recognition and Execution and the Executing Authority

The general rules on recognition and execution of EIOs set out in Art. 42.h(1) AJCEU are that the EIO is executed under the provisions of domestic procedural law and that no formal decision on recognition has to be made, unless it is established that there are reasons for non-recognition or non-execution or the existence of reasons for postponement provided by law. When executing the EIO, the executing authority has to take all the actions prescribed by domestic law necessary for its execution. As already explained, the Croatian law allows the execution of EIOs against legal persons (see above II.1.).

The competent executing authority in Croatia is the County State Attorney's Office that exercises the local jurisdiction in the place in which the evidence proceedings need to take place or where the evidence needs to be collected (Arts. 5(1)(2) and 42.h(1) AJCEU). When it is required under the rules of domestic law, the County State Attorney's Office will request a court order. The working party for drafting the law considered it to be the best solution to make it as similar as possible to domestic rules on obtaining evidence, since the State attorney either independently or-

[18] Ustav Republike Hrvatske [Constitution of the Republic of Croatia], Official Gazette 'Narodne Novine', No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

[19] *Krapac*, Kazneno procesno pravo (n. 17), p. 309.

[20] *Crnčec/Mišerda* (n. 9), p. 538.

ders their obtaining or it is done by the court at his proposal.[21] In executing his authority, the county State attorney can order the police to obtain some evidence whenever it is allowed under the rules of domestic law. The fact that municipal State attorneys are not competent for the execution of EIOs had consequences on the conducted research since two of them, due to lack of personal experience, did not participate in the part of the questionnaire relating to execution.

If the EIO is not issued or confirmed by the competent judicial authority, it will be returned to the issuing State (Art. 42.h(3) AJCEU). Authorities of the issuing State can be present at the execution of the EIO provided that this is not contrary to fundamental principles of domestic law or harms essential national security interests (Art. 42.h(4) AJCEU), but their representative does not have the power to take evidentiary action independently, unless it is in accordance with domestic law and to the extent agreed (Art. 42.h(5) AJCEU). To facilitate the effective execution, the process of consultations with the competent authorities of the issuing State is envisaged (Art. 42.h(6) AJCEU). The special requirements of the issuing authority that can be taken into account are discussed below (IV.3.).

2. Recourse to a Different Type of Investigative Measure

The competent authority executing EIO can always apply evidentiary measures that are more lenient than the ones requested if the same purpose can be achieved (Art. 42.i(3) AJCEU), but it needs to inform the issuing authority first, which can then decide to withdraw or supplement the EIO (Art. 42.i(4) AJCEU).

Following Art. 10(1) EIO-Directive, the Croatian law allows for recourse to a different type of investigative measure where the measure indicated in the EIO by another Member State does not exist in Croatian law or where it would not apply to the case concerned. In case of a *non-existent measure*, Art. 42.i(1)(a) AJCEU provides that the competent authority shall carry out an evidentiary measure different from that specified in the EIO. Therefore, it is not possible to challenge the application of such measures by arguing that they lack foreseeability because the measure that is applied does not exist in Croatian law. In case of a measure that exists in Croatan law, but would be inapplicable to the specific case concerned, pursuant to Art. 42.i(1)(b) AJCEU, the competent authority shall also carry out an evidentiary measure different from that specified in the EIO. In both cases, however, the executing authority needs to inform the issuing authority first, which can then decide to withdraw or supplement the EIO (Art. 42.i(4) AJCEU).

The execution of evidentiary measures that do not exist in the Croatian legal system was also an object of empirical research. All State attorneys who work as an executing authority responded that they would not execute such a measure. Responses varied, but all of them would execute the measure which is the most similar to the

[21] *Crnčec/Mišerda* (n. 9), pp. 542–543.

requested one, and which would produce the same result. In addition to that, the majority added that they would consult the issuing State in that regard. In this regard, one State attorney explained that he would ask what is the purpose of the requested measure. If, after this clarification, it would be clear that the objective can be achieved by a different measure known in the Croatian legal system, he would contact the issuing State and request amendments to the EIO. Otherwise, if it was impossible to use the measure sought, he presumes he would reject the EIO. On the other hand, two State attorneys stated that they would conduct some other measure with the same result, but without mentioning the consultations with the issuing State, and one of them stated that she, in case of similar evidentiary measure, would inform the issuing State afterwards. It would, however, be contrary to the above-mentioned Art. 42.i(4), which provides that the issuing authority has to be notified in advance.

The vast majority of interviewed judges, five of six, answered explicitly or implicitly that they would not act by the EIO in a situation when measures required by an issuing State were non-existent in Croatian law. Two judges pointed out that they would try to apply another measure the most similar to the one requested, which is provided for in domestic law. Unfortunately, the majority of the judges did not further elaborate whether they would recourse to other investigative measures, so no conclusion can be made in that regard.

The Croatian law provides for the *exceptions* set in Art. 10(2) EIO-Directive. Therefore, Art 42.i(2) AJCEU provides that the evidentiary measures which are non-existent or not applicable in a specific case can be executed if: a) obtaining information or evidence is already in the possession of the competent Croatian authorities, and such information or evidence could be obtained, under domestic law, in criminal proceedings or for the purposes of an EIO; b) obtaining information is already contained in databases maintained by the police or judicial authorities and directly accessible to the judicial authority in the course of criminal proceedings; c) the EIO requests examination of witnesses, experts, injured persons and victims, suspects or defendants or third parties in the territory of the State of execution; d) evidentiary action is requested in the EIO for which under domestic law no court order is needed; or e) the EIO requests identity information of persons who have a telephone number subscription or IP address.

The *concept of non-coercive investigative measure* that always has to be available, as indicated in Article 10(2)(d) and Recital 16 of the EIO-Directive, is introduced in Art. 42.i(2)(d) AJCEU, which regulates them as 'any evidentiary action which is conducted without a court order'. In this regard, Croatia adopted a formal criterion to differentiate between coercive and non-coercive measures: all measures which require court authorization are considered coercive measures, and the other measures are considered non-coercive measures. In the Croatian criminal justice system, the authorization of the court is generally required to undertake any investigative measure which represents a limitation of human rights and freedoms which are guaranteed by the Constitution. However, this general rule has some exceptions. These excep-

tions can roughly be classified into two groups. First, certain investigative measures, which, under the opinion of the lawmaker, represent a less severe limitation of human rights and freedoms may be undertaken by the State Attorney's office and by the police authorities.[22] Second, in situations of urgency, even some investigative measures which can normally be undertaken only under the authorization of the court, can be undertaken by the State Attorney's Office or by the police authorities without such authorization.[23]

3. Grounds for Non-Recognition and Non-Execution

The AJCEU distinguishes between mandatory and optional grounds for non-recognition and non-execution of EIOs. Compared to the EIO-Directive, the legislator has decided to turn some of the optional grounds for non-recognition and non-enforcement in Art. 11(1) EIO-Directive into mandatory grounds. Concerning the *mandatory grounds*, under Art. 42.j(2) of the AJCEU, the competent judicial authority shall not recognize and execute the EIO in the following cases: a) where the execution of the EIO would harm the essential interests of national security, jeopardize the source of the information or imply the use of confidential information pertaining to certain intelligence activities; b) where the execution of the EIO would be contrary to the *ne bis in idem* principle, unless the issuing authority has given assurance that the evidence obtained by the EIO will not be used for the purpose of prosecuting or punishing a person who has already been legally adjudicated in a Member State; c) where the EIO relates to an offense alleged to have been committed outside the territory of the issuing State and partially or wholly committed in the territory of Croatia, and the conduct for which the EIO is issued is not a crime in Croatia; d) where there are reasonable grounds to believe that the execution of the evidence gathering action referred to in the EIO would be incompatible with the obligations laid down in Art. 6 of the TEU and the CFR; e) where the conduct giving rise to the EIO is not a punishable act under Croatian law, unless it relates to an offense for which double criminality check is excluded;[24] and f) where the EIO has been issued in respect of an evidentiary proceeding whose application under Croatian law is limited to a catalogue of offenses or to offenses with a certain minimum sanction, which does not include the criminal offense for which the issuing State is undertaking the procedure.[25]

[22] For instance, the State attorney can order pre-trial detention lasting up to 48 hours from the moment of the arrest (Art. 112 CPA).

[23] For instance, the State attorney can order the special evidentiary actions, such as covert surveillance, for 24 hours where circumstances require that actions be taken immediately (Art. 332(2) CPA). However, the judge of investigation has to subsequently convalidate such an order (Art. 332(4) CPA).

[24] However, it does not apply to evidentiary measures set in Art. 42.i(2) AJCEU.

[25] However, it also does not apply to evidentiary measures set in Art. 42.i(2) AJCEU.

Ne bis in idem, fundamental rights and the double criminality as the grounds for non-recognition and non-execution of EIOs were objects of empirical research. Four out of seven State attorneys stated that they would invoke *ne bis in idem* as a ground for refusal. In addition to that, one further explained that she would do so if the decision to stop the proceedings in the investigation or the indictment phase was based on the merits of the case, and the other that she would do so only in the case the proceedings were suspended, and not in the case when the crime report was rejected. The remaining two stated that this would depend on the circumstances of the case and that they would rely on the jurisprudence of the CJEU. One of these two also mentioned that, as far as she knows, *ne bis in idem* was never invoked as a ground for refusal of the EIO in Croatia. On the other hand, one state attorney stated that she would not invoke *ne bis in idem* as a non-recognition ground. Three judges also stated they would invoke *ne bis in idem* as a ground for refusal. Fourth judge stated he would invoke it only exceptionally in the investigative phase when the matter is *res judicata* previously adjudicated in Croatia, and the last two stated they could not do it because they do not act as an executing authority.

Fundamental rights, the non-recognition ground under Art. 11(1)(f) EIO-Directive, is expressly stated as an obligatory non-recognition and non-execution ground in Art. 42.j(2)(d) of the AJCEU. It is still a hypothetical question whether higher national constitutional standards on fundamental rights could be used under that clause. In theory, they could be used, if taking certain evidentiary action would not comply with concrete minimum safeguards for protection of fundamental rights, which are in Croatia guaranteed at the constitutional level (e. g. existence of a court warrant for certain intrusive evidentiary actions, presence of a lawyer while taking certain evidentiary actions, etc.). Yet, in practice, none of the interviewed State attorneys had experience with fundamental rights as a ground for refusal, and none of the judges had ever encountered a case in which invoking fundamental rights was used as a non-recognition ground.

The majority of the interviewed State attorneys and all of the judges did not encounter any issues as regards *double criminality.* However, one State attorney has mentioned that the issue has arisen with EIOs issued for offenses that are considered misdemeanors under domestic legislation. However, since the precondition for the execution of an EIO is the criminality of the act, such EIO is executed, unless it is the evidentiary action for which the preconditions for application prescribed by domestic legislation have not been met. The other State attorney mentioned that occasionally, they receive EIOs for offenses which are not prosecuted *ex officio*, e. g. which are prosecuted in a private lawsuit, and in these cases the question arises as to whether they are competent to resolve it. One judge pointed out that at the early stage of proceedings it is difficult to assess which criminal offence is committed.

Concerning the *optional* grounds, under Art. 42.j(1) of the AJCEU the competent judicial authority may, based on the principles of effective cooperation, expediency

and the right to a fair trial, decide whether to execute or refuse recognition and enforcement of the EIO in two cases. The first case is the situation when there is immunity or privilege under Croatian law which precludes the execution of an EIO, or there are rules on the establishment and limitation of criminal liability regarding freedom of the press and freedom of expression in other media, which impede the execution of EIO. The second case is the situation where the EIO has been issued in proceedings instituted by administrative or judicial authorities for (not criminal) acts under the domestic law of the issuing State which constitute a violation of domestic law and the decision on these acts may lead to proceedings before a court having jurisdiction in criminal matters, but the evidentiary action would not be applicable in a comparable case under domestic law.

Contrary to the situation when issuing an EIO, acting against the *principle of proportionality* is not taken into consideration and provided as a ground to refuse the recognition and execution of an EIO in Art. 42.j AJCEU, neither within the competence of the executing State to assess whether the issuing State acted under that principle nor within its obligation to assess whether the recognition and execution of an EIO is contrary to Art. 6 TEU and the CFR. The question of whether the flagrant denial of proportionality would be considered as a ground for refusal of EIO was also included in the interviews with the practitioners. Out of seven State attorneys who had relevant experience with the execution of EIOs, five stated that they never had a case in which they refused to execute the EIO for reasons of proportionality. One of them added that they check whether the issued EIO follows the principle of proportionality. The other said that the principle is not clear enough and that that is the reason why she never invoked it, and the third said that, under Croatian implementing legislation, it is a precondition to issuing an EIO, but it is not regulated as one of the grounds for refusal of cooperation and that that is the reason why proportionality is not used as a ground for refusal in practice. One State attorney also expressed the opinion that the Croatian competent authorities recognize and execute even those EIOs which might be considered premature and by which the undertaking of preliminary investigations is required, the results of which might result in issuing EIOs for investigative actions and special investigative techniques, without necessary information being previously acquired through international police cooperation. The remaining two State attorneys stated that it would depend on the circumstances of the case. Besides, none of the judges reported the use of proportionality as a non-non recognition ground. In conclusion, although the principle of proportionality should be applied primarily when issuing an EIO, as Crnčec and Mišerda stated, the executing State also has certain duties and powers in assessing proportionality.[26] From diversity and also from the content of answers given by interviewed State attorneys, it is possible to conclude that the principle of proportionality should be more precisely regulated at the normative level and then elaborated in more detail in future practice.

[26] *Crnčec/Mišerda* (n. 9), p. 538.

IV. Cooperation Procedure

1. Channels of Communication

In Croatia, multiple channels of communication are accepted in practice: e-mail, telefax, postal service. In some instances, EIOs are delivered through Eurojust or the European Judicial Network. AJCEU in Art. 42.e regulates that EIOs can be transmitted by any means capable of producing a written record under conditions allowing the executing State to establish authenticity, including through the safety telecommunications system of the European Judicial Network in Criminal Matters.

Part of the research conducted through interviews with practitioners showed that channels of communication used by Croatian State attorneys are in most cases official e-mail and postal service. In cases of urgency, EIOs are transmitted through EJN contact points. EJN webpage is always used to identify the executing authority in another Member State, and it would be very difficult to imagine the functioning of judicial cooperation without the EJN webpage. On one side, only one State attorney confirmed that she uses the electronic version of the EIO form, while on the other side, all interviewed judges have used the electronic version of the EIO form. None of the interviewed judges reported any problem with the electronic version, except one judge who stated that it requires a lot of data to be entered in a limited scope of time, and if the time is exceeded, all data is automatically erased. Thus, only this judge prefers physical over the electronic EIO form, while all other judges prefer the electronic form. Besides, five out of six judges reported they use their official e-mail address for communication. Only one judge reported that she consulted the EJN webpage before issuing an EIO.

As concerns the form, it should be added that Croatian State attorneys, acting as the issuing authority, have mostly had positive experiences with the EIO form. None of them mentioned instances where their EIO was refused due to problems with the form. They stressed that they resolve all the problems through direct communication with foreign (executing) authorities.

2. Language

The general language-provision in Croatian legislation, which refers to the EIO as well, has not changed in the course of implementation of the Directive. Under Art. 9(1) AJCEU, the competent authority shall enforce the decisions of foreign judicial authorities issuing the EIO if they have been translated into Croatian with supporting documentation. In case of urgency, under the same provision, an English translation shall be accepted, provided that the Member State which delivers the decision in English also agrees to receive the decisions of the Croatian competent authorities in English. Decisions of the Croatian judicial authorities which the competent judicial authority forwards for enforcement to another Member State must be translated into the official language of that State or another language accepted by

that State (Art. 9(2) AJCEU). Interviews with practitioners have shown that communication problems are most often caused by poor translation. Since it is sometimes difficult to find a translator for the Croatian language, Google Translator is used. However, it does not ensure a legible translation, so in the end the communication takes place in English.

3. Formalities and Procedure

Croatian legislation allows for additional formalities requested by an EIO and not foreseen in the domestic system. Art. 42.h(2) AJCEU provides that the competent judicial authority shall comply with the specific requirements laid down by the issuing authority, provided that these requirements are not contrary to the fundamental principles of the domestic legal order. This is also reinforced by the principle of effective cooperation under Art. 4 AJCEU providing that competent authorities are obliged to act in such a way that the purpose of judicial cooperation is achieved to the maximum extent possible (but following the fundamental principles of the legal order). This means that issuing States' formalities for merely tactical reasons would be allowed if they are not contrary to the fundamental principles of the domestic legal order. On the other side, in virtue of Art. 42.c AJCEU, when issuing, Croatian authorities may request that additional formalities be completed in accordance with domestic law.

The research conducted through the interviews with practitioners showed that the majority of State attorneys have experienced situations in which they have either requested or have been requested to follow formalities in the execution of an EIO. From the perspective of the issuing authority, formalities have mostly been related to some specific rules of Croatian law which relate to the interrogation of the suspect/the accused person (letter of rights, right to a lawyer, audio-video recording of the interrogation) or the interrogation of witnesses (warning to persons who have the right not to testify under Croatian law). From the perspective of the executing authorities, they have also experienced that they were requested to follow formalities, even for tactical reasons (such as synchronicity of searches). None of them mentioned problems concerning this practice.

The particular question of confidentiality, in the context of judicial cooperation based on the EIO, was also an object of empirical analysis. Four interviewed State attorneys have answered that they have no relevant experience in the context of this question. Only one State attorney answered that she does not, as issuing authority, provide a justification why she would not reveal a measure to the suspect for confidentiality reasons and that she, as executing authority, does not request a specific justification why the measure should not be revealed to the suspect for confidentiality reasons. Others have given varying information. One of them said that she, as executing authority, acts under the Croatian implementing legislation and consults with the competent authority of the issuing State. The other one said that she provides an

explanation, as issuing authority, if that is important for the proceedings, and that she requires an explanation, as executing authority as well, if she thinks it is important for the proceedings. The third and the fourth interviewed State attorneys said that this depends on Croatian national law: if on one hand, the suspect has acquired the right to inspect the case file, she also has the right to be informed of the EIO, and if, on the other hand, the measure requested by the EIO is secret (such as special investigative techniques), the suspect is not informed thereof.

Unlike interviewed State attorneys who have different experiences with the issue of confidentiality in the context of judicial cooperation, judges do not have such experiences. Namely, it should be pointed out that, although confidentiality could be justified in some cases under Art. 42.s AJCEU, none of the interviewed judges reported that the confidentiality requirement was ever used in practice. The reason for that is probably in the fact that interviewed judges so far mostly used the EIO for witness examinations, and not for other evidentiary actions where the issue of confidentiality could be raised.

Finally, as concerns formalities such as the EIO form, part of the research conducted through interviews with practitioners showed that there are actually no major deficiencies. On one side, although interviewed State attorneys do encounter problems, they do not refuse to execute the EIO due to those problems. They rather choose to directly contact the issuing authorities and to resolve problems through direct communication. Similarly, none of the judges ever refused to execute an EIO due to problems with the EIO form. On the other side, State attorneys, acting as the issuing authority, have mostly had positive experiences with the EIO form. None of them mentioned instances where their EIO was refused due to problems with the form. Again, they said that they resolve all the problems through direct communication with foreign (executing) authorities. Also no interviewed judge reported problems with the EIO form while acting as issuing authority.

4. Time Limits

Croatian law provides certain time-limits for the recognition and the execution of an EIO. When regulating legislative deadlines, it was taken into account that the EIO is most often issued in the early stages of the procedure with certain time-limits, so quick action is needed.[27] Under Art. 42.k(1) of the AJCEU, the requested evidentiary proceeding, when there are no reasons for postponement and refusal, shall be conducted within the time limits prescribed for conducting the evidentiary proceeding in Croatian law and shall be accorded the same priority as in the comparable domestic case. Where the EIO issuing authority states that an evidentiary proceeding must be carried out within a shorter time or at a specified time, the domestic competent authority shall carry it out by the request, unless there are objective obstacles to its implementation within the requested deadlines (Art. 42.k(2) of the AJCEU).

[27] *Crnčec/Mišerda* (n. 9), p. 541.

General deadlines are provided in Art. 42.k(3) of the AJCEU: the competent judicial authority shall decide on the enforcement of the requested evidentiary proceeding without delay, and not later than 30 days after receipt of the EIO, while the competent judicial authority shall carry it out without delay and no later than 90 days after that decision. If the requested evidence is already in the possession of the domestic authorities, the competent judicial authority shall immediately forward it to the authority of the issuing State (Art. 42.k(4) of the AJCEU). Where the competent judicial authority is unable to act within 30 days or at the time specified by the EIO issuing authority, it shall immediately notify the competent authority of the issuing State about the reasons for the delay and the foreseeable additional time (max. 30 days) required to reach a decision (Art. 42.k(4) of the AJCEU). Where the competent judicial authority is unable to carry out the evidentiary proceeding within the 90 days deadline, it shall without delay notify the competent authority of the issuing State about the reasons for the delay and consult on an appropriate extended timeframe to conduct the evidentiary proceeding (Art. 42.k(5) of the AJCEU).

Besides these provisions, there are no specific consequences foreseen for the situation where the competent judicial authority was not able to act within the prescribed time-limits. Croatian legislation foresees the possibility for the State attorney to appeal against a court decision not to recognize or not to execute an EIO (Art. 42.m(1) AJCEU). When the State attorney uses such a possibility, it shall inform the competent issuing authority thereof. Such information does not postpone the execution of an EIO, unless the competent issuing authority requires differently (Art. 42.m(4) AJCEU). Therefore, there is a possibility to extend the time-limits for the recognition and execution of an EIO, when the competent issuing authority requires it.

The research conducted through interviews with practitioners showed that most of the State attorneys consider the deadline for the execution of the EIO appropriate. One of them even stated that she considers that it would be welcome to make the deadlines for the execution of the EIO even shorter. Most of them have experience with urgency requests, in case of proceedings in which the accused person is in pretrial detention or where special investigative techniques are requested through the EIO. Some of them use personal contacts, the EJN or Eurojust to make sure that their EIOs will be executed on time in cases of urgency.

Similarly, as interviewed State attorneys, all interviewed judges responded that the EIO time-frame is appropriate as these proceedings are dealt with urgency and electronic communication is available. Two of them responded that, based on their experience, the execution took place between thirty and fifty days. Only one of the judges mentioned that the time-frame could be difficult to meet when the issuing authority requests all measures to be taken simultaneously (e. g. search warrants). Yet, it can be generally concluded that the legal regulation of deadlines is appropriate and does not cause major difficulties in practice.

V. Position of The Defence

When we look at the position of the suspect or the accused person who is involved in criminal proceedings in Croatia and these criminal proceedings include a cross-border or a transnational dimension which also encompasses the gathering of evidence abroad, there are two main issues regarding this situation that determine the position of the defence. The first issue is the possibility for the suspect or the accused person or his/her defence lawyer to request the gathering of evidence abroad and the second is the possibility for the defence to challenge the issuing of the EIO, its execution and the use of evidence gathered abroad in criminal proceedings in Croatia.

1. EIOs Issued by the Defence

A provision that regulates the possibility for the defence to request the issuing of the EIO is Art. 1(3) EIO-Directive. Under that provision '[t]he issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights pursuant to the national criminal procedure'.[28] We can see that this provision does not create a binding European rule which would create a right for the defence to request the issuing of an EIO. Rather, it refers to national law and the rights that the defence has in national criminal proceedings.[29] This means that the defence shall be given the right to request the gathering of evidence abroad via EIO only to the extent to which they are allowed to request the gathering of evidence in a purely domestic context.

In the context of Croatian law, Art. 1(3) EIO-Directive was transposed in Art. 42.b(2) of the AJCEU according to which the issuing of an EIO may be proposed by the defendant and his/her defence counsel under the provisions of domestic procedural law. To see what are the possibilities for the defence to propose the gathering of evidence in a purely domestic context, we must turn to provisions of the CPA. The CPA foresees various possibilities for the defence to get actively involved in the evidence-gathering process. These possibilities are different in pre-trial and trial proceedings.

In the pre-trial proceedings, the defence can propose the undertaking of evidence-gathering actions to the State Attorney. If the State Attorney accepts the proposal, she shall conduct the proposed evidence-gathering action (Art. 213(4) for simplified investigation and Art. 234(1) for investigation).[30] If the State Attorney does not accept

[28] Some authors find the achievement of equality of arms between parties in the transnational context as the purpose of this provision of the Directive, *Crnčec/Mišerda* (n. 9), p. 537. See also *Primorac/Buhovac/Pilić* (n. 16), p. 358.

[29] *Burić*, Z., 'Transnational Criminal Proceedings and the Position of the Defence', in: Z. Đurđević/E. Ivičević Karas (eds.), European Criminal Procedural Law in Service of Protection of European Financial Interests: State of Play and Challenges (Zagreb: Croatian Association of European Criminal Law, 2016), 63, 76.

[30] Hržina also refers to the application of Art. 234 CPA, in: *Hržina* (n. 10), p. 19.

the proposal of the defence, the final decision on the undertaking of the proposed evidence-gathering action is rendered by the judge of investigation (Art. 213(4) for simplified investigation and Art. 234(2) for investigation). The second option for the defence to get actively involved in the evidence-gathering process in the pre-trial phase of proceedings is the possibility to propose the undertaking of an evidentiary hearing to the judge of investigation (Art. 213(4) for simplified investigation and Art. 235(1) for investigation). An evidentiary hearing enables contradictory gathering of evidence in the pre-trial phase of proceedings.[31] This phase is normally characterized by evidence gathering actions which are unilaterally undertaken by the State Attorney. The judge of investigation can either accept or reject the proposal of the defence. If the proposal is rejected there is a possibility of appeal which is decided by a panel of three judges (Art. 237(2)).

The question is: can both of these possibilities be used by the defence in the context of cross-border evidence gathering. In other words, can the defence use both of these possibilities to request the gathering of evidence abroad in the pre-trial phase of proceedings? There is no doubt that the first possibility – to propose to the State Attorney the issuing of an EIO – is at the disposal of the defence in the pre-trial phase of proceedings. However, the situation is not so clear concerning the second option – to propose to the judge of investigation the issuing of an EIO. This avenue seems to be closed to the defence. Such a conclusion arises from the provisions of the AJCEU that defines who are the authorities competent to issue an EIO. Under Art. 6(2) AJCEU the State Attorney's Office and the court conducting the proceedings are competent to issue an EIO. Since in pre-trial proceedings in Croatia the State Attorney's Office is the authority which is conducting the proceedings, it is the only authority which is competent to issue an EIO in this phase of the proceedings. Therefore, the judge of investigation is not competent to issue an EIO.

In the trial phase of proceedings, the defence can propose to the court which is conducting the trial to present the evidence at the trial, but also to gather the evidence for the trial (Art. 419(1)). The court can either accept or reject such a proposal. However, the grounds for rejection of a proposal are defined by the CPA. The proposal to gather or to present the evidence at trial may be rejected by the court only in four situations: if the proposal is not allowed, if it is not important, if it is not adequate, and if its goal is to prolong the proceedings (Art. 421(1)). The same possibilities which are open to the defence in the context of purely domestic proceedings are also open to them in the context of transnational proceedings. This means that the defence can propose to the court which is conducting the trial to issue an EIO to gather evidence located abroad. This follows not only the provisions of the CPA but also the already cited Art. 6(2) AJCEU, which defines the authorities competent to issue an EIO. In the trial phase of the proceedings, the court is the authority conducting the proceedings and is therefore the only authority which is competent to issue an EIO.

[31] *Krapac*, Kazneno procesno parvo (n. 17), p. 169.

2. Legal Remedies

Provision on legal remedies is contained in Art. 14 EIO-Directive. It is a fairly complex provision that regulates three issues: a) decisions that can be challenged by a legal remedy, b) information about the possibilities for seeking a legal remedy, and c) consequences of a legal remedy.[32] This provision is transposed in Art. 42m AJCEU, which enables to challenge a decision by which the court refuses to recognize and execute an EIO. This possibility is reserved for the State Attorney (Art. 42m(1)). On the other hand, under Art. 42m(2), the existence of preconditions to issue an EIO can only be challenged in proceedings initiated in the issuing State.[33]

What can be concluded from these provisions about the possibility for the defence to use legal remedies against the decision to issue and to recognize and execute an EIO? If Croatia is the issuing State, the existence of preconditions to issue an EIO can only be challenged in proceedings initiated in Croatia. However, the AJCEU does not foresee a specific legal remedy against the decision to issue an EIO. In purely domestic proceedings, following provisions of the CPA, there is also no possibility to challenge a decision to undertake an evidence gathering action. Therefore, neither the AJCEU nor the CPA seems to provide the possibility for the defence to use a legal remedy against the decision to issue an EIO.[34] The defence cannot also challenge the recognition and execution of an EIO, in cases where Croatia is acting as the executing State. This possibility is reserved only for the State Attorney and only against the court decision by which recognition and execution of an EIO were refused. Having all this in mind, the empirical analysis can hardly be a surprise. None of the nine interviewed State attorneys has ever encountered cases in which a suspect or an accused used legal remedies related to an EIO and cannot recollect such cases in practice. Also, none of the six interviewed judges encountered cases in which a suspect or an accused used legal remedies related to an EIO.

However, there are legal remedies that can be used by the defence. These remedies can be used in the context of admissibility of evidence gathered through EIO in domestic criminal proceedings. The defence can claim that evidence gathered abroad should not be admissible before Croatian courts since they fall into one of the categories of inadmissible (illegally obtained) evidence under Croatian law (Art. 10 CPA). However, in Croatian judicial practice, evidence gathered abroad is not subjected to the same level of scrutiny as evidence gathered in Croatia, which makes this

[32] For an analysis of this provision, see *Materljan*, I./*Materljan*, G., 'Europski istražni nalog i nacionalni sustavi pravnih lijekova: Pitanje primjerene zaštite temeljnih prava u državi izdavanja naloga', Hrvatski ljetopis za kaznene znanosti i praksu, 27 (2020), 745, 755–758.

[33] Since the executing State is only helping in the undertaking of criminal proceedings that are taking place in the issuing State, *Crnčec/Mišerda* (n. 9), p. 544.

[34] There are authors with different opinions who think that when Croatia is the issuing State, there is a possibility of an appeal against the decision to issue an EIO. This appeal needs to be directed at the State Attorney's Office. See *Hržina* (n. 10), p. 20.

legal remedy for the defence less effective in the transnational context than it is in a purely national context.[35]

VI. Conclusion

As some authors have initially labelled the EIO as 'controversial' instrument for cross-border evidence gathering in the EU,[36] one would expect that Croatia, being the youngest EU Member State, would encounter serious difficulties in applying the EIO. According to this study, however, Croatia did not face any substantial problems in the practical implementation of the EIO. Croatia transposed the provisions of the Directive with the Amendments of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union, which were adopted and entered into force in October 2017. This means that Croatia was almost five months late with the transposition. According to the statistical data, however, there is a significant increase in the use of EIO in Croatia since 2017, and information retrieved from our interviews with practitioners suggests that we can expect a further increase of issued and executed EIOs in Croatia in the coming years.

In Croatia, only the State attorney and the court, which are conducting the proceedings and depending on the phase of the process, have the authority to issue the EIO. The empirical part of the research showed that the EIO is mostly used by the State attorneys in the investigation (or simplified investigation) phase, and sometimes even in the preliminary investigation phase. Judges use the EIO in the trial phase, with exception of judges of the investigation who use it in the investigative phase. The police, as well as administrative authorities, cannot issue the EIO and there is no validation procedure conducted by the court or the State attorney. At the same time, according to the principle of proportionality, the competent authorities may issue the EIO only if the issuing of this order is necessary and in proportion to the designated purpose in each concrete case.

The competent executing authority in Croatia is the County State Attorney's Office that exercises the local jurisdiction in the place in which the evidence proceed-

[35] *Matak*, S., 'Dokazi iz inozemstva iz pozicije obrane – mogućnost pribavljanja, kontrola zakonitosti i pouzdanosti', Hrvatski ljetopis za kaznene znanosti i praksu, 27 (2020), 521, 536–538.

[36] *Heard*, C./*Mansell*, D., 'The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases', New Journal of European Criminal Law 2 (2011), 353, 353; *Mangiaracina*, A., 'New and controversial scenario in the gathering of Evidence at the European level: The proposal for a Directive on the European Investigation Order', Utrecht Law Review 10 (2014), 113, 113. Schünemann labeled the european investigation order 'a rush into the wrong direction'. *Schünemann,* B., 'The European Investigation Order: A Rush into the Wrong Direction', in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU-Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases (Cham: Springer, 2014), 29, 29.

ings need to take place or where the evidence needs to be collected. The general rules on recognition and execution are that the EIO is executed under the provisions of domestic procedural law without a need for formal decision in that regard. When executing the EIO, the executing authority has to take all the actions prescribed by domestic law necessary for its execution, which includes requesting a court order when needed. The AJCEU generally allows presence of the authorities of the issuing State, but without power to take evidentiary action independently, and envisages the process of consultations with the competent authorities of the issuing State.

The competent authority can, with the prior notification of the issuing authority, always apply evidentiary measures that are more lenient than the ones requested if the same purpose can be achieved. When an investigative measure does not exist in Croatian law or where it would not apply to the case concerned, the AJCEU allows for recourse to a different type of investigative measure. The Croatian law provides for the *exceptions* in specific cases set in Art. 10(2) EIO-Directive. The concept of non-coercive investigative measure that always has to be available is introduced on the basis of formal criterion that it is 'any evidentiary action which is conducted without a court order'.

Compared to the EIO Directive, the legislator has decided to turn some of the optional grounds for non-recognition and non-enforcement in Art. 11(1) EIO-Directive into mandatory grounds. *Ne bis in idem*, fundamental rights, the double criminality and proportionality were the objects of our empirical research. It has shown that the majority of the State attorney and judges would invoke *ne bis in idem* as a ground for refusal and that they did not encounter any issues with the double criminality. On the other hand, fundamental rights, although expressly stated as an obligatory non-recognition and non-execution ground, were never invoked in practice. Contrary to the situation when issuing an EIO, acting against the *principle of proportionality* is not provided as a ground for refusal of an EIO. None of the State attorneys or judges had a case where it was invoked as a ground for refusal. Some of them added that the reasons are that the principle is not clear enough and that it is not regulated as one of the grounds for refusal of cooperation. In that regard, it is possible to conclude that the principle of proportionality should be more precisely regulated at the normative level in order to be applied in practice.

As regards cooperation procedure, multiple channels of communication are used in practice. The empirical part of the research showed that State attorneys in most cases use the official e-mail and postal service, while in cases of urgency EIOs are transmitted through EJN contact points. The research also showed that Croatian State attorneys, acting as the issuing authority, have mostly had positive experiences with the EIO form. Croatian legislation also allows for additional formalities requested by an EIO and not foreseen in the domestic system, and the majority of State attorneys have experienced situations in which they have either requested or have been requested to follow formalities with the execution of an EIO, but none of them mentioned any problems with this practice.

Croatian law provides certain time-limits for the recognition and the execution of an EIO, and the empirical part of the research showed that most of the State attorneys consider the deadline for the execution of the EIO appropriate, as well as all interviewed judges responded that the EIO time-frame is appropriate as these proceedings are dealt with urgency and electronic communication is available. Therefore, it can be generally concluded that the legal regulation of deadlines is appropriate and does not cause major difficulties in practice.

It is often claimed that the position of the defence is more demanding in criminal proceedings involving a transnational dimension than in criminal proceedings set in a purely domestic context.[37] It is also claimed that judicial cooperation based on the principle of mutual recognition has primarily brought about better chances for transnational law enforcement, which have not been counterbalanced by equivalent measures for the defence, and which led to the structural weakening of the position of the defence in transnational criminal proceedings.[38] The purpose of the analysis undertaken here was to evaluate the extent to which the provisions of Croatian law transposing the Directive take into account specific interests of the defence by offering a possibility to request the issuing of an EIO and to oppose its use or the use of its results in criminal proceedings by means of legal remedies. Croatian law does give the defence the possibility to request the issuing of an EIO, both in pre-trial and in the trial phase of the proceedings. In both situations, this is just a possibility, since a final decision to issue an EIO is rendered by an authority which is conducting the proceedings (State attorney in the pre-trial and the court in the trial phase of proceedings). Concerning legal remedies, there are no legally recognised possibilities for the defence to challenge the issuing or the execution of an EIO. In Croatian law, the only avenue open for the defence is to challenge the use of evidence collected abroad in the domestic criminal proceedings by claiming that the piece of evidence collected abroad should not be considered admissible in criminal proceedings taking place in Croatia.

[37] *Gleß*, S., 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle', Utrecht Law Review 9 (2013), 90, 90–1.

[38] *Burić* (n. 29), pp. 64–66.

The European Investigation Order – a German Perspective

By *Kai Ambos, Peter Rackow* and *Alexander Heinze*

I. Transposition of the Directive into German Domestic Law

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO-Directive) has been implemented in due time by Germany with effect from 22 May 2017.[1] As regards the way of its implementation, Germany decided against the creation of an independent body of legislation[2] to encapsulate the various mutual-recognition instruments, which meanwhile have found their way into German law.[3] Instead the

[1] Viertes Gesetz zur Änderung des Gesetzes über die internationale Rechtshilfe in Strafsachen, BGBl. I ('Bundesgesetzblatt' – German Federal Law Gazette) 2017, p. 31 ff., available at https://s.gwdg.de/4KxOHc, accessed 2 January 2023.

[2] This was the advice of the German Judges' Association's ('Deutscher Richterbund' – DRB-Stellungnahme Nr. 07/2016, no. 1), available at https://www.drb.de/positionen/stellungnahmen/stellungnahme/news/716, accessed 2 January 2023.

[3] Framework Decision 2002/584/JHA on the European Arrest Warrant of 13.6.2002; Framework Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence of 22.6.2003; Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties of 24.2.2005; Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders of 6.10.2006; Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings of 24.7.2008; Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union of 27.11.2008; Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions of 27.11.2008; Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/947/JHA and 2008/909/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial of 26 February 2009; Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention of 23.10.2009; Directive 2011/99/EU of the European Parliament and of the Council on the European protection order of 13.12.2011; Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters of 3.4.

EIO-Directive has been integrated into the IRG (Gesetz über die Internationale Rechtshilfe in Strafsachen – Act on International Cooperation in Criminal Matters).[4] The transposition-legislation (Sec. 91a–91j IRG) constitutes a second paragraph of the IRG's tenth part on 'Other Legal Assistance with the Member States of the European Union'.[5]

II. The European Investigation Order in the German IRG

1. Scope of Application

Pursuant to Sec. 91a(1) IRG the provisions on the EIO concern the area of other legal assistance in criminal matters (cf. Sec. 59(1) IRG) for an EU Member State, that is legal assistance unrelated to extradition or enforcement matters. Criminal matters in this sense are (truly) criminal-offence related but also include proceedings for mere administrative offences (administrative offences ('Ordnungswidrigkeiten') may be appealed and hence reviewed) (cf. Sec. 1(2) IRG).[6] As the imposition of 'Ordnungswidrigkeiten', it is permissible to issue EIOs with regard to those Ordnungswidrigkeiten (see Art. 4(b)(c) EIO-Directive).

2. Channels of Communication

With regard to Art. 7 EIO-Directive, the German legislator did not see any need for transposition.[7] Therefore, in accordance with the general administrative provisions, EIOs may be communicated in urgent cases by telex, fax, telephone or e-

2014; Regulation (EU) 2018/1805 of the European Parliament and of the Council on the mutual recognition of freezing orders and confiscation orders of 14.11.2018.

[4] Act on International Cooperation in Criminal Matters (AICCM), engl. translation (as of 5 October 2021) available at https://www.gesetze-im-internet.de/englisch_irg/index.html, accessed 24 December 2022.

[5] Sec. 92d relating to telecommunications surveillance, has been incorporated into the IRG outside the second Sec.

[6] Note that a characteristic feature of the German legal system is the distinction between criminal offences ('Straftaten') and administrative offences ('Ordnungswidrigkeiten'). While this distinction seems to be clear on a formal level, it has not been conclusively clarified in substantive terms. The considerable proximity of administrative offences to criminal law is evident in several areas, *e. g.* in the area of traffic violations. Further, particularly in the area of commercial law, administrative offences are sanctioned with extremely high fines that often jeopardise the very existence of the respective company. Finally, the proximity of these two kinds of offences is demonstrated by the fact that fines imposed by the regulatory authority can be challenged before the district court usually competent for criminal offences (cf. Sec. 68 OWiG, Ordnungswidrigkeitengesetz – Administrative Offences Act).

[7] BT-Drs. 18/9757, p. 23 f, available at <https://dserver.bundestag.de/btd/18/097/1809757.pdf>, accessed 24 December 2022.

mail (Nr. 10(3) RiVASt).[8] However, it should be noted that Sec. 91d(1) IRG requires the submission in the form as set out in annexes A or C. Otherwise, the rendering of legal assistance is not admissible.[9] As a consequence, Germany will accept transmissions that comply with Art. 7(1) EIO-Directive in the case of incoming requests. From the perspective of the other Member States, it might be suitable to transmit requests to Germany via the EJN's telecommunications system.[10] EIOs transmitted this way will be forwarded to the EJN-contact points designated by Germany. These are, in particular, the general public prosecutor's offices.[11] Any further communications (regarding a request) will then take place directly between the issuing and executing authorities, without any particular formal requirements (Art. 7(2) EIO-Directive).[12]

3. Issuing Authorities

Pursuant to Art. 2(c) EIO-Directive in conjunction with Art. 33(1)(a) EIO-Directive, Germany has designated practically all judicial authorities (in a broad sense) as issuing authorities: in particular the Federal Prosecutor General at the Federal Court of Justice, the public prosecutor's offices, the general public prosecutor's offices, the central office in Ludwigsburg,[13] all courts responsible for criminal cases, and furthermore all administrative authorities responsible for the prosecution of administrative offences.[14] However, the German legislator has made use of the discretion provided by Art. 2(c) EIO-Directive. Accordingly, Sec. 91j(2) IRG provides that outgoing requests originating from administrative authorities must be validated by the public prosecutor's office.[15] Tax authorities play a special role since they represent the public prosecution in the context of criminal tax proceedings according to Sec. 399 AO (Abgabenordnung – The Fiscal Code of Germany). Thus, Germany has made a declaration under Art. 33(1) EIO-Directive that tax authorities should be regarded as

[8] So explicitly BT-Drs. 18/9757, p. 24.

[9] *Wörner*, L., in: K. Ambos et al. (eds.), Rechtshilferecht in Strafsachen (Baden-Baden: Nomos, 2nd ed. 2020), main Sec. 4 mn. 572 notes that this admissibility requirement is concealed under the heading 'Documents'.

[10] Cf. also GSC, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, Doc. No. 11168/19, 11.7.2019, p. 8 also on current developments <https://data.consilium.europa.eu/doc/document/ST-11168-2019-INIT/en/pdf>, accessed 24 December 2022.

[11] Cf. BT-Drs. 18/9757, p. 23.

[12] Cf. BT-Drs. 18/9757, pp. 23–4.

[13] 'Central Office of the Land Judicial Authorities for the Investigation of National Socialist Crimes'; cf. https://zentrale-stelle-ludwigsburg.justiz-bw.de/pb/,Len/Startpage, accessed 2 January 2023.

[14] Notification of the transposition of Directive 2014/41/EU (Ref. Ares[2018]2144837–23/04/2018), p. 1; cf. also *Wörner* (n. 9), main Sec. 4 mn. 538; *Trautmann*, S., 'Vor § 91a IRG', in: Schomburg et al. (eds.), Internationale Rechtshilfe in Strafsachen (Munich: C.H. Beck, 6th ed. 2020), mn. 12.

[15] Cf. below main text regarding n. 18 ff.

judicial authorities on the basis of their rights and obligations identical to those of the prosecuting authorities.[16]

4. Executing Authorities

Germany has designated all judicial authorities, the tax authorities and all administrative authorities responsible for the prosecution of administrative offences (to this extent after confirmation proceedings pursuant to Sec. 91j(2)–(4) IRG) as competent for outgoing requests. The IRG does not indicate which authority is specifically responsible for a request in individual cases but assumes that the Federal Ministry of Justice is in principle responsible for any outgoing request for judicial assistance (Sec. 74(1) IRG). However, this responsibility has been transferred to the *Länder* (the federal states) under a *Bund-Länder-Agreement* pursuant to Sec. 74(2) IRG. The *Länder*, in turn, have used their sub-delegation powers in different ways.[17] In light of this, it is always a question of the individual case or ultimately of Länder-regulations which authority is competent to issue an EIO. Usually the competent authority is a public prosecutor.

5. Outgoing EIOs

Validation is required for EIOs issued by administrative authorities (Sec. 91j(2) IRG). As far as the competences of the police are concerned, a distinction should be made between cases where the police acts in the context of the prosecution of administrative offences and criminal offences *stricto sensu.* In the former case, the police are usually not the administrative authority, but only responsible for urgent measures (Sec. 53 OWiG). This corresponds to its role in criminal proceedings (Sec. 163 StPO). In both constellations requests for judicial assistance are put forward for consideration by the police through the public prosecutor's office or the administrative authority.[18] If, however, the police acts as a regulatory authority, which may be the case in the area of traffic regulation offences (depending on the law of the respective Land), the procedure under Sec. 91j(2) may apply. Where validation is required pursuant to Sec. 91j(3) IRG, the competent authority must examine the conditions for issuing the request. The validating authority thus shall verify in particular whether the principle of proportionality is respected and whether the investigative measure to be requested could be ordered in a comparable national case under the same conditions.[19] As a rule, Sec. 91j(2) cl. 1–2 IRG requires the validation by the public pros-

[16] Notification of the transposition of Directive 2014/41/EU (Ref. Ares[2018]2144837–23/04/2018), p. 2; *Wörner* (n. 9), *op. cit.*; *Trautmann* (n. 14), *op. cit.*

[17] Cf. *Rackow*, P. (n. 9), main Sec. 1 mn. 139–40.

[18] Cf. BT-Drs. 18/9757, p. 80.

[19] BT-Drs. 18/9757, p. 80.

ecutor's office.[20] Yet, cl. 3 enables the *Länder* to use their legislative power and provide for a validation by the courts.

Sec. 91j(3) no. 1 IRG explicitly provides for a proportionality test for outgoing requests. The issuing authority is thus legally obliged to ensure that the principle of proportionality is satisfied. The explanatory memorandum to the law notes that there is scope for taking into consideration that cross-border investigation measures may entail special burdens for the person concerned.[21]

As regards EIOs initiated by the defence, Germany decided not to implement to implement Art. 1(3) EIO-Directive. The legal situation therefore remains that the accused or his defence counsel must apply to the public prosecutor or the court for the collection of cross-border exonerating/exculpatory evidence. It could be argued that transposing the Directive in such a way, i. e. where the suspect may (directly) request investigation orders, has the effect of putting suspects in purely national cases at a disadvantage compared to cross-border situations.[22]

6. Incoming EIOs

a) Language

According to the German notification on Art. 33 EIO-Directive, only investigation orders in German will be accepted,[23] apparently (according to the explanatory memorandum) due to the risk of increased translation workload for the competent State authorities.[24] Nevertheless, there appears to be uncertainty about how to deal with incoming requests drafted in a foreign language. It is sometimes argued that such requests are incomplete within the meaning of Sec. 91d(3) IRG.[25] As a consequence, the requesting authority of the other Member State would have to be given the opportunity to appeal the situation. However, according to a different view, it should also be possible to accept non-translated EIOs on a case-by-case basis, provided that the competent authority can work with the language used. This view is

[20] *Cf. Brahms*, K./*Gut*, T., 'Zur Umsetzung der Richtlinie Europäische Ermittlungsanordnung in das deutsche Recht – Ermittlungsmaßnahmen auf Bestellschein?', Neue Zeitschrift für Strafrecht 37 (2017), 388, at 394 – 95.

[21] BT-Drs. 18/9757, p. 81. Besides, according to the general rules, proportionality will depend in particular on the gravity of the alleged criminal conduct on the one hand and the seriousness of a possible infringement of the suspect's rights by the investigative measure on the other hand.

[22] *Cf. Schuster*, F. P., 'Die Europäische Ermittlungsanordnung – Möglichkeiten einer gesetzlichen Realisierung', Strafverteidiger 35 (2015), 393, at 394.

[23] Notification of the transposition of Directive 2014/41/EU (Ref. Ares[2018]2144837 – 23/04/2018), p. 2: '… incoming requests to authorities in Germany on the basis of the EIO Directive must be in German'.

[24] *Cf.* BT-Drs. 18/9757, p. 22.

[25] *Brahms/Gut* (n. 20), at 392.

supported by Sec. 91d(3) IRG, according to which the requesting authority must (only) be informed of the incompleteness of the form if 'mutual assistance cannot therefore be provided'.[26]

b) Time Limits

Pursuant to Sec. 91g(1) cl. 1 IRG, a decision on the authorisation of mutual assistance shall, upon receiving the request, be taken without delay, but within 30 days at the latest. This time limit may be extended by 30 days, if the original time limit cannot be complied with for practical reasons (Sec. 91g(4)); the requesting authority must be given notice without undue delay. A decision on the authorisation of requests to secure evidence shall be taken immediately and, if possible, within 24 hours after receipt of the request (Sec. 91g(1) cl. 2). Once the decision has been made, the requested measure is, 'as a general rule, to be executed without delay, but no later than 90 days after authorisation is given' (Sec. 91g(2)); if the deadline for transposition cannot be met, the requesting authority must be given notice (Sec. 91(5) IRG).

All time limits mentioned are target deadlines, the violation of which does not entail any consequences.[27] Yet, the situation regarding breaches of time limits without consequences is different with Sec. 91g(6) IRG concerning cases of cross-border interception of telecommunications where no technical assistance of the other State (by Germany) is required. In such cases, the competent authority must examine whether the measure would be admissible in a similar national case and, if not, without delay and at the latest within 96 hours inform the requesting authority that the measure should be terminated. If the agency fails to react to the notification about the implementation of the measure, the measure is considered authorised.[28]

c) Court Orders

In Germany there had been considerable concerns that a mutual-recognition evidence-gathering instrument might undermine the StPO's various requirements of authorization by a judge ('Richtervorbehalt'). These concerns are justified, considering the logic of the principle of mutual recognition that measures issued by any authority of a requesting State have to be accepted by the executing State as a sound 'product' without additional requirements (*forum regit actum*).[29]

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[26] *Schierholt*, C., '§ 91d IRG', in: Schomburg (n. 14), mn. 15–6.

[27] *Schierholt*, C., '§ 91g IRG', in: Schomburg (n. 14), mn. 1.

[28] BT-Drs. 18/9757, p. 75; *Wörner* (n. 9), main Sec. 4 mn. 605.

[29] Cf. *Schuster* (n. 22), at 396: 'paradigm shift'. Yet, as demonstrated by numerous conceivable constellations of differing (formal) prerequisites for investigative measures: the principle of mutual recognition may have reached its limits in the area of evidence-gathering, since 'evidence consists of "unfinished products" created as a part of the complex process of ascertaining the truth which cannot without further ado be taken out of their usual environ-

Against this background, Sec. 91h(1) IRG provides:

> 'If the conditions for rendering mutual assistance are met, a request as set out in section 91d (1) is to be executed under the same terms as would apply if the request had been made by a German agency …'.[30]

Accordingly, in principle, incoming requests have to be executed, albeit in line with applicable German rules. Concretely speaking, this especially means that requested searches and seizures continue to be subject to an order by a German court if national law so provides (*locus regit actum*).[31] Considering Art. 2(d) EIO-Directive, which interestingly did not exist in the original Directive's draft,[32] Sec. 91h(1) IRG appears to be in conformity with the EIO-Directive.

A crucial issue is the scope of the judge's control and review power. Interestingly, the legislator left further clarification to legal practice.[33] Whereas in a national case the judge carries out an examination of the admissibility of a certain measure[34] – which in case of rights infringing measures (such as the above mentioned searches and seizures) presupposes a sufficient degree of suspicion[35] – the first half-cl. of Art. 14(2) EIO-Directive[36] seems to indicate that the judge must not examine the substantive grounds of an incoming EIO because an effective remedy in that regard can only be obtained in the issuing State.[37] Yet, according to the second half-cl., the guarantees of protecting fundamental rights in the executing State are not affected.[38] Furthermore, Art. 6(3) EIO-Directive (in conjunction with Art. 6(1)[a] EIO-Directive) provides for the review of the requested measure's proportionality by the executing authority.[39] As the example of a clearly innocent person shows,[40] the question of the

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ment' (*Ambos*, K., European Criminal Law [Cambridge: Cambridge University Press, 2018], p. 451).

[30] 'Liegen die Voraussetzungen für die Leistung der Rechtshilfe vor, ist das Ersuchen … nach denselben Vorschriften auszuführen, die gelten würden, wenn das Ersuchen von einer deutschen Stelle gestellt worden wäre; […]'.

[31] BT-Drs. 18/9757, p. 20.

[32] Cf. *Rackow*, P., 'Überlegungen zu dem Gesetz zur Änderung des IRG vom 5. 1. 2017', Kriminalpolitische Zeitschrift 2 (2017), 79, at 85.

[33] BT-Drs. 18/9757, p. 31.

[34] Cf. *Schmitt*, B., '§ 162', in: B. Schmitt (ed.), Meyer-Goßner/Schmitt, StPO-Kommentar (Munich: C.H. Beck, 65th ed. 2022), mn. 14.

[35] Cf. *Kölbel*, R., '§ 162', in: H. Schneider (ed.), Münchener Kommentar StPO, vol. 2 (Munich: C.H. Beck, 2016), mn. 26.

[36] 'The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State; […]'.

[37] *Böse*, M., 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?', Zeitschrift für Internationale Strafrechtswissenschaft 9 (2014), 152, at 157.

[38] *Rackow* (n. 32), at 87.

[39] Insofar cf. GSC, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, Doc. No. 11168/19, 11. 7. 2019, p. 7, remarking that the situation addressed by Art. 6(3) EIO-Directive '… could occur if the

substantive reasons for the standard of proof cannot be clearly separated from the question of proportionality. Against this background and in light of the fact that the judge will only be provided a summary of the facts (Annex A Sec. G no. 1), it appears to be the lowest common denominator that the judge should at least check the proportionality of the measure by way of a kind of plausibility test (*Schlüssigkeitsprüfung*).[41]

d) Fundamental Rights Clause/Proportionality

With respect to incoming requests, the German implementation law differentiates between the permissibility ('Zulässigkeit') and the granting ('Bewilligung' – an alternative, albeit slightly misrepresenting translation is 'authorisation') of a request. Unless the requirements for the permissibility of a request are met, the request is to be denied; by contrast, once those requirements are met, the competent authority is presumed to have an obligation to grant the request in principle. Yet, where an obstacle to the granting of a request applies (Sec. 91e), the executing authority will decide with due discretion whether to invoke it.[42] The invocation then leads to the refusal of the request.

Sec. 91b(3) IRG implements the 'fundamental rights clause' of Art. 11(1)(f) EIO-Directive. This takes the form of a binding admissibility provision. Implementing Art. 11(1)(f) EIO-Directive by means of Sec. 91b(3) IRG (in lieu of recurring to the general provision of Sec. 73 cl. 2 IRG, which otherwise would apply via Sec. 91a(4) no. 1 IRG), is intended to improve the protection of fundamental rights to the extent that a 'justified reason' ('berechtigte Gründe') leads to non-permissibility.[43] Understood this way, it is a justified reason (again, leading to non-permissibility), whenever the competent German authority has plausible doubts about the conformity with fundamental rights and these doubts cannot be eliminated by the information available.[44]

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description of the offence is not sufficiently detailed, or the requested investigative measure is too wide and difficult to justify', or 'the measure is not described in a manner sufficiently concrete to allow for a proper assessment', <https://data.consilium.europa.eu/doc/document/ST-11168-2019-INIT/en/pdf>, accessed 24 December 2022.

[40] Example given by *Zimmermann*, F., 'Die Europäische Ermittlungsanordnung: Schreckgespenst oder Zukunftsmodell für grenzüberschreitende Strafverfahren?', Zeitschrift für die gesamte Strafrechtswissenschaft 127 (2015), 143, at 158.

[41] Cf. *Zimmermann*, F., '§ 91h IRG', in: Schomburg (n. 14), mn. 7 f.; *Böse* (n. 37), at 159; *Schuster* (n. 22), at 396.

[42] BT-Drs. 18/9757, p. 67; *Brahms/Gut* (n. 20), at 390 ff.

[43] From the perspective of the German explanatory memorandum, the significance of Art. 11(1)(f) EIO-Directive is that (contrary to ECJ-case-law on the European Arrest Warrant which renders an abstract risk of a violation of fundamental and human rights insufficient) justified reasons permit the rejection of an EIO (BT-Drs. 18/9757, p. 60).

[44] BT-Drs. 18/9757, p. 60.

The explanatory memorandum to the law predicts that the principle of proportionality will especially increase the practical relevance of Sec. 91b(3) IRG .[45] In this context, it should be highlighted that the wording of Sec. 91b(3) IRG refers to the execution ('Erledigung') of an incoming request. To this respect, there may be cases where the *executing* authority examines the request's permissibility (pursuant to Sec. 91b(3) IRG) by focusing on or limiting the examination entirely to the domestic implementation of a request.[46] However, the impact of execution on the one hand and issuance on the other hand is sometimes hard to distinguish. More concretely, it will not always be possible to make a clear distinction between cases in which the *execution* of the order violates fundamental rights and cases in which the *issuing* of the order constitutes a fundamental-rights-violation (which affects the execution).[47] This being said, it can be assumed that the fundamental-rights-clause might be invoked in cases of a 'flagrant denial of proportionality', even though firstly, the requesting State is obliged to ensure the proportionality of the measure (Art. 6(1)(a) EIO-Directive); secondly, the requesting authority is usually in a position to assess the proportionality of the measure (according to its legal system) more accurately on the basis of its knowledge of the facts; and, thirdly, the decision of the requesting State is (theoretically[48]) based on mutual trust.[49]

In all this, Sec. 91b(3) IRG contains an explicit reference to Art. 6 TFEU. It reads as follows:

> 'Section 73 sentence 2 applies, with the proviso that the rendering of mutual assistance is not permissible if there is justified reason to believe that executing the request would not be compatible with the obligations which the Federal Republic of Germany is under pursuant to Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union'.

The application of the German fundamental rights standard on the basis of Sec. 91b(3) IRG does not seem feasible, if only because of its clear wording ('obligations which the Federal Republic of Germany is under pursuant to Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European

[45] BT-Drs. 18/9757, p. 59.

[46] Cf. *Trautmann*, S./*Zimmermann*, F., '§ 91b IRG', in: Schomburg (n. 14), mn. 28 giving the following example: It later turns out that the apartment that, according to an EIO, is to be searched is, in a hospice to which the mortally ill suspect has moved in the meantime. In circumstances as such, the disproportionate nature of the search can be assessed solely by considering the circumstances of the execution of the measure requested.

[47] Cf. *Zimmermann* (n. 40), at 158 giving the example of an apartment search issued for stealing a chicken. This is obviously excessive according to European standards; see also *Rackow* (n. 32), at 82.

[48] Cf. *Ambos* (n. 29), Part 4 mn. 51: '… claim of a "high degree of trust and solidarity between the Member States" … is increasingly becoming, as the Union expands further and further, a mere Brussels or Luxembourg phantasmagoria'.

[49] Cf. *Trautmann/Zimmermann* (n. 46), mn. 27 ff.

Union').[50] However, there is a chance that in the future the Federal Constitutional Court might render a decision where it directly refers to the German standard of fundamental rights.[51] Such a hypothetical scenario will become real as soon as the application of a European standard of fundamental rights that was arguably less strict than the German one were to be seen as an abandonment of the core contents of German constitutional identity.[52] However, the practical significance of these considerations may be limited, as in view of the wide range of possible grounds for refusal, requests can in many cases be rejected on less problematic grounds.[53]

e) Implementation Of Grounds For Non-Recognition/Execution

The ground for non-recognition/execution pursuant to Art. 11(1)(h) EIO-Directive is implemented as a binding condition of admissibility. Therefore, an incoming request is to be denied, once it relates to 'specially designated criminal offences or offences of a certain degree of severity, and the offence giving rise to the request does not meet the requirements even, where applicable, in the case of analogous conversion of the facts' (Sec. 91b(1) no. 1).[54]

Sec. 91b(1) no. 2 IRG implements the scenario addressed by Art. 11(1)(a) EIO-Directive, that is not to recognise or enforce an incoming request whenever it conflicts with both immunities and privileges according to the law of the executing State. Again, Sec. 91b(1) no. 2 IRG constitutes a binding obstacle to admissibility.

As already explained, Sec. 91b(3) IRG refers to proportionality considerations on the basis of the fundamental rights clause.[55]

Sec. 91b(4) IRG implements the requirements of Article 11(1)(g) EIO-Directive. In the same way, it modifies the application of both Sec. 66(2) no. 1 (surrender of property) and Sec. 67(1) and (2) IRG (search and seizure) to the extent that there is no examination of dual criminality. This is – in principle – an admissibility requirement, where the incoming request relates to offences listed in Annex D to Article 11 EIO-Directive and the offence is punishable by a sentence of imprisonment or a measure of reform and prevention involving deprivation of liberty of a maximum of at least three years.[56]

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[50] Cf. *Trautmann/Zimmermann* (n. 46), mn. 21; *Wörner* (n. 9), main Sec. 4 mn. 557.

[51] Cf. the Lisbon Judgement by the German Federal Constitutional Court: BVerfG, Judgement of 30. 6. 2009 – 2 BvE 2/08 and others, Neue Juristische Wochenschrift 62 (2009) 2267, at 2272 ff.; *cf. Trautmann/Zimmermann* (n. 46), mn. 26.

[52] *Trautmann/Zimmermann* (n. 46), mn. 26.

[53] *Trautmann/Zimmermann* (n. 46), mn. 26.

[54] Cf. *Trautmann/Zimmermann* (n. 46), mn. 10; *Wörner*, (n. 9), main Sec. 4 mn. 549.

[55] Cf. BT-Drs. 18/9757, p. 60.

[56] It should be noted, however, that the abandonment of the requirement of double criminality by Sec. 94b(4) is partially reversed where an obstacle to authorisation occurs (Sec. 91e(1) no. 3). See below n. 60 ff.

With respect to the rendering of mutual assistance, Sec. 91e(1) IRG contains various invocable obstacles to the authorisation of such a rendering.[57] Sec. 91e(1) no. 1 IRG allows for the refusal of the authorisation, if essential security interests of the Federation or the *Länder* would jeopardise the sources of information or necessitate the use of classified information relating to specific intelligence activities. This implements the optional ground for refusal in Art. 11(1)(b) EIO-Directive.[58]

Sec. 91e(1) no. 2 then allows for the refusal of the authorisation in the face of a risk to violate the double jeopardy prohibition. The rule implements the ground for refusal in Art. 11(1)(d) EIO-Directive, which seems appropriate, considering that early in the proceedings involving other legal assistance it is often uncertain whether the proceedings relate to identical facts.[59]

Special emphasis should then be placed on Sec. 91e(1) no. 3 IRG. This provision implements Art. 11(1)(e) EIO-Directive, combining the principle of territoriality with the requirement of double criminality.[60] Accordingly, an authorisation may be refused where the offence giving rise to the request a) was committed outside the territory of the requesting State but (at least partly) on German territory; and b) does not constitute a criminal offence or an administrative offence under German law. The provision is of high practical relevance, as, for example, in the area of commercial criminal law, many cases can be conceived in which the offence was committed outside of the requesting State and its punishability under German law may be questionable. Sec. 91e(1), no. 3 IRG may be seen as a reinstation of the requirement of dual criminality (seemingly abandoned by Sec. 91b(4) IRG), which is quite relevant in practice.[61]

Of special importance is 91f IRG, which is formally not a permissibility-rule but of a procedural nature (comparable to Sec. 91h IRG). Less problematic is Sec. 91f(1) IRG that provides (as an expression of the principle of proportionality) that a less severe measure must be used if it produces an equivalent result.

Nevertheless, in light of the EIO-Directive's objectives and the context of its enactment, Sec. 91f(2) IRG carries the risk of creating considerable problems: the provision governs cases in which the requested measure does not exist under German law (no. 1) and furthermore applies to situations where the measure in question 'would not be available in a comparable national case' (no. 2). As regards the first group of cases, it covers measures which are not authorised by a special rule or by one of the general procedural clauses (Sec.s 161(1), 163(1) StPO).

[57] Sec. 91e(2) IRG allows for the decision to be postponed where there is a risk of interference with ongoing criminal investigations or where the evidence to which the request relates is used in other proceedings.

[58] BT-Drs. 18/9757, p. 67.

[59] BT-Drs. 18/9757, p. 68.

[60] BT-Drs. 18/9757, p. 68–69.

[61] Cf. *Schierholt*, C., '§ 91e IRG', in: Schomburg (n. 14), mn. 5.

Considering its wording, Sec. 91f(2) no. 2 IRG in conjunction with Sec. 91f(5)[62] appears to constitute a sweeping ground to refuse the request,[63] as the 'same outcome' will arguably not be achievable by a different (less intrusive) measure.[64] In addition, the 'availability'-threshold appears to be rather low: for instance, an investigative measure would already not be available in cases where the underlying conduct is not punishable under German law.[65] Such an interpretation would in effect amount to a requirement of double criminality, which would hardly be in line with the spirit of the Directive.[66] Nevertheless, Sec. 91f(2) IRG is only a (virtually) verbatim transposition of Art. 10(1) EIO-Directive.[67] Thus, eventually, it remains to be seen how Sec. 91f(2) no. 2 IRG is applied in practice.

The situation in question also appears to be (partly) covered by Sec. 91b(1) no. 1 IRG. According to this regulation that implements Art. 11(1)(h) EIO-Directive '[t]he rendering of mutual assistance is not permissible' where a request relates to 'specially designated criminal offences' ('besonders bezeichnete Straftaten') or 'offences of a certain degree of severity' ('Straftaten von einer bestimmten Erheblichkeit') specified by law, and where 'the offence giving rise to the request does not meet the requirements even, where applicable, in the case of analogous conversion of the facts'.[68] For example, a request for telecommunications surveillance (i. e. both interception and recording) is to be rejected, if it does not refer to any of the offences listed in Sec. 100a(2) StPO. Those situations (covered by Sec. 91b(1) no. 1 IRG) to a certain extent appear as special cases of Sec. 91f(2) no. 2 IRG as the measures could not be ordered in a corresponding German case. However, Sec. 91b(1) no. 1 IRG constitutes a binding ground for refusal.[69] Whether an alternative measure might produce comparable outcomes is irrelevant.

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[62] 'If, in the case under subSec. (2), no other investigative measure is available which can achieve the same outcome as that stated in the request in accordance with Sec. 91d (1), the competent agency in the requesting Member State is to be notified, without delay, of the fact that it was not possible to render the requested assistance'.

[63] Thereto BT-Drs. 18/9757, p. 25 ff.

[64] The explanatory memorandum remains rather vague on this point (BT-Drs. 18/9757, p. 71). Cf. On this *Zimmermann*, '§ 91f IRG', in: Schomburg (n. 14), mn. 6 ff.; *Rackow* (n. 32), at 83.

[65] Drawing this conclusion: *Böse* (n. 37), 152, at 156. In the same vein *Heimgartner*, S./*Niggli*, M. A., 'Einführung' in: M. A. Niggli/S. Heimgartner (eds.), Basler Kommentar Internationales Strafrecht (2015, Helbing-Lichtenhahn Verlag), mn. 58 on the EIO-Directive.

[66] Cf. *Zimmermann*, F. (n. 64), mn. 16 ff.

[67] 'The executing authority shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where: […] (b) the investigative measure indicated in the EIO would not be available in a similar domestic case'. On the genesis of Art. 10 EIO-Directive BT-Drs. 18/9757, p. 26: 'In the course of the negotiations on the general grounds for refusal, however, the provision itself was de facto developed into a comprehensive ground for refusal, although the provision has a less striking location and name'.

[68] Cf. *Trautmann/Zimmermann* (n. 46), mn. 10.

[69] *Wörner* (n. 14), main Sec. 4 mn. 549.

In both groups of cases, according to Sec. 91f(5) IRG, it then depends on whether 'the same result' can be achieved with another investigative measure. If this is not the case, the procedure ends with a corresponding notification to the requesting foreign authority. If, on the other hand, the desired result can be achieved by other means, the alternative measure is to be used (Sec. 91f(2) IRG).

Hence, Sec. 91f IRG *does* apply to catalogue measures (Art. 10(2) EIO-Directive), even though its non-applicability had originally been envisaged in the drafting process.[70] Yet, the German legislator believed that implementing the catalogue of Art. 10(2) EIO-Directive, which comprises measures that are to be available in all cases, was unnecessary: first, due to the fact that the list was said to contain only measures that would only lightly infringe upon the rights of the person; and second, since the old law on other legal assistance failed to specifically define the threshold for a serious rights' violation.[71] This point of view is unconvincing, since the severity of the infringement is not a requirement of Sec. 91f(2) no. 2 IRG (in conjunction with Sec. 91f(5) IRG). This means that Sec. 91f IRG (according to its wording) does cover cases involving minor infringements and accordingly, as just explained, the request will not be implemented where the measure would not be available in a national case. This ultimately means that the availability of catalogue measures is not guaranteed in all cases. In light of this, it is suggested that the issue should be solved by interpretation in conformity with the Directive.[72] Whether this is feasible is doubtful, however, given the clear wording of the provision.

In addition to the provisions mentioned above, Germany did apply the additional non-recognition grounds provided for specific sensitive measures. The discretion in this respect is implemented by Sec. 91c IRG, which governs heterogeneous special types of mutual assistance. For these types Sec. 91c IRG provides for '[a]dditional conditions governing permissibility', so that the competent authority has discretion as to the ground for refusal (Sec. 91b, 91c or 91f(2) IRG) indicated to the requesting State.[73]

Sec. 91c(1) IRG stipulates that audiovisual interviews would not be permissible, if the person to be interviewed did not consent thereto. The wording of the transposition provision includes not only both suspects or defendants but also witnesses and experts. It is doubtful whether this represents a transposition in conformity with the Directive, since Art. 24(2)(a) EIO-Directive provides for a consent requirement only for suspected or accused persons.[74]

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[70] Cf. Referentenentwurf ('Ministerial Draft'), p. 8 and 74 <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_InternationaleRechtshilfeStrafsachen.pdf?__blob=publicationFile&v=2>, accessed 24 December 2022.

[71] BT-Drs. 18/9757, p. 26.

[72] *Zimmermann* (n. 64), mn. 14

[73] BT-Drs. 18/9757, p. 62.

[74] Cf. *Trautmann*, S., '§ 91c IRG', in: Schomburg (n. 14), mn. 3.

Sec. 91c(2) IRG provides that, in addition to the conditions referred to in Sec. 91b (1), (3) or (4), the requested assistance in certain cases may be rendered only under the conditions set out in Sec. 59(3) IRG.[75] These certain cases are listed in nos. 1 and 2, and contain, inter alia, requests for information in respect of financial accounts, requests about individual account activities, etc. Sec. 59(3) IRG[76] is the (traditional) basic rule for other assistance,[77] requiring that the requested measure (according to German law) has a legal basis, with the consequence that a request would not be permissible, if it related to a measure unknown to German law. The same applies to requests that are subject to constitutional constraints.[78] Strictly speaking, Sec. 91c(2) IRG guarantees the unrestricted applicability of the basic provision of Sec. 59(3) IRG, as Sec. 59 IRG – *beyond* the cases of Sec. 91c(2) IRG – is the *lex generalis vis-à-vis* the special provisions implementing the EIO-Directive.[79] As a result of the unrestricted applicability of Sec. 59(3) IRG, the German standard of fundamental rights applies to Sec. 91c(2) IRG and its ensuing application.[80]

Implementing Art. 23(2) EIO-Directive, Sec. 91e(1) no. 4 IRG covers the situation where a person is to be transferred to Germany for the purpose of criminal proceedings in another Member State of the European Union. Granting can be refused whenever the person concerned does not consent.[81]

Sec. 91e(1) no. 5 IRG implements the provisions of Art. 29 EIO-Directive on assistance in undercover investigations. The authorisation may accordingly be refused, if no agreement can be reached between the competent authorities on the modalities of the operation (cf. Art. 29[3][b] EIO-Directive). Thus, it is ultimately up to the competent German (police-)authorities to bring about the rejection of the authorisation by declaring the negotiations on the undercover mission as failed.[82]

f) Remedies

Germany has not created a remedy which covers all EIO-cases. Legal remedies are the following:

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[75] The cases referred to in no. 1 – 3 correspond to the constellations defined in Art. 11(1)(c), 26(4) cl. 3, 27(5) cl. 3, 28(1), 29(3), 30(5) EIO-Directive (cf. BT-Drs. 18/9757, p. 62 f.).

[76] 'Legal assistance may be provided only in those cases in which German courts and executive authorities could render mutual legal assistance to each other'.

[77] *Trautmann*, S./*Zimmermann*, F., '§ 59 IRG', in: Schomburg (n. 14), mn. 33.

[78] Cf. On the significance and content of § 59 in particular *Trautmann/Zimmermann* (n. 77), mn. 34 ff.; *Güntge*, G.-F. (n. 9), main Sec. 4 mn. 9 ff. and 18 ff. Of course, Sec. 59(3) IRG must not be misunderstood as requiring (apart from the cases of Sec. 66 – 67 IRG) double criminality (cf. *Trautmann/Zimmermann*, in: Schomburg (n. 77), mn. 40).

[79] BT-Drs. 18/9757, p. 63.

[80] *Trautmann/Zimmermann*, in: Schomburg (n. 46), mn. 22.

[81] BT-Drs. 18/9757, p. 69.

[82] Cf. BT-Drs. 18/9757, p. 69.

As far as incoming requests are concerned, there is a specific legal remedy only for persons affected by the surrender of property to foreign countries. Persons can appeal to the Higher Regional Court (*Oberlandesgericht*) to review the legal basis for the provision of legal assistance. This remedy existed prior to the implementation of the EIO-Directive via Sec. 61(1) cl. 2 IRG. How limited the scope of this remedy is, demonstrates the fact that according to the prevailing view only third parties but not the accused count as affected persons.[83] If, for example, an item belonging to person X is a relevant piece of evidence in the proceedings against Y, only X, but not Y, can bring legal action against the transmission of the evidence. In the given example, this means that for the accused Y the general rules of the StPO apply. Y can appeal the decision to secure/seize X's object. If, in such a case, the competent Regional Court (*Landgericht*) comes to the conclusion that the seizure was illegal because the conditions for the provision of legal assistance were not met, it submits the matter to the Higher Regional Court.[84] This procedure integrates remedies within the context of legal assistance into those regarding the domestic execution of the requested measure (so-called 'integration model').

Sec. 91i(1) IRG does nothing more than to clarify that in cases in which the surrender of property is requested through an investigation order and proceedings under Sec. 61(1) IRG are initiated,[85] the Higher Regional Court examines the permissibility of legal assistance and both the related authorisation- (Sec. 91e[3] IRG) and Sec. 91f IRG-decision.

It may be added that beyond these cases, it is debatable whether authorisation-decisions can be reviewed by a court and, if so, which court has jurisdiction.[86] Arguably, authorisation decisions regarding other assistance (such as those rendered within the context of the EAW) should be subject to judicial review, since they are not only based on intragovernmental considerations concerning the external relationship with the other State but also include aspects of the protection of individual rights. The German legislator missed the opportunity to provide a clarification thereto,[87] as the explanatory memorandum explains that decisions under Sec. 91e and 91f

[83] BT-Drs. 18/9757, p. 30; Böhm believes that the defendant should be included by way of interpretation in conformity with the Directive, *Böhm*, K. M., 'Die Umsetzung der Europäischen Ermittlungsanordnung', Neue Juristische Wochenschrift 69 (2017), 1512, at 1514 with n. 20.

[84] Cf. OLG Dresden, Decision, 30. 11. 2010, OLG Ausl 74/10, Neue Zeitschrift für Strafrecht-Rechtsprechungs Report 2011, 146 f.; *Rackow* (n. 32), main Sec. 4. mn. 131.

[85] See *Wörner* (n. 9), main Sec. 4. mn. 616; also *Böhm* (n. 83), 1512, at 1514.

[86] See *Böhm*, K. M. 'Das Rechtshilfeverfahren', in: H. Ahlbrecht et al. (eds.), Internationales Strafrecht (2nd ed. 2018), p. 216.

[87] Despite the convincing counter-arguments, the view that the granting decision was not subject to appeal still enjoys a certain popularity. The proponents of this view argue that legal protection under the integration model is sufficient to ensure that the rights of the party concerned are not violated (cf. *Johnson*, C., '§ 61 IRG', in: H. Grützner et al. (eds.), Internationaler Rechtshilfeverkehr in Strafsachen (Heidelberg: C.F. Müller, 25th supplement Apr. 2012), mn. 15.

IRG do indeed affect individual rights and must therefore be subject to judicial review.[88] Then again, the clarification in Sec. 91i(1) IRG only refers to the cases of Sec. 61(1) IRG, as previously pointed out.

III. The EIO in Practice

The conlusions with regard to the German EIO practice are mainly based on questionnaires that have been circulated, filled in and returned via e-mail by the experts. One of the evaluated questionnaires contains collective answers from a German law enforcement agency. In one case, the information was collected through a telephone interview. The assessments from the field come from 14 prosecutors (based in Augsburg, Bielefeld, Bremen, Detmold, Flensburg, Freiburg, Gera, Göttingen, Hamburg, Heilbronn, Itzehoe, München I, Osnabrück, Saarbrücken) and one defence lawyer (Berlin).

1. The EIO Form

The utility of the form varies with regard to incoming EIOs. While about two thirds of the practitioners report to not have encountered any difficulties in respect of incoming EIOs, others point out that it was necessary to consult from time to time with the issuing authority. It should be noted that this communication is not regarded as the formal consultation within the meaning of Article 11(4) of the EIO-Directive. The subject of the aforementioned queries were the facts of the case or, particularly, the question of whether requested hearings should be conducted by the police, the Courts or the public prosecutor. Where documents are requested, it was sometimes unclear whether they were to be obtained through a search. In one instance, it has been criticised that the form did not provide for a checkbox to be ticked in cases where documents are to be obtained from witnesses or defendants. The quality of translations is also addressed, particularly regarding cases of economic crime.

Experiences regarding outgoing EIOs appear to vary, too. Although there were no refusals reported ‘due to problems with the EIO form’, nevertheless, the form was often perceived to be confusing. In concrete terms, several practitioners propose to provide for mandatory fields on the first page concerning the issuing authority and the executing authority or for a cover page to render a separate cover note unnecessary. Furthermore, it is reported by several practitioners that requested measures have been overlooked where an EIO relates to several investigative measures.

A further expert report suggests to completely restructure the form and place the alleged facts at the beginning. Furthermore, one expert criticises Annex A, Sec. E. The relevant information would potentially become confusing if several persons

[88] BT-Drs. 18/9757, p. 30.

were involved, especially if they had witness and sometimes accused status. Finally, Sec. G is criticised by one expert for not providing a field for the wording of an unlisted offence.

2. Time Frames

Different experiences were reported regarding the time limit regime. One practitioner explains that there are cases in which the deadlines cannot be met due to external circumstances (e. g. a witness does not appear). In some cases, however, it can also be observed that outgoing requests are still processed hesitantly (about one fifth of the reports accentuate this issue). By contrast, urgent requests under the EIO or EIOs which are mediated through contact points (Eurojust, EJN) were evaluated more positively.

3. Channels of Communication

As far as the transmission of an EIO is concerned, the most common way of sending EIOs is by postal mail or (tele)fax. The use of e-mails is also reported in some cases. In this respect, e-mails are encrypted or sent via the EJN. Some practitioners report that additional information is sent by e-mail, save for personal data. Most of the experts report that the electronic form is filled in (and then sent as a printed version). The EJN site is very often used to obtain information about the other country involved.

4. The Practical Experience with Non-Recognition/ Non-Execution Grounds

The rejection of an incoming EIO on the ground of disproportionality is only reported by one practitioner. According to one other practitioner, in exceptional cases, the request would be refused where it relates to a coercive measure, and the behaviour described is not punishable under German law. Another practitioner refers to requests relating to serious infringements in cases of proceedings involving petty offences. An inconclusive request would be rejected. A majority of the experts reports that in problematic cases consultation with the issuing authority is sought. Several experts confirm that the substantive grounds for issuing the EIO are taken into account in the proportionality assessment.

The majority of practitioners report that there has not been a refusal on the grounds of a violation of fundamental rights, yet. In one case it is reported that an incoming EIO was rejected with reference to Article 5 of the Basic Law (freedom of expression). The request in question was based on media reporting permissible under German law, which the requesting State considered to be defamatory. Another expert reports that the requested state claimed that fundamental rights' protections demanded

that bank account data could only be provided for a shorter period of time. The request was then limited accordingly.

Problems relating to double criminality appear to arise in certain areas of crime. Concrete cases in which incoming requests had to be rejected are reported from the area of sexual offences (non-registration as a convicted offender in the other State, which is punishable in the other State) and (repeatedly) from the area of defamatory offences. Also mentioned is the breach of maintenance obligation.[89]

With regard to outgoing requests being rejected due to double criminality issues, one such request is mentioned from the field of commercial criminal law.

Roughly fifty percent of the experts state that a request would be rejected as soon as it is apparent that it is not aimed at evidence gathering, but instead at the freezing of property. Where no such proceeding is described, it is reported that treatment as or the reinterpretation into a request pursuant to Framework Decision 2003/577/JI would be examined or a discussion with the authority of the other State would be sought. Where an EIO is intended for the purpose of freezing property only, one practitioner points out that this will regularly result in a domestic money laundering investigation. In the context of these procedures, the relevant provisional measures to secure confiscation are undertaken.

5. Remedies

As regards the perspective of the defence the German system of legal remedies in the field of other legal assistance is perceived as complex and insufficient. There is no specific remedy. Legal protection against incoming investigation orders must therefore be obtained in the course of the national remedy (e. g. 'Beschwerde' [complaint] pursuant to Sec. 304 StPO) against the requested measure.

IV. Conclusion

The European Investigation Order has arrived in German legal practice. Overall, there are no fundamentally negative assessments from the judiciary. Specific criticism relates in particular to the form. From a defence perspective the system of legal remedies deserves criticism; it has not been reformed in the course of the implementation of the Directive.

[89] For an explanation of both the term and crime, see <https://e-justice.europa.eu/content_maintenance_claims-47-de-en.do?member=1#toc_1>, accessed 24 December 2022.

Abbreviated National Report – Italy

By *Laura Scomparin, Valeria Ferraris, Andrea Cabiale, Caroline Peloso* and *Oscar Calavita*

I. The Implementation of the Directive of the European Investigation Order in the Italian Legal System

Italy has implemented the EIO-Directive by transposing the aforementioned Directive 2014/41/EU by means of Legislative Decree no. 108 of 21 June 2017, entered into force on 28 July 2017 (Italian Decree). The EIO-Directive was implemented by a legislative decree: this is an act adopted by the Government having the force of a law[1]. The delegation to the Government was contained in European Delegation Law no. 114 of 19 July 2015 (Annex B), which authorised the Government to transpose directives and other acts of the European Union. In particular, Art. 1(1) EIO-Directive delegates the implementation of the directives listed in Annexes A and B to the Government – the aforementioned directive is included in Annex B – and refers, with regard to procedures, principles and guiding criteria of the delegation, to Arts. 31 and 32 of law no. 234 of 24 Dec. 2012 ('General rules on the participation of Italy in the formation and implementation of European Union legislation and policies'). The transposition of the EIO Directive was delayed with respect to the deadline set out in Art. 36 EIO-Directive – which provided 22 May 2017 as the deadline. Although the Italian Government had already received the delegation to adopt the legislative decree implementing the EIO-Directive by European delegation law no. 114 of 2015, the delay was caused by the late planning of the text and the length of the process.

The EIO takes place in the criminal procedure. The only more precise reference is contained in Art. 27 of the Italian Decree in the chapter related to the issuing procedure for an EIO made by Italy: this Art. provides that the authorities which are entitled to issue an EIO are the Public Prosecutor or the judge in charge of the proceeding 'within the context of a criminal proceeding or a proceeding for the application of

[1] In Italy, the legislative decree is envisaged by Art. 76 of the Constitution of the Italian Republic. It is an instrument by which the Chambers decide, either due to technical inadequacy or lack of time, to not discipline in detail a matter which is not covered by statutory reserve. However, they reserve the right to establish the principles and guidelines, *i. e.* the 'framework' in which the Government will have to legislate. Legislation will be based on a specific delegated law. If the government violates the powers indicated in the delegated law, *e. g.* by adopting regulatory measures not provided for in the delegation, the relevant provisions are affected by constitutional illegitimacy (called 'excessive legislative delegation').

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a measure of patrimonial prevention'. The practical analysis conducted about the use of the EIO by the Italian judicial authorities has shown that the EIO is used in the preliminary investigative police or prosecutorial phase.

The Italian Decree takes into consideration the procedure of the EIO-Directive from two points of views, depending on whether the Italian authority is the addressee or the issuer of the EIO.

II. The Active Procedure

Art. 27 of the Italian Decree provides that the authorities which are entitled to issue an EIO in Italy are the Public Prosecutor or the judge in charge of the proceeding 'within the scope of their respective attributions' and 'within the context of a criminal proceeding or a proceeding for the application of a measure of patrimonial prevention'. Art. 27(2) provides also that 'the national anti-mafia and anti-terrorism prosecutors are informed of the issue of the order of investigation, with the purpose of investigative coordination if it concerns investigations relating to the crimes referred to art. 51, paragraphs 3-bis and 3-quarter, of the Code of Criminal Procedure'[2]. The public prosecutor will be in charge of the orders issued during the preliminary investigations also when the object of their activities requires prior authorization on behalf of the judge (for example, for interceptions). In fact, the incidental competence of the judge for the investigations does not change the domain of the phase (Art. 43 of the Italian Decree). The judge, on the other hand, will issue the orders in the *stricto sensu* procedural phases: the preliminary hearing (for example, for the performance of activities of probative integration pursuant to Art. 422 Italian Code of Criminal Procedure [CCP]), the special rites that provide for activities of investigative integration (for example, the abbreviated judgement, in the cases referred to in Art. 441(5) CCP) and the ordinary debating judgement. In general, Italian authorities have no specific issues in filling in the EIO form and they have no experience of rejecting their EIOs requests. It is possible to observe how the public prosecutors' offices have developed proper competent pools dedicated to EIO in which the magistrates and also the police forces work together.

III. The Passive Procedure

On contrary, concerning the passive procedure, Art. 4 Italian Decree provides that the Italian authority, public prosecutor or judge, shall execute the EIO for investiga-

[2] In Italy, there is a specific competence for anti-mafia crimes, aimed at stopping the spreading of organized crime on the national territory. Therefore, the legislator decided to create a specific competence of the Anti-Mafia and Anti-terrorism Prosecutor's Office in relation to certain types of crimes and in particular those listed in Sec. 51 of the Code of Criminal Procedure.

tions depending on whether an investigative or evidential act has to be carried out. The Italian authority must carry out the execution by observing the forms expressly requested by the issuing authority, provided they are not contrary to the principles of the State legal system. The choice to identify in the public prosecutor of the capital of the district the competent authority to execute the EIO is coherent with the Italian procedural legal framework. Entrusting the investigative activity requested by a foreign authority to the public prosecutor or to the judge for preliminary investigations seems more consistent with the proper vocation of these bodies, and more adequate for efficiency reasons.

However, it can happen, according to Art. 5 of Italian Decree, that the investigation acts or evidence assumptions must be carried out by the judge, because the issuing authority has made an express request in this sense or because the act has to be made by the Judge according to Italian law. In this case, the prosecutor verifies the existence of formal requirements of the investigation order and presents the request for assistance to the judge for the preliminary investigations (GIP), which authorizes – but it is not clear with what type of measure – the execution after verification of the conditions for the recognition of the investigation order (see above II.). In this case, the judge executes the order in accordance with Art. 127 CPP which provides a confidential procedure in closed session except if the issuing authority asks for different forms, and on the condition that they are not contrary to the principles of the State legal system (Art. 5 Italian Decree).

In the passive procedure a recognition of the EIO is always requested. The public prosecutor is the only receiving authority and no measure can be ordered by the police alone. The evaluation of the Prosecutor concerns:

– the existence, in the specific case, of situations which hinder the recognition and execution of the European Investigation Order, provided for by Art. 10 Italian Decree;
– the condition of immunity granted by the Italian State to the person against whom proceedings are being brought;
– the damage to national security that could result from the execution of the investigation order;
– the violation of the prohibition of non bis in idem if the person subject to the proceedings has already been definitively judged on the same facts;
– incompatibility with the obligations under Art. 6 TEU and the CFR;
– the verification of the principle of double incrimination: the order of investigation cannot be recognized if the act for which it was issued is not punishable by Italian law as a crime, regardless of the constitutive elements or legal qualification provided for by the law of the issuing State (Art. 10(1) lit. f Italian Decree), except for the exceptions to the double criminality provided for in the Art. 11 Italian Decree.

There are no particular inspections about the authority when the EIO is issued by a Prosecutor, in this case it's generally executed. Art. 4 Italian Decree provides that the EIO is recognised by a motivated decree issued by the public prosecutor in the Court of the district where the requested actions must be carried out. In the event that an investigation order is issued, in the same or in another procedure, to supplement or complete a previous order, recognition and execution are delegated to the competent prosecutor for the initial procedure. Consequently, all measures requested with an EIO must be ordered under the supervision of the public prosecutor or proceeding judge. In the explanatory report to the Italian Decree is indicated that the validation procedure requires that to the public prosecutor and the judge is assigned a role of control, and not only of a formal nature, concerning the existence of the conditions for the recognition of the investigation order.

In the case in which the Italian authorities receive an EIO request, more difficulties arise from the improper use of the form EIO by the requesting authorities. In addition to consider the form sometimes as irrational and illogical, the main problems observed by the Italian authorities concerns that very often personal details, like the place of birth of the person, are not specified. This makes hard to proceed with the identification of the people. Other problems arise from the fact that issuing authorities don't describe well the fact for which they proceed with the request for an EIO. A lot of problems concern the translation quality: getting high quality translations occur not to use English language, but other languages. Moreover, some judicial authorities tend to adapt the form: sometimes they only translate the model, but do not use the real form set forth by the Directive: in doing so, they refuse to cooperate.

It appears that, facing these problems arising from the use of the module, authorities use very often the consultation procedure and they use almost always informal channels between them, particularly when it comes to countries with which a close relationship is hinged. This process involves the exchange of email of directs call, also by means of the liaison magistrates: the authority talks directly in order to request other information and to ensure the execution of the EIO. Practitioners tend also to use cooperation and informal channels to complete the information on the condition that the formal requirements are respected: this practical solution allows to ensure a good operativity of the EIO across countries. Only when some essential aspects are missing or when there is no absolute respect for the EIO module, the authorities refuse the EIO.

IV. Language; Timeframe and Modality of Transmissions of EIO

Art. 32(4) of the Italian Decree states that 'The investigation order shall be transmitted in the official language of the executing State or in the language specifically indicated by the executing authority'. The language accepted for the EIO is Italian, but even if the website of the European Judicial Network indicates only Italian, in case of urgency English is also accepted: while waiting to translate the EIO into

the language of the country of execution, an English version is sent while waiting to find an interpreter who then relays it in the required language.

Concerning the channel of transmission of the EIO, Art. 32 Italian Decree (called Transmission of the Investigation Order) states that 'The Investigation Order and any communication concerning its execution will be transmitted to the executing authority in a suitable form to ensure the authenticity of the origin, also with the help of the central authority if necessary'. And Art. 32(2) and (3) specifies that 'the transmission may take place via the telecommunications system of the European Judicial Network' and that 'the executing authority shall be identified also with the help of the European Judicial Network'.

Concretely, it appears that the use of EIO's electron model is not systematically used by authorities and a lot of exchanges between issuing and receiving authorities take place very often by phone or email. It also appears that the European Judicial Network website is widely used and consulted by the authorities, particularly to find the addresses. But some problems arise from practice about channel of communications: it has been pointed out that sometimes the authorities don't reply to communications and there is also a lack of security in the system of communication by e-mail system: many countries don't have a certified mail system which raise the problem of the security of the data transmitted. The same problems concern the case in which the documents of a country contain a lot of data and the documentation is very voluminous. In this case, the use of traditional channel of communication can be problematic, in particular if it's sent by e-mail. The creation of a virtual space – like a cloud or an electronic platform – is encouraged because it is easier for authorities to share data and the electronic format of the EIO module.

Concerning the frame-time experience, Italian legislation has set a time limit for the recognition and execution of the EIO in accordance with Art. 4 Italian Decree. The public prosecutor of the capital of the district in which the requested acts are to be carried out must, by the way of a motivated decree, recognize the order of investigation within thirty days since its receipt or within a different period indicated by the issuing authority, and in any case no later than sixty days. Execution shall be carried out within the following ninety days, observing the forms expressly requested by the issuing authority if they are not contrary to the principles of the State's legal system. Art. 4(3) provides, however, that recognition and enforcement execution shall take place as soon as possible, if indicated by the issuing authority, when there are reasons of urgency or necessity. According to the report of the Ministry of Justice, the terms are to be intended as not entailing any disqualification (they called 'ordinatori' terms)[3]. In respect of time-limits, an appeal procedure is provided for; however, the

[3] Non-peremptory terms do not produce any legal consequences for the person who has not complied with them, except where the Judge, after a purely discretionary assessment, decides that the expiry of the time limit has led to a situation incompatible with the nature of the legal act for which the time limit was laid down. They are opposite to mandatory terms refers to terms with deadline that is considered essential, otherwise it will result in the loss of the possibility of carrying out that procedural activity which was linked to it.

time limit for appealing is not included in the time limits for recognition and execution. They start from the communication mentioned in Art. 4(4) (i. e. the communication of the decree of recognition which is communicated by the secretariat of the public prosecutor to the defender of the person under investigation within the time limit set for the purposes of the notice to which he is entitled under Italian law for the performance of the act). Art. 13 Italian Decree provides for a system of appeal so that within five days the person under investigation and his or her lawyer may, against the decree of recognition, file an objection to the judge for preliminary investigations.

In general, the time frame is considered reasonable and appropriate and Italian authorities meet the deadlines without major problems. In fact, when the timetable is not respected this is due to the fact that requesting States ask for some special investigations (e. g. banking inspections) which require more time. The need to proceed urgently is determined by the police and the Italian authorities said that they try to respect it and use Eurojust or other contact points of the European Judicial Network or even by making requests by email, telephone, fax – if these channels are allowed and under the condition that the order will be sent later by paper.

V. The Role of the Central Authority

Art. 2 of the Italian Decree contains the definitions and indicates that the central authority is the General Directorate for Criminal Justice – Office II – International Cooperation of the Italian Ministry of Justice. The Italian legal system has chosen direct transmission between the judicial authorities, both for the profile of the transmission of the order and for any further communications. Although Art. 7(3) EIO Directive allows a central authority to transmit and receive orders administratively, it was preferred not to aggravate the procedure. The intervention of the central authority is restricted to the functions of assisting the Italian judicial authorities as issuing authorities where necessary.

There are various references to the central authority and its prerogatives in the Italian Decree. The Ministry may be called on to assist 'if necessary' in the event of difficulty in communicating with the executing authority or when problems arise as to the origin and authenticity of the document, in accordance with the provisions of the Directive (Art. 32 'Transmission of the order of investigation'). Art. 4 Italian Decree establishes an obligation of communication 'in any case a copy of the investigation order received shall be transmitted to the Ministry of Justice' in order to allow the central authority to know the investigation orders received from the national judicial authority. Art. 15(2) Italian Decree provides that, in case of significant charges, the public prosecutor must inform the issuing authority and the central authority, in order to consider the share of the resulting charges with the issuing State. Art. 39 Italian Decree called 'Request for a hearing by videoconference or other audiovisual transmission' provides that if the executing authority does not have the necessary techni-

cal means or access, the judicial authority which issued the order for investigation may make them available through the central authority. Preventive notification to the central authority is recommended within the following limits. In fact, the letter and the whole regulatory framework of the Directive do not allow the Minister to recognize inhibitory powers.

VI. The Proportionality of the EIO

The Italian legislation has fairly faithfully transposed the spirit and the substance of the EIODirective: as issuing State, the Italian legislation paid attention to the respect of the principle of proportionality. The Italian Decree encompasses the principle of proportionality in Art. 7: this disposition underlines the concrete evaluation of the functionality of the instrument with regard to the pursued objectives and the non-redundancy of the requested and it is one of the criteria that the authorities have to evaluate. As a result, a violation of proportionality is always subject to the same screening of legal articles. The assessment takes place by comparing the evidentiary requirements of the investigation, the seriousness of the conduct and the compression of the fundamental rights of the suspect.

A violation of proportionality can therefore result from the violation of a fundamental right, but the assessment about proportionality is more complex when an investigative act is requested in execution of an EIO but the investigative framework is unknown by the receiving authorities and the request act is particularly invasive, according to the internal legislation. In general, the Italian authorities claim to avoid refusing the EIO on grounds of proportionality for reasons of cooperation between countries, often not knowing the general context of the investigation. In effect, the reference standard is always the impact of the measure on the fundamental rights of the suspect in the light of the internal procedural system: for this reason, clarification between authorities is always necessary. Sometimes if the other authorities do not cooperate, a refusal of the EIO based on a non-recognition ground is possible: for example, in a case in which France asked Italy to wiretap a large number of telephones, the Prosecutor realized that French legislation was different from Italian one, so he asked for the investigation files to be sent in order to understand more about the facts and the context of the wiretapping operation request. Because the investigation files were not transferred, he refused the EIO. In this case, the Prosecutor considered that it was impossible to assess the proportionality of this maximum interception request in the light of compliance with the guarantees provided by domestic law without taking into account the framework of the investigation in the request country.

VII. Special Methods of Execution and Guaranteed Acts of Investigations

Art. 9 (Special procedures for execution) of the Italian decree provides that when the act required for the execution of the investigation order is not provided for by Italian law or when the conditions required by Italian law for its execution do not exist, the public prosecutor, after notifying the issuing authority, must proceed to the execution of one or more other acts that are suitable for the achievement of the same objective. It must therefore be deduced that the Italian State accepts to carry out an investigative measure only when it is provided for by national law and only if the conditions which would make it executable on the national territory are met.

This is also the case in which the Italian system provides that some evidentiary activities can be carried out only in relation to certain types of crime and/or in the presence of a minimum thresholds of punishability. If the Italian system does not allow the execution of unforeseen measures, but still allows the execution of acts, albeit different, suitable for the achievement of the same purpose.

Otherwise, it should also be considered that the atypical evidence is admitted by the Italian system, based on Art. 189 CPP. In such a case, the legislator requires the judge first of all to examine the aptitude of the evidence to verify the facts and secondly to ascertain whether the assumption may lead to an infringement of the person's moral freedom. In any case, before admitting it, the parties must be put in a position to exercise their right to be heard. However, if the evidence is not regulated by law and if it is an evidence acquisition that affects a Fundamental Right, it is necessary to have an express discipline in accordance with the rule of law. Acts of investigation who affect fundamental rights must be regulated by law in the cases and in the modalities of Art. 13, 14 and 15 of the Italian Constitution.

This general rule is also confirmed by Art. 23(1) and (2) Italian Decree with regard to interceptions requested by foreign authorities, which must be carried out with the assistance of the Italian authority. The disposition in fact provides that operations must be authorized by the judge for preliminary investigations 'as long as the conditions of admissibility provided for by national law are observed'. However, Art. 24(2) Italian Decree outlines, in relation to interceptions to be carried out without the assistance of the Italian authority, a special rule less respectful of national requirements: it is only prescribed that the judge for preliminary investigations informed of the operations must order 'the immediate cessation' of the operations if the interceptions have been ordered in relation to offenses for which, according to national law, 'are not allowed'. It has been pointed out that the literal content of the prescription seems to apply only to the provisions of Art. 266 and Art. 266*bis* CPP – that identifies offenses for which wiretapping is possible – and not to other requirements for admissibility set out in Art. 267 CPP. This would mean that, in relation to the foreign interception measures discussed, the logic of mutual recognition would apply almost entirely. It is an interpretation that is confirmed in some passages

of the explanatory report to the decree, according to which, in this case, it would be sufficient to only formally screen for the recurrence of a title of crime that, in the internal system, allows access to the means of evidence. It would not be conceivable to require foreign authorities to venture into calibrated assessments of the typical forms of the Italian system, probably foreign to the habits and culture of the requesting State. If this were the case, it would be possible to use extremely invasive investigative tools for privacy on the Italian territory, without any investigation into the existence of the historical premises for justifying them. Such an outcome would be incompatible with the obligation to respect fundamental rights, which is clearly laid down in Art. 1(4) EIO-Directive and Sec. 1 Italian Decree.

VIII. Case of Refusal of EIO

Sec. 10 of Italian Decree regulates the grounds for refusing an enforcement request of an EIO in accordance with the provisions of Art. 11 EIO-Directive. Enforcement may be refused if: (a) 'the order of investigation transmitted is incomplete or the information contained in it is manifestly erroneous or does not correspond to the type of act requested'.

That hypothesis reproduces the ground for refusal of Art. 16(2) lit. a) EIO-Directive which provides that, without prejudice to Art. 10(4) and (5) EIO-Directive, the executing authority must inform the issuing authority immediately and by any means available: (a) if it is impossible for the executing authority to take a decision on recognition or enforcement because the form in Annex A is incomplete or manifestly incorrect. Point (b) of the Sec. 10 Italian Decree states that the EIO shall not be recognized and enforced if 'The person against whom the proceedings are being conducted enjoys immunities recognized by the Italian State which restrict or prevent the exercise or continuation of criminal proceedings'.

This provision refers to Art. 11(1) lit. a) EIO-Directive which states that the executing authority may refuse enforcement or recognition where the law of the executing State provides for immunity or privileges which make it impossible to enforce the EIO, or rules on the determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media which would make it impossible to enforce the EIO.

Moreover, this provision for refusal is linked to Art. 9(4) Italian Decree which states that: 'If authorization to proceed is necessary to carry out the act which is the subject of the order for investigation, the public prosecutor shall request it without delay'. Consequently, if the privilege or immunity is revoked by an authority of the executing State, the executing authority must transmit the request to that competent authority without delay. This case is related to the provisions of Art. 11(5) EIO-Directive which states that, in the case referred to in para. 1(a) – or the hypothesis of refusal on the grounds of immunity or privilege – the executing authority must

promptly forward the request to the competent authority to waive the immunity or privilege.

Point c) states that that the execution of the EIO could be refused if it is execution can be 'prejudicial to national security'. This case resumes the hypothesis of Art. 11(1) lit. b) EIO-Directive. Art. 10(1) lit. d) EIO-Directive says that the execution of the EIO must be rejected if 'the information supplied shows that there has been a breach of the prohibition on subjecting a person, who has already been finally tried, to a retrial for the same acts'.

This situation is in accordance with Art. 11(1) lit. c) EIO-Directive and recital (17) of the Directive (with regard to the prohibition on Art. 10 EIO-Directive) provides the refusal if 'there are reasonable grounds for believing that the execution of the requested act in the order of investigation is incompatible with the State's obligations under Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union'. This situation is in accordance with Art. 11(1) lit. f) EIO Directive. Finally, Art. 10 lit. f) Italian Decree provides for a refusal if 'the act for which the investigation order has been issued is not punishable by Italian law as a crime, regardless of the constituent elements or legal qualification identified by the law of the issuing State, except as provided for by art. 9, paragraph 5, and 11'.

Art. 10 lit. f) Italian Decree combines Art. 11 lit. g) and lit. h) EIO Directive, both of which give rise to a lack of punishment, into a single provision.

The Italian legislation provides also additional non-recognition grounds for specific investigation measures set in Art. 22 to 31 EIO Directive. As part of the measure aimed at the temporary transfer of a detained person in the issuing State, Art. 16 Italian Decree evokes the cases of refusal formulated by Art. 22 EIO Directive for the same act of investigation. The case in which the detainee refuses his consent to the transfer, according to Art. 16 Italian Decree, entails that the order of investigation issued cannot be execute. On the other hand, Art. 16 does not provide anything for the hypothesis of Art. 22(2) lit. b) EIO Directive according to which the transfer could be refused even if it prolongs the person's detention.

Art. 23(2) EIO Directive – related to the transfer of the detainees to the issuing State – provides that the specific refusal grounds of Art. 22(2) lit. a), must apply also to this case of Art. 23. However, Art. 17 Italian Decree – concerning the same situation as Art. 23 EIO Directive (referred to the transfer of the person held in custody to the executing State) – does not reproduce the same specific grounds for refusal envisaged by Art. 16 in the case of a transfer of a person held in the issuing State.

With regard to hearings via videoconference, Art. 18(2) Italian Decree provides that a hearing by videoconference or other audio-visual transmission of the person under investigation, of the accused, of the witness, or of a technical adviser or an expert may be held only if they allow it, in accordance with Art. 24(2) lit. a) EIO Directive. On the other hand, the possibility of Art. 24(2) lit. b) EIO Directive concern-

ing the refusal of execution when this investigative measure is contrary to the fundamental principles of the law of the executing State it is not envisaged. It is not expressly provided for by Art. 18 Italian Decree. It must be considered, however, that the more general provision of Art. 9 Italian Decree – which states that where the act of investigation required for the execution of the EIO is not provided for by Italian law or where the conditions for its completion do not exist – sets forth that the prosecutor provides for the performance of different acts that can be applied. It is not expressly provided for in Art. 18. On the contrary, an offence against the fundamental principles of the state of execution can be justified.

Art. 20(1) Italian Decree makes it possible to obtain information and documents from banks and financial institutions by combining the two cases provided for by Art. 26 and 27 EIO Directive, respectively, on the acquisition of information relating to bank accounts and banking operations. Art. 26(6) and 28(5) EIO Directive provides that the act may be refused 'if the execution of the investigative measure would not be authorised in a similar domestic case', but Art. 20 of the Italian Decree does not specify this case.

Art. 28 EIO Directive on 'Investigative measures involving the obtaining of evidence in real time, continuously and for a specified period' is transposed into Art. 20(2) Italian Decree, which refers to the obtaining of computer or telematic flows in real time from banks and financial institutions.

Art. 29 of the EIO Directive, on the other hand, refers to infiltration operations, providing that, in addition to the grounds for non-recognition and non-execution set out in Art. 11 EIO Directive, the executing authority may refuse to execute an EIO when:

– the execution of the infiltration operation is not authorized in a similar internal case or
– it has not been possible to reach an agreement on the modalities of infiltration operations.

This is reflected in Art. 21 Italian Decree (Undercover Operations) where it is provided that the investigation order for carrying out undercover operations is recognized and implemented in accordance with the provisions of Art. 9 of Law 146 of 16 March 2006.

With regard to wiretapping, Art. 30(5) provides that 'in addition to the grounds for non-recognition or non-execution set out in art. 11, the execution of the EIO referred to in paragraph 1 may also be refused if the investigative measure concerned is not admitted in a similar internal case. The executing State may make its decision to execute an EIO subject to the conditions applicable in a similar domestic case'.

This indication seems to have been transposed in Art. 23 (Interception of telecommunications with the technical assistance of the Italian judicial authority) according to which 'The recognition of the investigation order issued for the interception op-

erations shall be carried out, by the public prosecutor of the Court of the capital of the district referred to in the Art. 4, if the conditions of admissibility provided for by national law are met'. The interception ordered on the basis of the EIO can therefore be refused when the conditions which make the interception possible under national law do not exist.

Likewise, an hypothesis of refusal is provided for also in the case of the so-called 'routing' provided by Art. 31 EIO Directive and transposed in Art. 24 Italian Decree, that is the case where the interception of telecommunications is authorized by the competent authority of a Member State and the communication address of the person subject to the interception is used on the territory of another Member State whose technical assistance is not necessary to carry out the interception. Such hypothesis of refusal, illustrated in Art. 31(3) lit. a) and b) EIO Directive, states that the competent authority of the notified Member States may refuse the interception in case where the interception would not be authorized in a similar domestic case. This case is transposed in Art. 24(2) Italian Decree which states that the judge for the preliminary investigations must order the immediate cessation of the operations if the interceptions have been ordered in reference to an offence for which, according to the internal system, interceptions are not allowed and give contextual communication to the public prosecutor. It is therefore confirmed that Italian law provides for the refusal of recognition in cases where the interception operation is not possible under national law.

IX. European Investigation Order and Fundamental Rights

The Italian Decree refers constantly to 'fundamental rights'. Art. 1 (Provisions of principle) states that the Italian Decree – which implements the EIO Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 in Italian national law – was drafted in compliance with the principles of the law and the Charter of Fundamental Rights of the Union European Union in the field of fundamental rights, as well as in the field of freedom and due process. This provision does not expressly refer to the rights protected by Art. 6 TEU; it refers only to those protected by the CFR and to the principles of the constitutional system.

However, that provision refers to dispositions that govern the protection of the rights of the person in the criminal trial, as in Art. 2, 3, 13, 14, 15, 24, 27, 111 and 112 of the Italian Constitution. From this perspective, the 'programmatic nature' of this rule can be highlighted at the beginning of the Italian Decree, which finds implementation throughout the dynamics of application of the EIO, as can be seen from Art. 4(2), Art. 10(1), lit. e) and Art. 33 Italian Decree. Also Sec. 4(2) Italian Decree states that the execution of the EIO shall be made by the Italian authority (prosecutor or judge in charge of the proceeding) in accordance with the forms expressly requested by the issuing authority, if these conditions are not contrary to the principles of the

legal system of the Italian State[4]. Art. 10(1) lit. f) Italian Decree provides the refusal of EIO execution when there are serious grounds for considering that the execution of the requested act in the order of investigation is not compatible with the State's obligations under Art. 6 TFEU and the CFR.

The problem of coordination between European law and internal principles, both of which are responsible for protecting fundamental rights, appears in the relationship between *lex loci* – the law of executing State where evidence is located – and *lex fori* – the law of the issuing State where the evidence is to be used. It is therefore necessary to define the meaning of the concept of the principles that would preclude the execution of the EIO. It would be possible to attribute the value of 'counter-limits' to these principles, which the state of execution places in relation to the indications of the *lex fori* in order to protect its area of sovereignty[5]. These principles should therefore be interpreted restrictively, since they are intended to protect only the core set of essential rights of the national legal order[6]. According to this interpretation, the Italian State must observe its constitutional principles even in the context of evidentiary mutual legal assistance. The expression of Art. 11(1) lit. f) EIO Directive, which provides a ground for refusal if the execution of the investigative measure would be incompatible with Art. 6 TEU and the CFR, is in accordance with EU law, in particular with the principles of equivalence and proportionality of CFR: in fact, according to Art. 53, EU law should in principle guarantee fundamental rights a level of protection no lower than that which they receive in other systems with which the Union interacts: the European Convention of Human Rights ('ECHR') system, national systems and international law. This principle is more an ideal aspiration than a solution that is always feasible in practice: there are situations where equivalence could only be achieved at the cost of frustrating the Union's objectives: this is why the principle of proportionality provided by Art. 52(1), deals with the principle of equivalence[7]. Moreover, the CJEU is showing great sensitivity to the objectives of the Union in the field of judicial cooperation, often invokes the need of protecting the 'primacy', 'unity' and 'effectiveness' of EU law, and not always adequately justifies the result-

[4] *Kostoris*, R. E., 'Ordine di investigazione europeo e tutela dei diritti fondamentali', Cassazione Penale 37 (2018), 1439, 1441.

[5] The theory of the counter limits turns around the concept that Italy can accept the limitations of sovereignty – as provided by Art. 11 of the Italian Constitution – coming from the supranational orders, but with the limit of the fundamental principles of the constitutional order. This is developed in some decisions of Italian Constitutional Court: (Corte cost.), no. 117 (23 March 1994); Corte cost., 27 Dec. 1965, no. 98; Corte cost., 21 Apr. 1989, no. 232. *Draetta*, U., 'Diritto dell'Unione europea e principi fondamentali dell'ordinamento costituzionale italiano', Il Diritto Dell'Unione Europea, 12 (2007), 13, 14.

[6] *Kostoris*, R. E., Processo penale e paradigmi europei (Turin: Giappichelli, 2018), p. 135.

[7] *Mangiaracina*, A., 'L'acquisizione "europea" della prova cambia volto: l'Italia attua la Direttiva relativa all'ordine europeo di indagine penale', Diritto Penale e e Processo 24 (2018), 158 ff.

ing restrictions on fundamental rights. This is the failure, in particular of the 'Melloni judgment'[8].

In this context, it is the responsibility of the national judicial authorities called to apply the EIO-Directive to observe very strictly Art. 52 and 53 CFR. The Directive provides the means to achieve this objective: a split proportionality check between the issuing and executing authorities, which is implemented through the checks provided for in Art. 6(1), 1(4), 9(2), 11(1) lit. f, 10(3) and 14(7) EIO Directive. This is made possible by the open formulation of the EIO Directive and the receipt national act, which, while requiring compliance with the formalities and procedures indicated by the issuing authority, the fundamental principles of the law of the executing State and the fundamental rights of persons, constitute open rules. These rules must be filled with content on a case-by-case basis by the judicial authorities called upon to gather and use evidence, on the basis of autonomous balances between the values at stake and taking account of the indications of the supreme judge as regards the interpretation of Union law[9]. In fact, the CJEU is the judicial authorities that dialogue directly through the instrument of preliminary rulings.

X. Role of the Defence and Rulings of the Italian Courts

There is no express reference to the lawyer as the person who can directly issue the European Investigation Order in the Italian decree. Art. 27, which limits itself to identify the public prosecutor and the judge as persons authorised to apply for an EIO, specifies that the judge shall issue the order after hearing the parties.

However, Art. 31 provides that an investigation order can be issued by the public prosecutor or by the judge at the request of the defence. The paragraph 1 of Art. 31 states that 'The defender of the person under investigation, the accused, the person for whom the application of a preventive measure is proposed, can ask the Public Prosecutor or the judge who proceeds to issue an investigation order'. The request shall contain, on pain of inadmissibility, the act of investigation or evidence and the reasons justifying its execution or implementation (para. 2). If the Prosecutor decides to reject the request of the defence, he shall issue a motivated decree.

The position of the defence does not, however, seem to be sufficiently taken into account: the defence has only the possibility to request indirectly the issuance of an

[8] CJEU, Judgement of 26 Feb. 2013, C-399/11 (Melloni), ECLI:EU:C:2013:107: *cf. Manacorda*, S., 'Dalle carte dei diritti a un diritto penale à la carte', Diritto Penale. Contemporaneo online (17 maggio 2013), available at https://archiviodpc.dirittopenaleuomo.org/upload/1368649563MANACORDA%202013a.pdf, last accessed at 10 Jan. 2022.

[9] For a detailed analysis of the use of the EIO in respect of fundamental rights, see *Daniele*, M., 'Le metamorfosi del diritto delle prove nella direttiva sull'ordine europeo di indagine penale', Diritto Penale Contemporaneo – Rivista Trimestale, 4 (2015), 82, 92 ff, available at https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/daniele_4_15.pdf, accessed 5 January 2022.

EIO and, moreover, cannot appeal against the refusal decree of the Prosecutor refuses. It was also pointed out that the defensive investigations cannot take into account because the defence lawyer cannot ask to the Prosecutor to issue an EIO in consequence of the defensive investigation[10]. It is also noted that the decree does not provide the possibility of ensuring effective participation of the lawyer in the procedure abroad, ensuring the possibility of a double defence and a system of free legal assistance in Europe. The need to appreciate more broadly the problem of the defence in the EIO also arises from the difficulties in finding translators and ensuring a good level of translation.

The recognition phase therefore appears to be of fundamental importance from the point of view of the protection of the suspect's rights of defence and the possibility for the latter to appeal against the EIO's recognition decree concerning him. The secretariat of the Public Prosecutor has to proceed with the communication (i.e. *notification*) of the recognition decree to the defence counsel of the person under investigation within the time limit set by Italian law for the completion of the act; but if it is an act which the defence counsel has the right to attend without being notified in advance, in accordance with Art. 365 CPP, the recognition decree must be communicated at the time of the completion of the act or 'immediately after' (Art. 4(4) Italian Decree). Moreover, it is fundamental, considering that the decision to recognise the EIO depends not only on the issuing authority's preliminary requests, but also on the verification that the enforcement authority must operate with regard to the respect of the fundamental principles of its internal system, that the decree is usefully transmitted to the defence, which can validly challenge the complex assessment underlying the recognition only by examining it.

The absence of the decree of recognition is therefore able to change the procedural sequence that should protect the effective intervention of the suspect in the procedure of which herein, configuring a general nullity to intermediate regime, referred to in Art. 178(1) lit. c) CPP.

On the other hand, in the case where the recognition decree is however materially issued, but late with respect to the deadlines provided for by the legislation, there is a concrete risk of frustrating the protection of the rights of the suspect: all validation and execution operations must, in fact, respect certain and rapid deadlines.

The Italian Supreme Court of Cassation, in a case where the German judicial authority had asked Italy to carry out some acts of search and seizure against a person suspected of tax evasion, found a clear violation of Art. 4(4) of the decree[11]. The prosecuting body had, in the meantime, carried out the requested activities, carrying out the searches and seizures on 24 May and ordering, on 5 June, non-repeatable technical assessments pursuant to Art. 360 of the Italian Criminal Code for the copying

[10] Should be provided the possibility of using the EIO for defence investigations and maximise the participation of the defense counsel in the procedure by integrating its presence on the exchange platform.

[11] Cass. Pen. Sez. VI, Judgement of 7 Feb. 2019, n. 14414.

operations of the seized IT material, sending, on that date, the prescribed notice to the suspect. Also, the belatedly issued or communicated acknowledgement therefore alters the procedural sequence aimed at ensuring the correct intervention of the suspect in the proceedings and therefore generates a nullity under Art. 178(1) lit. c) CPP[12].

By this rulings, Italian Court of Cassation has specified how the specific nature of the recognition decree radically excludes an equivalence between the procedure that consists in adopting and subsequently communicating the recognition decree and its partial or complete transposition into the 'body' of another act issued by the enforcement authority, since these two acts are 'governed by different assumptions, functions and purposes'.

The above jurisprudence, enhancing the role of the recognition decree issued by the Public Prosecutor, also points out the importance of opposition as a means of appeal granted to the suspect or his defence counsel and closely connected to the recognition order. The remedy referred to in Art. 13 of Legislative Decree no. 13, although it does not have the suspensive nature of investigative acts, is in fact linked to the recognition of the EIO because it is only from this measure, which contains a careful assessment made by the enforcement authority also and above all with regard to the fundamental rights of the individual, that the defence can take a position, for the first time, on the EIO that concerns it. Specific rules govern the case in which the EIO has as its object the seizure of evidence: in such a case, the person from whom the evidence or property has been seized and the person who would be entitled to its restitution before the judge, who will decide in chambers, may also lodge an opposition. Subsequently, these subjects, in addition to the Public Prosecutor, will be able – always in the sole context of the evidence seizure for the purposes of proof – to appeal to the Supreme Court for violation of the law within ten days of the communication or notification of the judge's decision, on the basis of paragraph 7 of Art. 13 of decree.

The opposition therefore plays an essential role in that, if accepted by the *GIP,* it is aimed at obtaining the annulment of the recognition decree and thus makes it possible to interrupt the execution of the EIO and avoid the transmission of the evidence to the foreign authority, although this effect can only be obtained with certainty if the evidence has not yet been transmitted to the issuing authority of the EIO. More problematic is the hypothesis, on the other hand, where the transmission has already taken place and, subsequently, the *GIP* accepts the opposition: in this case, it is necessary that the executing State that has subsequently transmitted the evidence should make

[12] However, some case-law considers that the consequences of an incorrect issue of the recognition decree constitute a different kind of procedural invalidity, on this point see *Calavita*, O., 'Ordine europeo di indagine e rimedi interni: riflessioni sulle prime applicazioni giurisprudenziali', La legislazione penale (2021), available at https://www.lalegislazione penale.eu/wp-content/uploads/2021/09/Calavita-Approfondimenti-1.pdf, accessed on 04 April 2022.

an effort to make it known that the decree of recognition issued by the Italian judge is null and void[13].

Opposition is therefore the first moment in which the suspect and his defence counsel can express their position on the request for evidence submitted by means of EIO and it seems that it is the only way in which such a challenge can be asserted, except in the case expressly provided for in the Art. 28 of the decree authorising the suspect/defendant, his defence counsel or the person from whom the evidence or property has been seized or who would be entitled to have it returned, to submit a request for review by the EIO pursuant to Art. 324 CPP. The Court of Cassation had in fact sketched out the possibility of a competition of means of appeal under which the suspect or his lawyer could present the opposition provided for by Art. 13 of Decree, but also the so-called 'riesame' provided for by Arts. 257 and 324 of the Criminal Code, however, this latter possibility was excluded. The Italian Court of Cassation has in fact denied the possibility to act with the 'riesame' stating that it would end up allowing 'the initiation of two autonomous and parallel appeal procedures (…) with completely uncoordinated effects between them' since a double track of protection is not admissible'[14]. This solution of Italian case law seems to be preferable in accordance with the provision of Art. 14(2) EIO Directive under which the substantive reasons leading the foreign authority to issue an EIO can only be challenged by an action brought before that authority, therefore, before the enforcement authority, it will only be possible to challenge the recognition decree alone and not the investigative act itself.

[13] This can be linked to what has been noted about the need to ensure legal assistance across different countries; – providing financial support by creating support for the expenses due to the assistance of lawyers in different countries; train lawyer and magistrate to use English language.

[14] Cass. Pen., Sez. VI, Judgement of 14 Feb. 2019, dep. 14 March 2019, n. 11491, C.E.D. Cass. n. 275291.

The European Investigation Order in Portugal – Legal Analysis and Practical Dilemmas

By *Mário Simões Barata, Ana Paula Guimarães* and *Daniela Serra Castilhos*

I. Introduction

This Chapter seeks to analyse the Portuguese legislative act that transposed Directive 2014/41/EU regarding the European Investigation Order (EIO) as well as the practical dilemmas associated with this novel mechanism. Thus, it is divided into two parts. The first part will consider Law no. 88/2017 that transposed the EIO-Directive into Portugal's legal order, while the second part will analyse the practical dilemmas associated with the implementing legislation from the perspective of the practitioners (judges, prosecutors, and police forces), as well as the Portuguese Bar Association and criminal attorneys.

II. Transposition

Law no. 88/2017 which transposes the EIO-Directive was adopted by the Portuguese Legislative Assembly – *Assembleia da República* – and published in the official journal – *Diário da República* – on 21 Aug. 2017, in accordance with Art. 119[1] and 161[2] of the Portuguese Constitution. The Directive was not implemented on time. On the contrary, the implementing legislation entered into force three months after the deadline established by Art. 36(1) EIO-Directive (i. e., 22 May 2017). However, no official reason was given for the delay.

The law that was adopted by the Portuguese national Legislative Assembly contains 50 Articles. In structural terms, it is divided into eight chapters that cover the following matters: a) general dispositions; b) procedure and guarantees relating to the issuing of an EIO; c) procedures and guarantees relating to execution of an EIO; d) dispositions relative to certain investigative measures; e) telecommunication

[1] Art. 119 Portuguese Constitution regulates the publication of all acts and states in section a) that all laws approved must be published in the official journal: Diário da República.

[2] Art. 161 Portuguese Constitution disciplines the legislative function of the Portuguese Parliament.

interception; f) temporary measures; g) legal remedies; h) transitional and final provisions.[3]

However, this analysis will not follow this specific structure. On the contrary, our analysis of the law that implemented the Directive will cover the various stages associated with the life cycle of an EIO that were identified by the EIO-LAPD Project consortium: drafting; transmission; recognition; execution; transfer.[4]

1. Drafting an EIO

The first stage in the life cycle of an EIO refers to the act of drafting the order. In other words, this section will consider problems associated with who can and in what circumstances can an EIO be issued.

According to Art. 5 of Law no. 88/2017 an EIO may be issued in certain types of proceedings/cases. The law states that an EIO can be issued in penal procedures that are initiated by a judicial authority or that can be initiated by that authority according to the internal legal order of the issuing State; procedures that can be initiated by judicial authorities relative to facts that are punishable under the law of the issuing State so long as the decisions can be appealed to a judicial body; proceedings that are initiated by administrative entities relative to facts that are punishable under the law of the issuing State; d) proceedings relative to crimes or other punishable acts involving the responsibility or punishment of non-human legal persons according to the laws of the issuing State.

An EIO can only be issued or validated if two conditions are met. These conditions are regulated by lines a) and b) of para. 1 of Art. 11 of Law no. 88/2017. The first one relates to the necessity, adequacy, and proportionality while the second one states that the investigative measure or measures requested must be capable of being ordered, in the same conditions, within the scope of similar national proceedings. Furthermore, section two states that these conditions are evaluated on a case-by-case basis.

The first condition leads the issuing authority to consider the principle of proportionality in an ample sense. Therefore, the flagrant denial of proportionality could be considered as a fundamental rights non-recognition ground in the sense that the national issuing authority must observe the law and the Portuguese Constitution. Proportionality is a principle that may be found in various norms of the Portuguese Constitution. Firstly, it is included in the principle of the rule of law, which is a fundamental principle of the Portuguese Constitution (see Art. 2 Portuguese Constitution). Secondly, fundamental rights restrictions must be necessary, adequate, and propor-

[3] An analysis of the Portuguese law that transposed the EIO-Directive can bee found in *Triunfante*, L. L., Manual de Cooperação Judiciária Internacional em Matéria Penal (Coimbra: Almedina, 2019), pp. 175 ff.

[4] The EIO-LAPD Project is constituted by a group of seven institution based in six countries that were given a grant by the EU Commission.

tional (see Art. 18(2) Portuguese Constitution). Thirdly, administrative action is limited by the principle of proportionality (see Art. 266(2) Portuguese Constitution). Finally, police measures must be strictly necessary (i. e., they must be necessary, adequate, and proportional) (see Art. 272(2) Portuguese Constitution).

The question regarding the competent issuing authority is regulated by Art. 12 of Law no. 88/2017. According to this legal precept, an EIO can be issued by the national judicial authority that has the competence to steer the specific phase of the procedure. Secondly, an EIO can be issued by the national EUROJUST member. Thirdly, an EIO can be issued by the competent administrative entity regarding the violation of administrative rules. For example, the Portuguese Tax Authority – *Autoridade Tributária* – could issue an EIO. However, it would have to be validated by the State Prosecutor's Office. In Portugal, the *Ministério Público* is the State Prosecution Office according to Articles 219 and 220 of the Constitution.

The national implementing law states that it is the national judicial authority that issues an EIO. This concept refers to the court, investigating judge or State prosecution Office and the competence to issue an EIO varies according to the specific phase of the criminal proceeding (i. e., inquiry/investigation, instruction; trial).[5] Therefore, the police cannot issue an EIO relative to a criminal proceeding. The law also uses the concept referring to administrative agencies. These agencies can issue an EIO within the context of a proceeding relative to the violation of administrative rules. However, this emission/issue is only valid when the decision is susceptible of being appealed to a court of law and it must be validated by the State Prosecution Office.

The Portuguese legislator established a central authority in Art. 10 of Law no. 88/2017. The central authority in Portugal is the *Procuradoria Geral da República* (*PGR*), a body/office within the State Prosecution Office (i. e., *Ministério Púbico*) which runs and oversees the magistrates (i. e., state prosecutors) that represent the interests of the State and any other interests defined by law according to Arts. 219 and 220 Portuguese Constitution.[6] This Office is designated as the central authority to assist the competent judicial authorities in matters relating to the issuing and execution of an EIO. In addition, all EIOs issued and received by the competent national authorities must be communicated to the central authority. The State Prosecution Office is a body that administers justice and part of the judicial branch of power in Portugal.[7] The Prosecutor or Attorney General is the highest-ranking magistrate and his/her Office is at the top/apex of the State Prosecution.

[5] These constitute specific and separate phases in a criminal proceeding in Portugal. See *Antunes*, M. J., Direito Processual Penal (Coimbra: Almedina, 2017) and *Silva*, G. M., Direito Processual Penal Português: Do Procedimento (Marcha do Processo) (Lisboa: Universidade Católica Editora, 2018).

[6] See Art. 18(5) of Law no. 88/2017.

[7] On the constitutional provisions regarding the State Prosecution Office, see *Gomes Canotilho*, J. J., Direito Constitucional (Coimbra: Almedina, 7th edition 2003), pp. 684 ff.

However, there is a certain aspect of the State Prosecution Office that causes some concern. This aspect is tied to the appointment process regarding the Attorney/ Prosecutor General. According to lines m) of Art. 133 of to the Portuguese Constitution, the Attorney General is proposed by the Government and then appointed/exonerated by the President.[8] This designation process presupposes the trust and impartiality in the person appointed and that he/she is not susceptible to any type of pressure or political influence (i. e., instructions from the Minister of Justice).[9] However, there are certain sectors of the legal doctrine that consider, especially in contexts of political harmony between the President of the Republic and the Government, that the precariousness of the position is notorious, as well as the risk of governmentalization, given the existence of real guarantees of stability. The political power appoints whoever it wants, renews the mandate if it wants and dismisses whenever it wants.[10]

2. Transmission

The channels of communication for the transmission of an EIO are regulated by Art. 13 of Law no. 88/2017. The general rule is found in para. 1 of Art. 13. It states that an EIO is directly transmitted by the issuing authority to the executing authority. The transmitting authority can resort to any means that allows for the conservation of a written document and in conditions that permit the scrutiny of its authenticity. The law also allows for the transmission of an EIO through the telecommunication system of the European Judicial Network.

3. Recognition

The question of recognition is disciplined in Art. 18 of Law no. 88/2017 relative to the recognition and execution of an EIO by the national authorities. The first section states that the executing authority recognizes without any additional formalities the EIO issued and transmitted by the competent authority of another Member State and guarantees its execution based on the principle of mutual recognition in the conditions that are applicable to the investigative measure if it would have been ordered by a national authority. Section two establishes that the executing authority respects

[8] The President cannot appoint or exonerate without a proposal from the Government. However, he may refuse to appoint the candidate proposed. See *Miranda*, J./*Medeiros*, R., Constituição Portuguesa Anotada: Tomo II Organização Económica, Organização Política, Artigos 80° a 201° (Coimbra: Coimbra Editora, 2006), p. 385.

[9] The designation process and other questions regarding the State Prosecution's autonomy and independence are examined in *Guimarães*, A. P./*Castilhos*, D. S./*Barata*, M. S., 'O conceito de "autoridade judiciária de emissão" a partir dos Processos apensos C-508/18 e C-82/19 PPU (Caso Parquet de Lübeck) e eventuais ecos na Decisão Europeia de Investigação em Portugal', Revista Jurídica Portucalense 28 (2020), 4 – 29, available at <https://revistas.rcaap.pt/juridica/article/view/21638>, accessed 6 January 2021.

[10] See *Fábrica*, L. S., Autonomia e Hierarquia no Estatuto do Ministério Público (Lisbon: SMMP – Sindicato dos Magistrados do Ministério Público, 2020), p. 61.

the formalities and the procedures expressly indicated by the issuing authority, except in the cases foreseen in the law that transposed the EIO-Directive, and as long as they comply with the preconditions and criterions in domestic law in matters relating to evidence within the context of similar national proceedings. To facilitate the recognition and execution of an EIO, section three states that the issuing authority may consult the executing authority by whatever means.

Art. 19 of Law no. 88/2017 answers the question regarding who the national executing authorities are in matters relating to recognition of an EIO. Section one establishes the general rule and states that the competence to recognize an EIO lies with the national judiciary authority that is competent to order the investigative measure in national territory in accordance with the law that regulates penal procedure, the laws relative to the organization of the judicial system, and the law that disciplines the status of the State Prosecution.

Under Law no. 88/2017 an EIO must be translated into the Portuguese language or any other official language of the European Union (EU) that Portugal has declared that it will accept. However, the law in question does not state what official languages of the European Union Portugal accepts. Consequently, English would not be accepted in urgent cases.[11] Furthermore, the lack of the necessary translation impedes the executing national authority to decide upon the recognition of the EIO and, consequently, the order must be sent back to the issuing State (Art. 20(3) of Law no. 88/2017).

The Portuguese legislator introduced time-limits for the recognition and execution of an EIO. Those time-limits are laid down in Art. 26 of Law no. 88/2017. According to section one of the legal precept in question, a decision on the recognition of an EIO cannot surpass 30 days. These are counted from the date of its reception. It also contemplates the possibility of a 30-day extension for the decision of recognition when the initial time-limit cannot be met. Section two adds that an EIO must be executed within 90 days. The law also imposes an obligation to inform the issuing authority regarding the reasons for the delay and consult about the time needed to render a decision. The law does not establish specific consequences if these time-limits are not respected. However, if the non-observation of the deadline/time limits is intentional and seeks to benefit or cause harm to someone, that action will generate criminal and civil liability. Furthermore, any intentional action can also generate disciplinary liability.

Art. 24 of Law no. 88/2017 regulates the motives or reasons for a delay. Section one states that the recognition or the execution of an EIO can be delayed for two reasons: a) during a reasonable time when the execution of an EIO can harm an ongoing investigation or penal action for a period that the executing State deems reasonable; b) when the objects, documents or data in question are being used in another case

[11] However, a Portuguese judge signalled a willingness to accept a legislative alteration that would accept an EIO in the English language in urgent cases so long as a translation would follow.

until they are no longer necessary. Section two establishes that the executing State shall immediately execute the EIO once the motive for delay no longer exists and informs the issuing State in whatever manner that permits the conservation of a written record.

4. Execution

Art. 19 of Law no. 88/2017 regulates the question regarding the national executing authority. The general rule can be found in para. 1 of Art. 19 that states that an EIO is executed by the national judicial authority that has the competence to order the investigative measure in Portuguese territory, in accordance with the laws that govern penal procedure (i. e., Portuguese Code of Penal Procedure), the laws relative to the organization of the judicial system, and the law that regulates the legal status of the State Prosecution Office. Therefore, the competence to execute depends upon the specific phase of the criminal proceeding (i. e., inquiry; instruction; trial). Under certain circumstances (i. e., the violation of administrative rules), an administrative entity may also execute an EIO after it has been recognized by the State Prosecution Office (Art. 19(8) of Law no. 88/2017). Lastly, the national EUROJUST member may also execute an EIO in certain circumstances (Art. 19(10) of Law no. 88/2017).

The Portuguese legislator applied all the non-recognition or non-execution grounds that are stated in Art. 11 EIO-Directive. The grounds can be found in lines/points a) to h) of para 1 of Art. 22 of Law no. 88/2017. These refer to:

a) behaviour that is not classified as a crime in the executing State;

b) immunity, privilege or legal norms that reduce the criminal responsibility in the area of the freedom of the press;

c) a request that may harm essential interests relating to national security;

d) the investigative measure is not allowed in national proceedings of a similar nature;

e) *ne bis in idem* principle;

f) extraterritoriality of the infraction;

g) incompatibility with duties stemming from the observation of fundamental rights;

h) the investigate measure is only admissible in the executing state for certain crimes or punishments with certain thresholds.

Furthermore, the Portuguese legislator applied the additional non-recognition or non-execution grounds provided for specific sensitive measures regulated in Art. 22 – 31 of Directive 2014/41/EU. These can be found in Art. 32 to 43 of Law no. 88/2017.

5. Transfer

The transfer of evidence is regulated by Art. 23 of Law no. 88/2017. Section one establishes that the executing authority transfers the evidence collected or in its possession to the competent authorities of the issuing State after it has been obtained. In addition, section two states that whenever it is requested in the EIO and if possible, according to the law of the executing State, the evidence is immediately transferred to the competent authorities of the issuing State that assist in the execution of an EIO according to Art. 27 of Law no. 88/2017. Section three establishes an exception. The transfer of evidence might be suspended until a decision is rendered on an appeal filed unless the issuing authorities indicate in the EIO that the immediate transferal of the evidence is essential for the progress of the investigation or the preservation of individual rights. The transfer can also be suspended if it causes serios and unrepairable damage to the person in question. Finally, the executing authority may indicate if it wants the evidence back once it is no longer necessary for the issuing authority to keep.

6. Other Questions

The final section of this initial part of the article will deal with the role of the attorneys in the law that transposed the EIO-Directive and the consecration of specific legal remedies. In relation to attorneys, the Portuguese legislation that transposed Directive 2014/41/EU provides for the possibility of an EIO to be applied/requested by the defence. This possibility can be found in para. 4 of Art. 12 of Law no. 88/2017. An EIO can be issued at the request of a procedural subject, under the terms in which they may request the obtaining or production of evidence, in accordance with the law regulating criminal procedure. Therefore, the defendant can request an EIO for the purpose of his/her defence or the assistant (i. e., victim) for the purpose of supporting his/her position in the criminal proceeding as a procedural subject collaborating with the public prosecutor.

Once this request has been made in the investigation phase, depending on the type of measure that is requested, it may be granted or rejected by the prosecutor or will have to be authorized by the criminal investigating judge. For investigative measures that conflict with the fundamental rights of citizens, it is the criminal investigating judge who is competent, in the context of an investigation, to authorize them (Art. 17 of the Portuguese Code of Penal Procedure (CPP): the investigating judge is responsible for exercising all the jurisdictional functions until the referral to the trial, including Art. 268 of the CPP, which regulates the acts that are performed by the investigating judge and Art. 269 of the CPP, which disciplines the acts that must be ordered or authorized by the investigating judge during the investigation).

III. Practical Dilemmas: Data from the Issuing and Executing Authorities

Although the questionnaire was sent to judges, prosecutors, and police this section will consider the practical dilemmas from the point of view of the prosecution in Portugal since the research team received an extraordinary number of replies to its questionnaire (i.e., more than forty) from this specific category of practitioners.

The Public Prosecution Office answered that they have already resorted to an EIO in all of the phases mentioned in the questionnaire (i.e., preliminary investigative police phase; court/prosecutor investigation phase; in the trail phase; in the post-trial phase). However, most of the replies indicated that the EIO is especially used in the court/prosecutor investigation phase.

The Public Prosecution also replied that they are familiar with Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (EU). The replies received from the State Prosecution Office indicate that this mechanism has been used by a minority of magistrates. The answers also suggest that the exchange of information can be useful to confirm information that might be useful to issue an EIO (for example: suspect's location) and then determine a person's formal status and official questioning. It is not an alternative to an EIO, since the information obtained through this mechanism cannot be used as evidence in the case. It (i.e., evidence) can only be used within the context of an international judicial cooperation through an EIO or mutual legal assistance.

1. Issuing an EIO

As we have already stated this article will analyse the replies obtained from the Public Prosecution Office from the perspective of the life cycle of an EIO. The first phase deals with the issuing of an EIO, and the next paragraphs will consider questions related to the following issues: EIO form, formalities, confidentiality, assistance in another Member State, double criminality, and court orders.

The Public Prosecution Office replied that they had never encountered problems with the EIO form as an issuing authority nor experienced a refusal of their EIOs due to difficulties with the form. Furthermore, the Office noted that the form is quite simple to fill out in most cases.

The next question that was asked was related to the request for additional formalities to be executed within the context of an EIO. The replies received from the State Prosecution Office are varied. Some magistrates have never requested specific formalities to be fulfilled by the executing authority while others replied in the affirmative. These relate to the formalities consecrated in the Portuguese Code of Penal Procedure in the following situations: formal status of the person accused (Art. 58 CPP); declaration relative to identification and residence (Art. 196 CPP); warning connect-

ed to victims of domestic violence that have the right not to make any formal statements (Art. 134 CPP); wiretap formalities (Art. 188 CPP); the questioning of the accused by a magistrate from the State Prosecution Office and its use during the trial phase (Art. 143 CPP); the right of a witness to remain silent (Art. 132 CPP); presence of an attorney during the interrogation of a defendant that is less than 21 years of age (Art. 64 CPP).

One of the replies indicated that two EIOs had been requested to be executed in synchronicity for tactical reasons. The reply also indicated that the Portuguese central authority was asked to articulate the matter with the executing authority of the other Member State.

A third question that was raised in connection to issuing an EIO related to confidentiality. Most of the replies received from the Public Prosecution Office indicate that the magistrates do not provide a justification for not revealing a measure to the suspect. Furthermore, the Office noted that Art. 30 of Law no. 88/2017 disciplines confidentiality and establishes that the national executing authority guarantees, in accordance to the law, the confidentiality of the facts and the content of the EIO, except for what is necessary to carry out the investigative measure. Furthermore, the provision states that the national executing authority shall inform, without delay, the issuing authority, if it is not possible to assure the confidentiality of the facts and content of the EIO. However, the Office added that the most relevant question, in the absence of any reference to the concept of confidentiality regulated in the Portuguese Code of Penal Procedure, is whether the confidentiality referred to in the law that transposed the EIO-Directive is equivalent to the national/domestic procedural concept of secrecy of justice, and whether the State Prosecution Office must therefore always obey these internal rules. Assuming it is, because it makes sense in the context of criminal investigation, the State Prosecution Office, as executing authority cannot violate the confidentiality of an EIO, and should always consider that the EIO is covered by secrecy, applying, consequently, the rules consecrated in Art. 86 and subsequent provisions of the Portuguese Code of Penal Procedure.[12] This will be the case, unless such a system of confidentiality is expressly dispensed by the issuing authority, or if the case is in a procedural stage that does not admit secrecy/confidentiality, as in the case of the trial phase. In the latter case (i. e., a phase that isn't secret/confidential), Portugal, as the executing authority, should, according to the State Prosecution Office, mention this internal legal circumstance to the issuing authority. Similarly, Portugal, as the issuing authority, should also state its position relative to the evidence to be obtained and issued via an EIO (i. e., if it is to be covered by the secrecy of justice or not). Furthermore, the Office added that the confidentiality/secrecy rules do not apply to information relative to any appeal that must be given and the options available to the defence to challenge the investigative measures or challenge the material justifications underlying the issuing of an EIO to guarantee fundamental rights (see Art. 45 of Law no. 88/2017 and Art. 14 EIO-Directive).

[12] Art. 86 CPP regulates the publicity of the criminal proceeding and the secrecy of justice.

A fourth question relates to the possibility of issuing an EIO for an investigative measure to be conducted in another Member State without its assistance. The replies received from the Public Prosecution Office indicate conflicting positions. Some magistrates stated that they would issue an EIO for an investigative measure conducted in the executing State where no assistance of the executing Stare is necessary while other answered negatively. However, there is little or no experience with such EIOs. The Office also stated that this is a way it can conduct wiretaps and it has the advantage of applying Portuguese wiretapping rules/formalities. The application of the rigorous formalities consecrated in the Portuguese Code of Penal Procedure are a source of some problems for the executing authorities.

A fifth question related to the problem of double criminality. All the magistrates from the Public Prosecution Office answered that they never had an issue regarding double criminality as the issuing/executing authority.

A final question related to the possibility of issuing an EIO without a court order. The vast majorities of the replies received from the State Prosecution Office answered that it would always request authorisation/court order before it would send an EIO if a court order is necessary for a certain measure in Portugal. However, a few magistrates replied that they would send the EIO without the court order.

2. Transmission

The Public Prosecution Office replied that they use the electronic forms and consult the EJN webpage. In most cases, EIOs are sent through e-mail.

3. Recognition

The third phase of the life cycle of an EIO refers to recognition. This specific section of the article will consider two problems. The first relates to the time frame or time limits regarding recognition and the second will analyse the grounds for non-recognition of an EIO.

Most of the replies received from the Public Prosecution Office answered that the timeframe for the recognition and execution of an EIO is adequate and does not constitute a problem. However, the Office also referred that some Member States do not comply with the deadlines (i.e., slow in their response).

In addition, three questions covered the grounds for non-recognition. The first one involved fundamental rights. All the replies received from Public Prosecution Office indicate that as an issuing/executing authority it had never experienced the use of fundamental rights as a non-recognition ground.

The second one referred to the application of the principle of *ne bis in idem.* The answers received from the Public Prosecution Office indicate a varied approach to *ne bis in idem* as a non-recognition ground. Some replies indicate an unwillingness to

invoke this ground while others clearly indicate that the magistrate will invoke the *ne bis in idem* non-recognition ground if the legal criterions are met. However, in the opinion of one magistrate the principle exists regarding judicial decisions that are definitive on the guilt of the accused and not in the investigative phase. Furthermore, it might not be easy to determine that the cases are the same.

The principle of proportionality was also the object of a question regarding the recognition of an EIO. The answers obtained indicate a varied response to this question from the State Prosecution Office. Some magistrates answered that they would not use proportionality as a non-recognition ground while others replied in the affirmative and tied their position to the observation of fundamental rights.

One magistrate noted that this principle (i. e., proportionality) does not constitute a ground for the non-recognition of an EIO according to the EIO-Directive[13] and the national implementing legislation.[14] Concretely, proportionality considerations pertain to the first phase of the life cycle of an EIO: issuing. Therefore, proportionality should not be considered in the recognition phase and alerts to the risks associated with the double assessment of this principle since this might constitute a step backwards in international cooperation in criminal matters which is contrary to the objectives of the EIO-Directive.

4. Execution

The execution of an EIO also generates specific problems. This section will analyse the replies referring to the EIO form, alternatives to the investigative measure requested, use of an EIO for non-evidentiary purposes, and the verification of the issuing authority.

The overwhelming majority of the replies received from the Public Prosecution Office indicate that they have not encountered difficulties with the EIO form in the execution phase. However, a small number of replies mention the following situations: lack of clarity; fields that are repetitious; problems with the quality of the translations; absence of essential information or necessary documents. In most of these cases, these difficulties have been resolved easily through direct consultation with the colleague. If necessary, magistrates can also resort to the European Judicial Network and/or Eurojust. In addition, one reply stated that an EIO was not executed since there were doubts in relation to the alleged criminal act.

Most of the replies from the State Prosecution Office indicate that the magistrates would probably refuse the EIO and that an alternative investigative measure would have to be found. Furthermore, the Office resorted to section one of Art. 21 of the law that implemented the EIO-Directive that refers to alternative investigation measures. The provision states that if the investigative measure does not exist in the law of the

[13] See Art. 11 EIO-Directive.

[14] See Art. 22 of Law no. 88/2017 that transposed the EIO-Directive.

executing State, or if it is not admissible in a similar national case, the executing authority shall resort, whenever possible, to a different investigative measure than the one indicated in the EIO.

A third question was related to the use of an EIO. Most of the answers received from the Public Prosecution Office state an EIO would be refused if it is obviously intended for non-evidentiary purposes. However, a magistrate noted that this position depends upon what is requested and if it comes in an isolated form. In addition, he added that he would adopt a pragmatic and practical approach and provided the following example: if an EIO is issued for the interrogation of a suspect and the notification of a certain document (formal charge), he did not see any problem in executing the two even though the notification is not an investigative measure.

The concept of issuing authority and its verification in the execution phase was the object of a specific question. The State Prosecution Office replied that one should verify the issuing authority to confirm that it emanates from a magistrate, and this also applies for the validation of an EIO. The Office also sustains that one should accept an EIO when issued by a magistrate from the State Prosecution. This position is in line with the Advocate General's opinion – Manuel Campos Sánchez-Bordona – in the conclusions relative to the preliminary reference procedure in Case C-584/19.[15]

Finally, a specific question regarding the request of a court order was also raised. Most of the magistrates from the State Prosecution Office answered that they would request authorization/court order before they would execute an EIO if a court order is necessary for a certain measure in Portugal.

5. Transfer

The last phase in the life cycle of an EIO refers to the transfer of evidence and a specific question was posed relative to the use of the evidence obtained through an EIO in other cases/proceedings.

The answers received from the Public Prosecution Office are varied. Some magistrates replied in the negative while others stated that evidenced obtained under an EIO can be used for other purposes and invoked Art. 23 of the law that transposed the EIO-Directive in Portugal. One answer indicated that the only prohibitions that exist in relation to the transfer of evidence in Portugal relate to wiretapping. This is probably because this type of investigative measure must be authorized because of its coercive nature and constitutes a significant restriction of fundamental rights, namely the right to privacy (Art. 26 Portuguese Constitution)and the inviolability of communications (Art. 34 Portuguese Constitution). Furthermore, it can only be used when no other investigative measure can prove the criminal conduct. Consequently, author-

[15] ECJ, Opinion of Advocate General of 16 July 2020, C-584/19 (*Staatsanwaltschaft Wien*), ECLI:EU:C:2020:587.

ization is granted on a case-by-case basis and the evidence obtained cannot be used in other proceedings.

6. Other Question: Evidence And Legal Remedies

This last section will consider questions referring to evidence and legal remedies.

The Public Prosecution Office replied that they did have experience with the video conference as a tool for cross-border gathering of evidence. In addition, the Office stated that video conference is used in the trial phase to hear witnesses and that the equipment is adequate. However, this cannot be used for the accused outside of Portugal because this is prohibited by the Portuguese Code of Penal Procedure, which according to the Office is outdated and conflicts with the content of the Directive.

The overwhelming majority of the replies received from the State Prosecution Office indicate that the magistrates have not encountered any problems specific to digital evidence. Furthermore, the answers provided indicate that they would not use an EIO to order the disclosure of traffic telecommunication data of a suspect in an executing State if their own national system did not provide for a data retention system. In addition, the Office offered the following observation: the answer to this question may vary depending upon if the investigative measure exists in Portugal or if we are dealing with an inefficiency of the system or if the system prohibits a certain type of evidence. The Prosecution cannot circumvent a national prohibition by asking for it in another Member State that admits it.

A final question referred to legal remedies. The State Prosecution Office never encountered a case in which the suspect/accused made use of the legal remedies against the EIO.

IV. Practical Dilemmas: Attorneys

This section will cover issues relating to certain phases of the life cycle of an EIO from the perspective of the attorneys[16] in Portugal who practise criminal law and answered a specific questionnaire regarding practical dilemmas. Concretely, the following phases of an EIO were considered: issuing, recognizing, executing, and the transferal of evidence. In addition, it analyses specific problems relating to the additional costs that will be incurred by the accused because of an EIO and issues relating to the EIO form.

[16] A definition of an attorney is not provided in the Directive 2014/41/EU regarding the EIO in criminal matters. For the purpose of this questionnaire, an attorney is a legal professional who is legally qualified and licensed, according to national law, to represent a suspect/defendant in any types of proceedings for which an EIO can be issued according to Art. 4 Directive 2014/41/EU.

1. Issuing an EIO

The first question that was posed to the participating attorneys related to the legal norm foreseen in the EIO-Directive and the national implementing legislation that regulates a request for an EIO made by the defence (Art. 12(4) of Law no. 88/2017). This question received different answers. On the one hand, the President of the Portuguese Bar Association replied that, as an attorney, he has never requested the issuing of an EIO because it has never been necessary. However, other attorneys replied that they have requested an EIO and that it was issued. In Portugal, an attorney cannot issue an EIO. It must be requested and there is no specific procedure. The request is made to the person/entity that has the competence to steer the criminal proceeding in a particular phase: judge; investigating judge, and the prosecuting magistrate. The issuing authority can only issue an EIO if it complies with the following conditions: the EIO is necessary and proportional considering the type of case and bearing in mind the rights of the suspect or the accused; the investigative measures indicated in the EIO can be ordered in the same conditions in a similar domestic/national case.

According to the answers received, the problems associated with these requests lie with the slow response from the executing authorities, translation, and the impossibility of participating in the collection of evidence in the executing State due to financial constraints. Another relevant problem is tied to the understanding adopted by several courts which sustains that there is no legal basis to support the hearing of the accused via video conference in the trial phase. A final issue that was mentioned is tied to the difficulty connected with an appeal relative to the decision that does not authorize the issuing of an EIO.

A second question regarding this specific phase of the life cycle of an EIO pertains to the potential challenge of the decision to issue. The President of the Bar Association indicated that as an attorney he has never challenged an EIO in the issuing State (i. e., other Member State of the European Union). A similar response was given by other attorneys. In respect to possible problems connected to the legal challenge in the issuing State, the attorneys mentioned the speed of the procedure and the enormous costs.

A third question considered the possibility of challenging the decision to issue an EIO in Portugal. The President of the Portuguese Bar Association indicated that as an attorney he would resort to a written request or an appeal in accordance with the Code of Penal Procedure to challenge the procedures and or decision to issue an EIO. Another attorney indicated that the violation of the principle of proportionality and the non-observation of specific formalities would constitute grounds for a challenge in the Portuguese legal system. Furthermore, a violation of fundamental rights would also substantiate a challenge relative to the issuing of an EIO.

2. Recognition

Recognition is the third phase in the life cycle of an EIO. The decisions made in this specific phase are also susceptible of being challenged. In Portugal, attorneys can challenge an EIO in the recognition and execution phase through a complaint, an appeal or solicit a hierarchical intervention combined with the suspension of the execution of the investigative measure in accordance with the Code of Penal Procedure. Appeals filed in accordance with Art. 407 and 408 of the Code of Penal Procedure have a suspensive effect. The formal validity of an EIO and its conformity to EU law and the concrete application of the grounds relative to non-recognition or non-execution of an EIO referred in the Directive and transposed by the national law can substantiate the challenge against the EIO in this particular phase. A violation of fundamental rights also constitutes a ground for challenging an EIO in both the recognition and execution phases.

3. Execution

Execution comes after recognition and constitutes the fourth phase in the life cycle of an EIO. The attorneys that replied to the questionnaire never challenged an EIO in the executing State (i. e., another Member Sate of the EU). A specific reply stated that as an attorney she would never interfere in an EIO in an Executing State without the collaboration of a local attorney to avoid any question relating to 'malpractice'. The answers from the Portuguese attorneys also pointed out to the potential problems related to this type of challenge: speed of the proceeding and the lack of legal requirements in the Portuguese legal system that are not foreseen in the executing State.

A specific question relating to the grounds for a potential challenge related to the principle of proportionality. The President of the Bar Association stated that he would challenge an EIO in the executing State based on proportionality. Another attorney who answered the questionnaire stated that proportionality could be used to challenge the grounds for issuing an EIO if the principle was not considered or the concrete application/consideration of the principle in the context of issuing an EIO. The attorney in question also pointed out to the fact that there is no harmonized concept of proportionality in the EU.[17] In addition, the President of the Bar Association also stated that he could question the reasons/motives behind the issuing of the EIO. As an attorney he could consult with the executing authorities (national) and the issuing authority (foreign) to obtain additional data if the information provided in the EIO form was not enough to make that evaluation. In Portugal, an attorney can challenge an EIO through a written request or appeal in accordance with the Code of Penal Procedure.

[17] See *Ramos*, V. C., 'Meios Processuais de Impugnação da Directiva Europeia de Investigação – Subsídios par a Interpretação do Artigo 14° da Directiva com uma Perspectiva Portuguesa', Revista Anatomia do Crime 7 (2018), 113, 127 ff.

Another specific question relating to the grounds for a potential challenge related fundamental rights. The President of the Portuguese Bar Association as well as other attorneys indicated that they would challenge an EIO in the executing State based on a fundamental rights violation. Furthermore, an attorney can consult the executing authority (national) and the issuing authority (foreign) to obtain additional data if the information provided in the EIO form is insufficient to make the assessment. An attorney can resort to a written request or an appeal to challenge the EIO in accordance with the rules established in the Code of Penal Procedure.

4. Evidence

Evidence was the object of several questions that made up the questionnaire. The first one related to challenging the legality of the evidence gathered with an EIO in a criminal procedure. The responses obtained indicate that the attorneys had never challenged the evidence collected with an EIO in a criminal procedure.

A second question pertained to the possibility of arguing for the automatic exclusion of evidence if the accused was successful with his legal remedy in the executing State. The President of the Bar Association stated that as an attorney he would be able to argue for the automatic exclusion of evidence from the criminal procedure in the issuing State if the accused would be successful with his legal remedy in the executing State (legal remedy in the executing State did not suspend the execution of the investigation measure). This position was also expressed by other lawyers. However, they noted that it depends upon the type of violation. Success is not guaranteed. In Portugal, an attorney would probably have to invoke Art. 32 of the Portuguese Constitution (guarantees in criminal proceedings) and Art. 126 of the Code of Penal Procedure (prohibited methods of gathering evidence) to exclude the evidence. Furthermore, an attorney from Lisbon pointed out that European rules are needed to regulate this question because the EIO-Directive leaves this question to the legal order of the Member States.[18]

A related question connected with the previous one and tied to the possibility of changing the preceding judge because he/she could be excluded at a later stage in the proceedings received contradictory responses. On the one hand, an attorney answered that he could request a change in the preceding judge because he could be able to access evidence which could be excluded at a later stage in the proceeding. On the other hand, other attorneys manifested some reservations with this course of action and stated that this was not possible in Portugal.

A third question related to evidence revolved around the destruction and return of evidence to the executing State by the issuing State. The President of the Bar Association indicated that as an attorney he was able to ensure that the evidence is destroyed or returned to the executing State by the issuing State if the accused is suc-

[18] See *Ramos* (n. 17), p. 166.

cessful with his legal remedy in the executing State. Other attorneys indicated that they could not guarantee the destruction or return but were willing to try.

A fourth question related to the use of video conference and received mixed replies. The President of the Bar Association stated that he did not have any experience with video conferences as a tool for cross-border gathering of evidence. However, other attorneys indicated that they did have experience with a video conference as a tool for cross-border gathering of evidence. For example, an attorney in Lisbon requested an EIO to hear witnesses that resided in Germany during the trial phase and pointed out to various problems with the video conference such as: translation; scheduling; slow response from the authorities; no prior equipment tests and equipment incompatibility.

A fifth and final question referred to digital evidence and the replies received indicate that attorneys in Portugal did not report any problem regarding the EIO specific to digital evidence.

5. Other Questions

The last subsection of this specific part of the article will deal with two problems relating to the additional costs for the accused associated with an EIO and potential problems with the EIO form.

The President of the Bar Association stated that the decision made by the issuing authority to issue an EIO adds costs to the accused and these depend upon various factors such as the country and language. These costs can run up to several hundred euros and include the additional costs related to translation and knowledge of foreign legal systems. Other attorneys referred to other factors. These relate to the attorney that would defend the accused in the issuing State would have to have a knowledge of a foreign language (for example: English); knowledge of EU law; contacts with lawyers in other Member States; the accused would have to hire a lawyer in the executing State; travel costs for the lawyers involved; translation costs. These could run into several thousand euros.

Lastly, there was a question regarding the EIO form found in the annex of the Directive and the national implementing legislation. The President of the Bar Association stated that as an attorney he has not found any problem with the EIO form regarding the information provided by the issuing/executing State. A similar position was expressed by other attorneys.

V. Conclusion

Four years have passed since the adoption of Law no. 88/2017 that implemented Directive 2014/41/EU regarding the European Investigation Order (EIO) in Portugal.

The answers obtained from the State Prosecution Office relative to the the national/internal implementing legislation have led the authors of this article to conclude that the Portuguese law has not generated any significant/major legal controversy.

This conclusion is also supported by the position expressed by the Judicial Police ('Polícia Judiciária') in Portugal that replied to our questionnaire and stated that there have been no difficulties in the process of implementing the law that transposed the EIO-Directive within the context of their specific competences and responsibilities. In addition, this police entity stated that the communication with the competent judicial authorities and with Eurojust is splendid.

Similarly, the lawyers who replied to the questionnaire did not raise significant concerns relative to the national implementing legislation. However, some replies indicate that there is room for improvement in the process of issuing and executing an EIO. Furthermiore, there is a need to adopt uniform definitions and rules regarding particular aspects of the EIO, namely the principle of proportionality and rules regarding the exclusion of evidence.

In conclusion, the judicial and police entities that have to deal with the various phases connected to the issuing/executing of an EIO in Portugal have not provided criticisms that call for any major/significant legislative alteration. However, some judges and attorneys have expressed a need for minor revisions and clarification of particular aspects of the EIO at the European level.

Legal Implementation and Practical Application of the EIO Directive in Slovenia

By *Miha Šepec, Tamara Dugar, Anže Erbežnik* and *Jan Stajnko*

I. Introduction

The European Investigation Order was introduced to be the new cornerstone of judicial cooperation in matters concerning evidence gathering and information exchange. Although most MSs have not implemented the EIO-Directive on time, the EIO is currently being used in all participating MSs, which have now begun to realise its usefulness and practicality, but also its shortcomings. How was the EIO-Directive implemented in Slovenia is presented in the beginning of the article, followed by an analysis of practical application of the EIO by practitioners (and one attorney) in Slovenia, presenting the practices they have established, the problems they noted and where can they see room for improvement of the EIO.

II. Analysis of Legal Implementation of the EIO-Directive

Slovenia was one of the proponents of the Directive 2014/41/EU on the European Investigation Order (EIO-Directive)[1] in April 2010, along with 6 other MSs (Austria, Bulgaria, Belgium, Estonia, Spain and Sweden). The Slovenian Parliament transposed the EIO-Directive into Slovenian legal order by adopting the Act Amending the Cooperation in Criminal Matters with the MSs of the European Union Act (CCMMSEUA)[2], which was passed in the parliament on 22 March 2018 and entered into force on 5 May 2018. Given that the due date for transposing the EIO-Directive into national legal orders, set forth in Art. 36 EIO-Directive, was 22 May 2017, the implementation took place nearly one year past the deadline. The EIO-Directive was

[1] 'Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters', 1 May 2014, OJ L 130/1, pp. 1–36, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041&from=EN>, accessed 16 January 2022.

[2] Cooperation in Criminal Matters with the Member States of the European Union Act (Zakon o spremembah in dopolnitvah Zakona o sodelovanju v kazenskih zadevah z državami članicami Evropske unije – ZSKZDČEU-1B), Official Gazette of the Republic of Slovenia, No. 22/18, published on 4.4.2018.

not implemented by a separate legal act, but rather as an amendment to the CCMMSEUA, which introduced a revised Chapter 8 ('Recognition and execution of the European investigation order'), revised Chapter 9 ('Sending EIO to other Member States for recognition and execution') and a new Chapter 9.a ('Special provisions regarding certain investigative measures under the EIO').[3]

In accordance with Sec. 72 of the CCMMSEUA the EIO can be issued in both criminal and misdemeanour proceedings by the authorities competent to order investigative measures in criminal and misdemeanour proceedings. State prosecutor at the District State Prosecution Office or the Specialised State Prosecution Office of the Republic of Slovenia is the issuing authority for certain non-coercive investigative measures in pre-criminal or criminal procedure, while the investigative judge at the District Court is the issuing authority for all of the remaining coercive and non-coercive investigative measures in pre-criminal or criminal procedure.[4] The judges are the issuing authorities for investigative measures in trial proceedings. In the procedure on misdemeanours, where provisions on investigative measures in the Criminal Procedure Act[5] (CPA) are applicable, the judge at the Local Court is the issuing authority.[6]

Following the judgement of the European Court of Justice (ECJ) in case C-508/18 (*Parquet de Lübeck*)[7], where the court decided that German public prosecutors lack independence to be considered an independent judicial authority, competent to issue a European Arrest Warrant (EAW), the question arose whether the same should apply

[3] For more information about the adoption procedure and the official and unofficial reasons for delayed transposition of the EIO in Slovenia see *European Investigation Order – legal analysis and practical dilemmas of international cooperation – EIO-LAPD, National report on legal implementation and practical application of the EIO in Slovenia* (Report on legal implementation), Question 1, pp. 5–6, available at <https://lapd.pf.um.si/materials/>, accessed 9 May 2022.

[4] The concept of coercive/non-coercive investigative measures, as indicated in Article 10(2)(d) and Recital 16 of the Directive, is not defined in the CCMMSEUA nor in the CPA. They are, however, interpreted with respect to the fundamental rights restriction. Coercive measures are the ones where the enforcement of measures entails a more severe restriction of certain fundamental rights (e. g. the right to respect for private and family life). Those measures can only be ordered by the investigative judge. Non-coercive measures are the ones where the enforcement of measures restricts fundamental rights of persons to a lesser extent and can be ordered by the State prosecutor. (*Horvat*, Š., Zakon o kazenskem postopku (ZKP): s komentarjem (Ljubljana: GV založba, 2004), p. 324). The request for a dynamic IP address and request for historical telecommunication data for example are considered as a coercive measure in the Slovenian legal order. Pursuant to Art. 149.b(1) CPA, they can be ordered by an investigative judge upon a reasoned proposal of a State prosecutor.

[5] Criminal Procedure Act, Official Gazette of the Republic of Slovenia, No. 32/12 – official consolidated text, 47/13, 87/14, 8/16 – dec. CC, 64/16 – dec. CC, 65/16 – dec. CC, 66/17 – ORZKP153, 154, 22/19, 55/20 – dec. CC and 89/20 – dec. CC.

[6] For a detailed list of investigative measures that can be ordered by each issuing authority see Report on legal implementation, Question 4, pp. 8–9.

[7] CJEU, Judgement of 27 May 2019, Joined Cases C-508/18 and C-82/19 PPU (*OG (Parquet de Lübeck)*), ECLI:EU:C:2019:456.

to public prosecutors in respect of issuing an EIO. It should first be noted that the Ministry of Justice in Germany has the authority to give directions and instructions to State prosecutors in German States, which is not the case in Slovenia. The only issuing authority of EAW in Slovenia is the court, State prosecutors cannot issue the EAW. They can, nevertheless, propose the issuing of EAW, but the ultimate decision will have been taken by the competent court (Sec. 41 and 42 CCMMSEUA). What is more, State prosecutors in Slovenia also enjoy a much more independent position than their counterparts in Germany. Although institutionally part of the executive branch of the government, it is evident from the Constitution[8] (Art. 135) and State Prosecution Service Act[9] (SPSA) that State prosecutors cannot be given instructions and directions by the executive branch of the government, which safeguards their independent nature from political pressure. This was reiterated by the Constitutional Court in its 2013 decision: 'Slovenian state prosecutor, when exercising its powers, is therefore not part of the executive branch in such a way that any kind of political and professional instructions in specific matters could be given to them by the government or any ministry'.[10]

Nevertheless, State prosecutors can issue EIOs in Slovenia and although they cannot be given instructions by the Government, they are given instructions by the Supreme State Prosecutor's Office. The Prosecutor General adopts prosecution policies (Sec. 145 SPSA) and issues general instructions under respective prosecution policies, where he defines conditions, criteria and special circumstances that influence the decisions of State prosecutors.[11] He also issues general instructions for the conduct of prosecutors in handling of cases. The general instructions refer to the uniform application of the law, directing or equalizing prosecution policies and informing State Prosecution Offices (Sec. 167 SPSA). All of these instructions from the Prosecutor General have a direct impact on the independent judgement of State prosecutors. Adjustments of Slovenian legal system therefore could be necessary in such a way that the EIOs issued by State prosecutors would have to be validated by the courts. However, as the CJEU followed the opinion of Advocate General M. Campos Sánchez-Bordona in case Case C-584/19 (*Staatsanwaltschaft Wien*)[12], this is not necessary after all. As the court stated in its conclusions, the concepts of 'judicial author-

[8] Constitution of the Republic of Slovenia (Ustava Republike Slovenije), Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90,97,99 and 75/16 – UZ70a.

[9] State Prosecution Service Act (Zakon o državnem tožilstvu – ZDT-1), Official Gazette of the Republic of Slovenia, No. 58/11, 21/12 – ZDU-1F, 47/12, 15/13 – ZODPol, 47/13 – ZDU-1G, 48/13 – ZSKZDČEU-1, 19/15, 23/17 – ZSSve and 36/19).

[10] Constitutional Court of the Republic of Slovenia, 7. Feb. 2013, U-I-42/12 – 15, ECLI:SI:USRS:2013:U.I.42.12, para. 27.

[11] Prosecutor General's Office, available at <https://www.dt-rs.si/pristojnosti>, accessed 5 January 2022.

[12] CJEU, Judgment of 8 Decembet 2020, C-584/19 (*Staatsanwaltschaft Wien*), ECLI:EU:C:2020:1002.

ity' and 'issuing authority', for EIO purposes include the public prosecutor, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that MS and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting an EIO.

Furthermore, since the EIOs can only be issued by authorities competent to order investigative measures, a system of validation was introduced for cases when authorities other than national courts or State Prosecutor's Office suggest issuing the EIO. The validation authority assesses whether all requirements for ordering the investigative measure in Slovenia are met (Sec. 73(3) CCMMSEUA). In criminal proceedings, the validation authority is either the investigative judge or the State prosecutor, depending on the fact which of the two has competence to order the investigative measure in national Criminal Procedure Act. In misdemeanour proceedings the validation authority is the judge at the Local Court. Although EIOs can also be issued in respect of a misdemeanour in tax proceedings, tax authorities in Slovenia cannot issue EIOs by themselves and neither can the police.[13]

When sending EIOs, the issuing authorities can make use of various different channels of communication, as provided in Sec. 6 CCMMSEUA. They can be sent in writing by post, telefax or in electronic form (e-mail). These are predominant forms of communication, however the issuing authorities can also use other safe technical means, which provide an appropriate level of security of personal information during the transfer, ensure that documents are illegible or unrecognisable and during transfer enable the executing authority to verify the credibility of the sender and data. Considering that Slovenia is also a member of Eurojust and European Judicial Network, those channels of communication are also at their disposal.

Since the Slovenian legislator did not take the opportunity to establish a central authority regarding the EIO, the issuing authorities in other MSs have to send their incoming EIOs to competent executing authorities in Slovenia. Depending on the type of investigative measure that is requested, the competent executing authority is the State prosecutor at the District State Prosecution Office, within the jurisdiction of which the requested investigative measure should be performed, or the investigative judge at the District Court, within the jurisdiction of which the requested investigative measure should be performed. For cases where territorial jurisdiction cannot be established, the executing authority is the District State Prosecution Office of Ljubljana and the District Court of Ljubljana. For investigative measures in the procedure on misdemeanours the executing authority is the Local Court within the ju-

[13] The police can only take measures intended to obtain information, such as requesting information about the owner or user of a communication device from a mobile service provider (Sec. 149.č(1) CPA), requesting temporary retention of traffic and content data until the receipt of court order (Sec. 149.e(1) CPA), as well as requesting information from banks and other financial institutions regarding the account holder or its authorised person (Sec. 156(5) CPA).

risdiction of which the requested investigative measure should be performed. Issuing authorities in other MSs can get the information regarding the competent Slovenian courts and prosecution offices and their contact information through European Judicial Network and its contact points as well as through national representative to Eurojust. The Ministry of Justice may also assist with identifying competent authorities or provide other relevant information if needed.

As regards the language of the EIOs, Slovenia accepts EIOs not only in Slovene, but also in English (Sec. 6(6) CCMMSEUA), so there is no need for the issuing authority to show that a case is urgent, in order to ensure that an EIO in English language will be recognised. The recognition and execution procedure is, however, limited in time. In accordance with Art. 68 CCMMSEUA the executing authority must decide on the recognition and the execution of a EIO in time limits applicable to investigative measures in national legislation, but no later than 30 days after the receipt of the order. The executing authority should, if possible, abide by the time limit suggested by the issuing authority. In any case, the investigative measure should be executed without undue delay, but no later than 90 days after the recognition of the EIO. If the time limit for recognition and execution of the EIO could not be respected, the executing authority must immediately notify the issuing authority, explain reasons for the delay and give an estimated time frame in which the EIO could be executed. In such cases the time limit of 30 days can be prolonged for up to 30 days. If the requested investigative measure cannot be executed in the 90-day time limit, the executing authority must immediately notify the issuing authority, give reasons for the delay and consult the issuing authority regarding the new appropriate date. Non-compliance with time limits, however, does not entail the application of any sanction: the time frame for recognition and execution is, accordingly, left to the discretion of the State prosecutor or the judge.

When deciding on the recognition and execution of an EIO, the executing authorities are bound by non-recognition grounds enumerated in Sec. 62 CCMMSEUA, which applied all of the non-recognition grounds listed in Art. 11 EIO-Directive. For specific sensitive measures the additional non-recognition grounds, set forth in Art. 22–31 EIO-Directive, were also applied.[14] The fundamental rights non-recognition ground in Art. 62(1) no. 6 CCMMSEUA was applied with a reference to Art. 6 of Treaty on European Union (TEU)[15] and Charter of Fundamental Rights of the European Union (CFR)[16], as well as to fundamental principles of Slovenian legal order. The execution of the investigative measure indicated in the EIO

[14] For a detailed list of such investigative measures and additional non-recognition grounds, see Report on legal implementation, pp. 18–20, Questions 19 and 20.

[15] 'Treaty on European Union', 2012 C 326/01 (26 Oct. 2012), OJ C 326/13, pp. 13–390, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>, accessed 16 January 2022.

[16] 'Charter of Fundamental Rights of the European Union', 2012/C 326/02 (26 Oct. 2012), OJ C 326/391, pp. 391–407, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>, accessed 16 January 2022.

would therefore be refused, if there were reasonable grounds to believe that the execution of the investigative measure would be incompatible with Slovenia's obligations in accordance with Art. 6 TEU and the CFR or with fundamental principles of Slovenian legal order. Accordingly, higher national constitutional standards on fundamental rights could be used under that clause, because Slovenia explicitly added fundamental principles of its legal order to the formulation of the clause, in order to safeguard it as a non-recognition ground in Slovenia.

As regards the principle of proportionality, one of the cornerstones of EU law, Sec. 73(1) CCMMSEUA sets forth conditions that need to be respected by the competent issuing authority before issuing an EIO. One of the conditions is that the obtaining of evidence, presumed to be on the territory of the executing State, is necessary and proportionate for the purposes of conducting a criminal or misdemeanour proceeding, taking into account the rights of the suspected or accused person. The proportionality of the measure is therefore assessed by the issuing authority with regard to the characteristics of a particular case. A flagrant denial of proportionality by the issuing authority, in this regard, could therefore be considered a fundamental rights non-recognition ground in Slovenia under Sec. 62(1)(f) CCMMSEUA. If the EIO lacks proportionality, it is contrary to Art. 52(1) CFR as well as to fundamental principles of Slovenian legal order. Although Slovenian Constitution does not explicitly mention the principle of proportionality, it is generally accepted as one of the principles of the rule of law (Art. 2 of the Constitution). The Constitutional Court in its decisions established the principle of proportionality as one of the foundations of the constitutional review criteria, thereby elevating the principle of proportionality to the constitutional level.

Furthermore, as national procedural legislation differs between MSs, there is no uniform set of rules that would apply to executing investigative measures. The issuing authorities can therefore indicate in the EIO that the executing authority should follow specific formalities when carrying out investigative measure, in order for gathered evidence to be admissible in national proceedings. In case such additional formalities were requested by the issuing authority, they would be allowed, even if they were not foreseen in the Slovenian legal order, provided that they were not contrary to fundamental principles of the Slovenian legal order (Sec. 66(2) CCMMSEUA). The issuing State's formalities for mere tactical reasons would therefore also be allowed. That would not be the case, if the requested formalities would breach the fundamental principles of the Slovenian legal order, such as the principle of equal treatment (if, for example, a house search was exercised in such a way that it would discriminate against the suspect in Slovenia) or the principle of proportionality (if, for example, the intrusiveness of a house search would exceed what is necessary for its purposes).

CCMMSEUA has also provided the possibility of recourse to an alternative investigative measure by the executing authority in three different situations. In case the investigative measure, requested in the EIO, does not exist in the Slovenian legal

order or exists, but would not be allowed in a similar domestic case, the executing authority can choose an alternative investigative measure than the one requested in accordance with Sec. 63.a(1) CCMMSEUA. In such a case, however, the executing authority has to consult the issuing authority first (Art. 63 CCMMSEUA). Nevertheless, if the use of an alternative investigative measure would not be able to yield the same results as the requested investigative measure, the executing authority would have to inform the issuing authority that the EIO could not be executed (Sec. 63.a(4) CCMMSEUA). Given that the measures used would be the ones existent in the Slovenian legal order, the issue of the foreseeability requirement for special investigative measures would not arise in such a case. It is also important to note that a recourse to a different investigative measure is not allowed if the requested investigative measure is one of the measures that always have to be available under the law of the executing State according to Art. 10(2) EIO-Directive.[17] After having consulted the issuing authority first, the executing authority also has the possibility to use an investigative measure other than the one indicated in the EIO, if it would achieve the same result by less intrusive means (Sec. 63.a(3) CCMMSEUA).

The lack of legal protection for the parties, stemming from the fact that CCMMSEUA does not provide a specific legal remedy for EIO cases, is mitigated by the rules on exclusion of evidence in criminal proceedings. For matters not directly regulated by CCMMSEUA, the provisions of CPA apply (Sec. 2(3) CCMMSEUA), meaning that the remedies regarding the EIO follow the rules of the CPA, which allows for exclusion of evidence, including the ones obtained by the use of an EIO. Nevertheless, for situations where the EIO is requested against a third party/not the suspect, even the rules of the CPA do not foresee a legal remedy.

Moreover, CCMMSEUA also does not contain a specific provision regarding the possibility of EIOs being applied for by the defence. In accordance with the rules of the CPA, however, the suspect or accused person or lawyer on their behalf can suggesting the issue of an EIO to a competent judge or State prosecutor. The possibility of issuing would then be assessed by the judge or the State prosecutor with regard to the conditions, set forth in CCMMSEUA. If, for example, the State prosecutor makes an assessment, in accordance with Sec. 73(1) CCMMSEUA, that the issuing of an EIO would not be necessary in the given proceeding or it would be disproportionate, it is in his discretion to deny the issuing. In the investigative phase the parties can also propose the order of an investigative measure (and the EIO) to investigative judge.

[17] Investigative measures that would therefore always be executed are: the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could be used in other criminal proceedings in accordance with the CPA; the obtaining of information contained in personal databases held by the police, State prosecution offices or courts, to which the executing authority has direct access in the framework of criminal proceedings; the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of Slovenia; any non-coercive investigative measure as defined in the CPA; and the identification of persons holding a subscription of a specified phone number or IP address.

However, if the judge disagrees with it, he or she has to refer the matter to the chamber of judges at the district court to decide on it definitely (Sec. 177 CPA). It is important to note that the judge, on the whole, cannot arbitrarily refuse the issuing of an EIO, as that would infringe the suspect's right of defence and due process.

It must also be noted that following the CJEU decision in joined cases C-293/12 and C-594/12 (*Digital Rights Ireland*)[18], where the CJEU held that Directive 2006/24/EC[19] (Data Retention Directive) was invalid *ab initio*, the Constitutional Court of Slovenia repealed the provisions of the Electronic Communications Act[20], which governed retention of data. Since general data retention system was abolished in Slovenia, it was unclear, whether the issuing authorities in Slovenia are able to issue a EIO for the purpose of obtaining traffic telecommunication data from other MSs, where a general data retention system is still in place. It is important to note, that the retention of data was, however, reintroduced in Slovenia with the Act Amending the Criminal Procedure Act[21], which applied a nuanced approach to obtaining traffic data under the CPA. Sec. 149.b through 149.e each set out a specific aspect of obtaining traffic data, with Sec. 149.e providing for temporary retention of electronic evidence, including traffic data.[22] According to Sec. 73(1) CCMMSEUA, which sets out conditions for the issuing of an EIO, the investigative measure should be necessary and proportionate for the purpose of the proceedings, as well as permissible in a similar domestic case under Slovenian legal rules. Since retention of data in an individual case is allowed in Slovenia, such measure could therefore be carried out in Slovenia and consequently requested from other MSs in an EIO.

III. Analysis of Practical Application of the EIO

To better understand the problems that occur in practice when using EIOs, practitioners who have the competence to act as issuing and executing authorities were in-

[18] CJEU, Judgement of 8 Apr. 2014, Joined Cases C-293/12 and C-594/12 (*Digital Rights Ireland and Seitlinger and Others*), ECLI:EU:C:2014:238.

[19] 'Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC', 13 Apr. 2006 OJ L 105/54, pp. 54–63, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0024&from=en>, accessed 17 January 2022.

[20] Electronic Communications Act, Official Gazette of the Republic of Slovenia, No. 109/12, 110/13, 40/14 – ZIN-B, 54/14 – dec. CC, 81/15 and 40/17.

[21] Act Amending the Criminal Procedure Act (Zakon o spremembah in dopolnitvah Zakona o kazenskem postopku – ZKP-N), Official Gazette of the Republic of Slovenia, No. 22/19, published on 5. 4. 2019.

[22] Predlog Zakona o spremembah in dopolnitvah Zakona o kazenskem postopku, pp. 9–10, available at <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=9837>, accessed 23. October 2020.

terviewed, along with one attorney, who shared their experience with EIO cases and gave recommendations on improvement of the EIO.

1. Data from Issuing and Executing Authorities

The practitioners that were interviewed were State prosecutors, investigative judges and judges. State prosecutors mostly use the EIO in the preliminary investigative police/prosecutorial phase, where they have the authority to issue an EIO, while in court/prosecutor investigation phase and the trial phase they can propose the issue of an EIO to the judge. Investigative judges use the EIO in the preliminary investigative police/prosecutorial phase and the court/prosecutor investigation phase, while the judges use it in court/prosecutor investigation phase and the trial phase. None of the practitioners had ever used the EIO in the post-trial phase.

Practitioners were in agreement that the EIO supersedes all other means of gathering of evidence in cross-border cases in both ease of use and quality of results. When questioned in particular on the usefulness of Council Framework Decision 2006/960/JHA[23] (hereinafter FD 2006/960/JHA) and whether it could be considered an alternative to the EIO at the preliminary investigative phase (or equivalent phase), the practitioners all answered that they do not consider it an alternative to the EIO, because the use of FD 2006/960/JHA is a lot narrower than the use of the EIO, as it concerns only the existing information and evidence. Even more so, none of them have ever used FD 2006/960/JHA.

In relation to the question of whether or not they would refuse an EIO that is obviously intended for non-evidentiary purposes (e. g. freezing of property), the prosecutors answered that they would refuse it if such a purpose was obvious. However, they added that they are tolerant and pragmatic, considering the expenses that the issuing authority had had with issuing an EIO, so they would also execute EIOs intended for certain other purposes, such as service of documents. They were in agreement that issuing EIOs for other purposes is sometimes easier, because the EIO has become a sort of a central tool. Some also said that they would consult the issuing authority to see, whether there had been a mistake (e. g. they filled out the wrong form). The judges on the other hand answered that they would refuse such an EIO and notify the issuing authority on other available means of international cooperation.

The research has further shown that practitioners do not check whether the issuing authority has the status of a judicial authority and they automatically accept EIOs when the issuing authority is a State prosecutor. Some pointed out that the CJEU

[23] 'Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union', 29 Dec. 2006, OJ L 386/89, pp. 89 – 100, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006F0960&from=EN>, accessed 10 May 2022.

judgment in case C-508/18 (*Parquet de Lübeck*) cannot have a significant impact on accepting the EIOs issued by prosecutors, since the judgement concerned the EAW and detention orders interfere significantly with one of the most important basic freedoms of a person, right to liberty. The EIO, on the other hand, concerns investigative measures, which are in most MSs already in the hands of public prosecutors, to a large extent also in Slovenia, and the investigative measures do not present such a serious interference with human rights and freedoms.

As regards the EIO form, practitioners encountered very little problems regarding the information provided by issuing authorities, since EIOs are usually filled in very well. The problems they noted related to the absence of essential information, duplication of information in different categories of the EIO form and misplacement of information in wrong categories (e. g. some issuing authorities provided inaccurate information in section E of the form – identity of the relevant person, which relates to the identity of the subject of the requested investigative measure and not the identity of the suspect, as some mistakenly interpret it). They also noted problems with the quality of translations. Furthermore, some practitioners noted that in cases of bilateral agreements between Slovenia and other MSs, under which the authorities of the issuing State can send Mutual Legal Assistance (MLA) in their own language, they send EIOs in their own language as well. Since Slovenia accepts EIOs only in Slovenian or English language, the issuing authorities are in such cases requested to send proper translations of the EIOs. It was however noted, that practitioners in bilingual areas along the Italian border execute the EIOs in Italian language as well and do not request a translation.

In case they encounter any problems with incoming EIOs, practitioners use the consultation procedure. Whether it is a formal consultation or direct informal consultation via e-mail or telephone, depends on the issue in the matter. If the issuing authorities cannot be reached through these channels, they use the help of EJN or Eurojust. So far, none of the practitioners had ever refused to execute an EIO due to problems with the form, as the problems were mostly related to the content of the EIO. If there are any problems with the form, they try to avoid refusing the execution of a EIO by the use of consultation procedure.

When asked if they themselves have encountered any problems with the EIO form, they all answered in the negative. However, they believe there is some room for improvement. One of the main criticism of the EIO form was that it is complex and difficult to read. Some found the order of categories to be impractical, since it starts with the category of requested investigative measure, while the substance of the case and the legal qualification come later. They believe the order of categories should follow the one in domestic investigation orders, where the substance of the case comes first (suspect, criminal offence, investigative measure). They also noted that because of the structure of the categories a lot of the information is duplicated in more than one category. Furthermore, some would like to see additional categories, such as the suspect in the case (now there is only the subject of the investi-

gative measure) or the authority to which the EIO is being sent (i. e. the executing authority). Since EIOs are being sent to translators, who could have problems translating online forms, some practitioners use the Word version of the EIO form and have also encountered some technical problems, *e. g.* when some sections need to be marked, they have to copy-paste the crosses in order to achieve that. Although filling out the EIO form is a lengthy and tiresome process, practitioners nevertheless rarely experienced refusals of their EIOs due to any reason and never due to the problems with the form.

One judge pointed out that the EIO could also use some improvement on protection of human rights and the principle of mutual trust. It could follow the example of the EAW, where it is evident that the decision on detention was made by a competent judicial authority, whereas with incoming EIO one cannot know, whether the issuing authority would be able to order such investigative measure, as requested in the EIO, in a domestic case. What is more, the issuing authorities usually provide in the EIO only the provisions of the national Criminal Code, which are necessary for the double criminality check, but not the provisions of the national Criminal Procedure Act, which would allow the executing authority to see *e. g.* that the EIO was issued by a prosecutor, who could not order such an investigative measure in a domestic case, but would need the order of a court. It would therefore be beneficial to human rights protection if it was indicated on the EIO form, whether or not the EIO went through the assessment of a competent authority in the issuing State.

Furthermore, according to practitioners, they do not use any specific secure channels of communication. They transmit EIOs by post or via e-mail (some use both at the same time) and they confirm the receipt of EIOs via e-mail. Almost all of practitioners use the electronic versions of the EIO form, while some use the Word versions because of translations. All of them also use Atlas on the EJN website before issuing an EIO. If they cannot find the relevant information, they ask for help the contact points with EJN or Eurojust. The latter has also offered to be the intermediary in EIO matters, so the issuing authorities can send EIOs to Eurojust (via e-mail) and they transmit them to the executing authorities. During the Covid-19 epidemic it was agreed that EIOs should be sent to contact points via e-mail to be transmitted to the executing authorities.

Since national implementation legislation (CCMMSEUA) introduced time limits on the recognition and execution procedure, set forth in the EIO-Directive, practitioners were also questioned on the appropriateness of the time limits. There was no uniform position between the prosecutors regarding the EIO time-frame. Some considered it appropriate and never experienced any problems with execution of EIOs in time, while others considered it too short, as none of their EIOs were ever executed on time. Those who thought the time-frame was too short, said that EIOs usually get executed in 3 to 6 months. In their experience the results vary between different MSs and executing authorities. The judges on the other hand considered the time-frame to be appropriate, however they also noted that it is seldom respected.

Most of practitioners had already had experience with urgency requests, yet they were very rare and sometimes unjustified. They also noted that MSs differ significantly in justification of urgency – some simply write that it is necessary for criminal or pre-criminal procedure, while others explain the need for urgency and the deadline. Practitioners also said that they rarely use urgency requests, but when they do, urgency is respected.

When questioned about their experience with video conferences as a tool for cross-border gathering of evidence, the prosecutors answered that they had no experience with video conferences in the pre-trial phase, because of the nature of the investigative measures at their disposal and the fact that Slovenia is one of the rare countries that has the investigative judge, but they had experience with it in the investigation phase and the trial phase, where they can propose gathering of evidence with the use of the EIO. They do not have the necessary equipment at public prosecutor's offices. Most of the judges, on the other hand, had already had experience with video conferences in EIO cases in the trial phase of the proceedings. All of the judges answered that they have the proper equipment at their disposal at the courts. They noticed that in some MSs the courts do not have the proper equipment, especially courts in the periphery, and this is true even for some of the Western countries. Judges further noted that in the last few years video conferences have become one of the most important means of gathering evidence, not only in EIO cases. They were particularly useful in times of Covid-19 pandemic, when witnesses and suspects could not commute from one Member State to another.

Moreover, practitioners did not encounter any specific problems regarding digital evidence (electronic data, traffic data – data retention). When questioned if they would use the EIO to order the disclosure of traffic telecommunication data of a suspect in the executing State, even if a national system does not provide for data retention, most of them said that they would not use the EIO, if it could not be issued in a similar domestic case. Prosecutors explained that they do not have the competence to request traffic data, as this is reserved for courts only. Consequently, prosecutors have to propose the gathering of electronic evidence to the court in accordance with the provisions of the CPA (Sec. 149.b). The judge then issues an order for disclosure of traffic data and an EIO on its basis. Such an order therefore cannot be issued contrary to the provisions of the CPA, so neither can the EIO.

In case a court order is necessary for certain investigative measures in Slovenia (e. g. house search), but the issuing authority sends the EIO to the prosecutor's office, prosecutors stated that they do not request a court order before executing the EIO, but rather transmit the EIO to the court, so the judge is the executing authority. Similarly, if a court order is needed for certain investigative measures in Slovenia, the prosecutors do not issue the EIOs themselves, but rather propose the order of the investigative measure and the issue of EIO to the court. The judge then issues an order for the investigative measure and the EIO at its own discretion, so the EIO is sent by the competent authority.

When questioned about whether or not they provide justification why a measure should not be revealed to the suspect for confidentiality reasons, the prosecutors answered that they do not provide a special justification. Judges, on the other hand, noted that this is relevant when requesting bank information and traffic data, because in some countries banks and telecommunications operators notify the person whose information is being requested. In these cases, they follow the rules of the CPA and ask for confidentiality, they indicate it in section I of the EIO and cite relevant provisions of the CPA (Sec. 156 and 149.b). The difference in the approach between prosecutors and judges might be due to the fact that only judges can order coercive investigative measures, where confidentiality is crucial. There was nonetheless a uniform position between all practitioners that they do not request justification when acting as executing authorities.

As regards the use of evidence transferred under the EIO for other purposes, practitioners were in agreement that it is safer to obtain consent of the executing State[24] before using such evidence in other proceedings, even though the Slovenian legal system does not limit the use of evidence by the speciality rule. While this rule is also not mentioned in EIO-Directive, one prosecutor observed that by closely reading the EIO-Directive it is evident that the speciality rule should be respected. Before requesting the gathering of evidence with the EIO, the issuing authority has to perform a proportionality test to make sure that the requested measure is necessary and proportionate. Such a test cannot be performed afterwards in a different proceeding, so the speciality rule should also apply to evidence gathered with the use of the EIO.

Furthermore, in order to ensure admissibility of gathered evidence in criminal proceedings, most of the practitioners have requested from executing authorities to follow specific formalities when carrying out investigative measures. The requested formalities were mostly the instruction of the suspect or witness on their rights, especially the right to refuse to testify and the privilege against self-incrimination, the hearing of a witness by a judge, that the person should be served with documents in person. Such formalities were usually respected. Another important formality that they requested was the presence of two witnesses during a house search, however, this formality is often not followed by the executing authorities (especially in Italy).

When requesting formalities to be fulfilled for tactical reasons, the synchronicity of house searches is almost a rule in joint actions in the experience of one judge. The issuing authority indicates in the EIO the preferred date of synchronised house searches and specifies the formalities or other circumstances of house searches. And the same is expected from other issuing authorities. After receiving such an EIO, the specifics are discussed with participating executing authorities, they are warned about certain things etc. As for other practitioners, none of them have ever requested formalities to be fulfilled for tactical reasons, except for one prosecu-

[24] This is also the recommendation of Eurojust.

tor who was involved in unsuccessful synchronised house searches in Slovenia and Italy.[25]

Only one judge had also experience, both as the issuing and executing authority, with EIOs for investigative measures (e. g. wiretapping) conducted in the executing State, where no assistance of the executing State was necessary. It concerned requests for consent that related to wiretapping of conversations in vehicles that crossed Slovenian territory. Most of the time the wiretapping was already performed and the Member State used Annex C (Notification about interception of telecommunication without technical assistance), while consent was given afterwards. When wiretapping is ongoing and relates to a future act, a decision which allows it may be issued. Other practitioners had not had any experience with issuing an EIO for such investigative measures in the executing State, but if the circumstances of the cases called for such a measure, they were in agreement to notify the executing State with Annex C (in Slovenian version Annex 3.b).

When questioned if they had had any experience with the fundamental rights non-recognition ground, whether as issuing or executing authority, practitioners answered in the negative. They were, however, in agreement to invoke the *ne bis in idem* non-recognition ground as executing authorities in the trial phase of the proceedings, since this is one of the mandatory non-recognition grounds in Slovenian implementation legislation (Sec. 62 CCMMSEUA). If the procedure was, however, stopped at the investigation phase of the criminal proceeding, they would generally not invoke it as a non-recognition ground. Some said that it depended on the reason why the proceeding was stopped in Slovenia, whether it was the lack of procedural requirements or a decision on the merits. If it was not a decision on the substance of the case, they would not refuse the recognition of the EIO, because in that case the proceeding could be initiated again, and the suspect could be charged anew.

Similarly, practitioners have never used proportionality as a non-recognition ground, but would consider doing so, if the circumstances of the case called for it. They all stated that they advocate the principle of trust, which is why they do not question the grounds for issuing the EIO and would consider doing so only, if it was really obvious that the use of EIO is disproportionate (e. g. in cases of very minor offences). The issuing authority has an obligation to respect the principle of proportionality when issuing an EIO, so they trust their judgement. They also noted that it is hard for the executing authority to assess proportionality, because the EIO is a form, in which judicial authority of the issuing State claims that someone committed an offence. It is impossible to know whether or not the issuing authority has sufficient evidence for such a claim. The executing authority does not receive enough information regarding the case from the issuing authority. EIOs and MLA

[25] In Slovenia they quickly sent the proposal to the court to issue an order of house search, which was limited in time. However, in Italy the order was not issued on time, so the house search in Slovenia was delayed twice, until they could not wait any longer and they conducted the house search in Slovenia alone.

requests therefore cannot be held to the same standards as ordering investigative measures in domestic criminal procedures. One prosecutor, on the other hand, had experience with proportionality of a requested investigative measure: the issuing authority requested a house search by using the EIO, but the same result could be achieved with seizure of an object, so in accordance with proportionality principle the prosecutor used this investigative measure instead of a house search.

Furthermore, if a measure, which does not exist in the Slovenian legal system, was requested by issuing authorities, practitioners would notify the issuing authority that the requested investigative measure cannot be executed in Slovenia. They would suggest to the issuing authority an alternative measure that is similar to the one requested or can achieve the same results and is allowed under Slovenian legislation. If such a measure did not exist, the execution of the EIO would be refused. In this regard, some practitioners noted problems when wiretapping is requested by the issuing authorities. In accordance with Sec. 150 CPA, the order of wiretapping in Slovenia is issued for a limited period of 1 month, which can be extended on the basis of a substantiated proposal, if there are sound reasons to believe that concrete evidence will be discovered later. A lot of Member States, *e. g.* Germany and Netherlands, order wiretapping for substantially longer time periods of 3 or 4 months. When issuing authorities in such countries issue an EIO for wiretapping, such measure is therefore allowed under the rules of the CPA, but the time limits requested are longer than allowed under Slovenian law. It also has to be taken into account that approximately 10 days get lost because of translation. This issue could be solved if investigative measures limited in time were regulated at EU level.

Most of the practitioners have also reported issues regarding double criminality, especially in cases where a certain offence is considered a criminal offence in Slovenia, but a misdemeanour in the executing Member State, or vice versa. In cases like those the executing authorities on both ends refused EIOs. The examples of criminal offences in Slovenia that were not a criminal offence in the executing Member State are: non-payment of child support, which does not constitute a criminal offence in Austria; small theft, which is considered a misdemeanour in Hungary; and infringement of workers' rights, which is not a criminal offence in Austria and Germany. On the other hand, most traffic offences are considered a criminal offence in Germany and a misdemeanour in Slovenia, and doping was (until very recently) also not a criminal offence in Slovenia.

It was pointed out that there is a systemic problem regarding double criminality in EIO cases, because the EIO was introduced to simplify the gathering of evidence in other Member States, yet the list of criminal offences is based on the list of criminal offences in the EAW. Composing such a list in the EAW was definitely a considerable step forward. However, there is no need for the same logic to apply to the EIO as it does not interfere with fundamental rights the same way as the EAW does (detention of the suspect and restriction of his liberty). Furthermore, evidence gathered by the executing State can be exculpatory evidence.

Lastly, none of the practitioners have ever encountered a case in which the suspected/accused person made use of legal remedies regarding the EIO. Although Slovenian legislation does not provide for legal remedy against the EIO itself, the parties can request exclusion of inadmissible evidence gathered with the use of the EIO in accordance with the rules of the CPA, however the practitioners have yet to witness such an attempt.

2. Data from an Attorney

The attorney that was interviewed had never requested issuing of an EIO in line with the applicable defence rights of national law, nor did he challenge (on behalf of the accused) an EIO in the issuing or executing State. It should be noted, however, that in Slovenia there is no possibility to challenge an EIO in the issuing procedure or in the recognition and execution procedure, because no such legal remedies exist. It is only possibly to challenge the admissibility of gathered evidence (and thereby indirectly an EIO) in the criminal procedure (exclusionary rule).

According to the interviewee, attorneys are generally not aware of the possibility of using the EIO and consequently do not use it often (if at all). In his opinion, the lack of use of EIOs by attorneys could be attributed to several factors. First, there is no specific regulation or procedure which would allow for the defence to use the EIO. Hence, not many attorneys are aware of this option. Further, a lack of specific provisions brings with it a certain degree of uncertainty regarding the procedure and the use of the EIO for an attorney and his client.

Another reason for the lack of usage is the fact that the defence needs to ask a judge (or an investigative judge) to initiate the procedure. Such an approach is connected with two significant problems. Firstly, it is not entirely clear how to react if the (investigative) judge declines an attorney's request. As a general rule, such decline could constitute a breach of the right to defence and a due process violation. There is, however, no existing legal practice regarding this question, which makes it hard to predict the outcome of potential legal proceedings. Secondly, asking for retrieval of evidence through a court might not be a sound strategy from the perspective of trial tactics. As an attorney, one cannot be entirely sure what evidence might be uncovered through the EIO. Such evidence could potentially hurt attorney's client standing, as it would be reviewed by the court before it would be passed to the attorney. Hence, it is more sound to just refrain from gathering such evidence through the EIO in the first place. Even the Attorney Ethics Code may be read in a way as to prevent the use of the EIO in the first place if there is even a shred of doubt that doing so could potentially hurt the attorney's client.

Last but not least, it is not entirely clear how the EIO could be used in the early stages of the criminal proceedings, since the *dominus litis* of the 'pre-criminal procedure' is the State prosecutor. It is not clear if this would mean that the defence should ask the State prosecutor to issue an EIO. It is even more obvious that from

the perspective of the trial tactics, doing so would be very unwise for the defence. It would, however, make sense for an attorney to more actively use the EIO if he represents the victim, yet the interviewee had never had a case where he would ask for the issuing of an EIO on behalf of the victim – nor did he hear of such a case. He speculated about the reasons: in general, there are not many cases with a transnational element in criminal law and many attorneys might not be aware about the possibility of using the EIO as an attorney.

The interviewee has also pointed out that there are cases where the EIO should be used instead of informal police cooperation, else the defendant's right to defence might be breached. If the State prosecution uses informal channels of communication and similar police tactics, which do not enable the traceability of communication to gather evidence, he argued that such evidence should be inadmissible in the criminal procedure (at least where there are instruments like the EIO which could be used instead). He also noticed that courts sometimes use the EIO not to gather evidence, but instead to gather information on rules of criminal procedure in other Member States. In his experience, the court once used the EIO to ask the "executing" authorities if the way their police officers gathered evidence (which was later passed to Slovene police using informal police channels) was obtained legally in their respective Member States.

IV. Conclusion

All legal practitioners, who have the capacity to act as executing or issuing authorities, indicated that the EIO is a useful instrument, which they encounter on a daily basis. Interviews with practitioners left no doubt that the EIO is regularly used in criminal legal proceedings with a cross-border element. The research has, however, revealed some issues that will need to be addressed in the future. Most of the practitioners agreed that the EIO form is usable in the current form, but could use some improvement, especially regarding the order of categories and overall complexity of the form. Timeframes for the execution of the EIO were further criticised as too short and some practitioners pointed out that in certain Member States deadlines are systematically not respected. It is also worrying that practitioners usually do not use safe communication channels when dealing with the EIO, which presents a problem, since information they share is of sensitive nature. Most practitioners had also reported issues regarding double criminality, especially in cases where a certain offence is considered a criminal offence in Slovenia, but a misdemeanour in the executing Member State, or vice versa. Additionally, interview with an attorney revealed that the lack of regulation on how the EIO should be used by the defence presents an issue and contributes to the lack of practical application of the EIO-Directive in that regard.

European Investigation Order – A Comparative Analysis of Practical and Legal Dilemmas

By *Miha Šepec, Tamara Dugar* and *Jan Stajnko*

I. Introduction

Directive 2014/41/EU on the European Investigation Order in criminal matters (hereinafter EIO-Directive) established a single comprehensive framework based on the principle of mutual recognition that allows MS to obtain evidence from other MS. It replaced existing frameworks for the gathering of evidence, namely the 2000 EU Mutual Legal Assistance Convention, Framework Decision 2008/978/JHA on the European evidence warrant and Framework Decision 2003/577/JHA on the freezing of evidence.

The EIO-Directive was adopted in April 2014, giving MS (except Ireland and Denmark) three years for its transposition. After the implementation, the EIO-Directive soon became the leading legal instrument for gathering of evidence in the EU, therefore revolutionizing the EU cooperation in criminal matters. By providing deadlines for execution as well as the introduction of a practical form in Annex A which was soon adopted in practice, EIO did not remain a theoretical concept, but a commonly used and useful tool for legal practitioners dealing with offences with a cross border element in the EU.

The EIO-Directive further introduced rules relating to types of procedures in which EIO can be used, conditions for its usage, rules of recognition and execution, as well as legal safeguards for refusal of execution, thereby safeguarding basic rights of the defendants and preventing serious infringement in criminal procedure of MS (e. g. demanding an execution of an investigation measure that is not legally implemented in the executing state).

However, it would be quite utopian to expect that such a commonly used legal instrument would be completely absent of any theoretical and practical shortcomings. With the purpose to identify those difficulties and to find solutions to remedy them, we started an international project named EIO-LAPD, which was funded by the European Commission. It included thorough analysis of legal framework and practical dilemmas and solutions in six EU MS: Germany, Austria, Portugal, Italy, Croatia and Slovenia.

The purpose of this comparative chapter is to present the most relevant shortcomings of the EIO-Directive which were identified upon a comparative analysis of legal framework implementing the Directive as well as its practical application. The following topics are therefore addressed: overall shortcomings of the EIO form, language problems in urgent cases, transmission of EIOs and electronic evidence via (in-)secure communication channels, video conference tools, responding to requests for inexistent measures, the *ne bis in idem* non-recognition ground, coercive measures, speciality rule, and requests for issuing of EIOs by the defence.

II. Shortcomings of the EIO Form

The overall objective of introducing a standard EIO form, available in all official languages of MS, was to simplify formalities, improve quality and reduce translation costs. Despite the fact that results of the Comparative report showed that practitioners do consider the EIO form usable in its current formulation, there is little doubt that the form itself could be improved in many ways. While some practitioners reported that one just needs to get used to filling out the EIO form as it is, the overall majority of the practitioners called for the improvement of the form. They pointed out that the form is too long and confusing in its current state, as they argued that the layout of the form is not entirely logical (for example duplication of information in different parts of the form; lack of certain checkboxes to be ticked when filling out the form; lack of certain categories, such as suspect of the case; no place to indicate which annexes are sent with the EIO; confusing order of categories in the form etc.). What is more, the executing authorities reported that they encounter on a regular basis EIO forms which are not properly filled out (for example absence of essential information, such as facts of the case; lack of contact information of issuing authority; misplacement of information in wrong categories etc.).[1]

The results of the Comparative report regarding the EIO form correspond with the findings of other initiatives aimed at identifying the issues that hinder the smooth functioning of the EIO mechanism. The Commission's report to European Parliament and Council regarding the implementation of the EIO-Directive (hereinafter: Commission's report)[2] identified overall the same major difficulties regarding the EIO form, most frequently the length and complexity of the form.[3] Joint note of Euro-

[1] *Šepec*, M./*Dugar*, T./*Stajnko*, J., European Investigation Order – legal analysis and practical dilemmas of international cooperation – EIO-LAPD: Comparative report on legal implementation and practical application of the EIO in Austria, Croatia, Germany, Italy, Slovenia and Portugal (Maribor: Apr. 2021), pp. 16–18, <https://lapd.pf.um.si/materials/>, accessed 9 May 2022.

[2] European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, COM/2021/409 final (20. July 2021).

[3] European Commission (n. 2), p. 12.

just and EJN on the practical application of the EIO (hereinafter Joint note of Eurojust and EJN) also identified some of the same challenges when filling in the EIO form, such as lack of fundamental information (about the measures, facts or persons affected), the lack of a tick box to indicate some investigative measures (such as searches, production orders and EIOs in relation to forensic evidence) and lack of a tick box/section to indicate different annexes to the EIO form.[4]

In this regard it is important to point out, however, that according to executing authorities the incorrectly filled in EIO form is almost never a reason for refusal of execution. In the spirit of international cooperation, the executing authorities reported using the consultation procedure in order to avoid refusing the execution of EIO because of faulty form. They also reported that in order to resolve any issues stemming from incorrectly filled in EIO form, they mostly used informal direct communication with the issuing authorities (for example e-mail and telephone). What is more, some of the executing authorities reported seeking help from EJN contact points and national Eurojust members.[5] Both EJN and Eurojust[6] proved to be very helpful in facilitating international cooperation with regards to EIO requests.[7]

To address the issues stemming from EIO form itself and the poorly filled in forms, we suggest specific training of issuing authorities[8], with regard to proper filling out of the EIO form, as well as drafting and dissemination of respective guidelines[9] for practitioners. A creation of specific working group tasked with improving

[4] Eurojust and European Judicial Network (EJN), Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order (June 2019), p. 7., <https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2019-06-Joint_Note_EJ-EJN_practical_application_EIO.pdf>, accessed 7 January 2022.

[5] European Commission (n. 2), pp. 16–18.

[6] According to Eurojust's casework report, the help of Eurojust was mostly sought with regards to clarifying questions or requests for additional information in relation to the description of the criminal acts (such as legal qualification, differences in national law, factual elements of the case), description of the investigative measure requested (such as obtaining of documents, hearing of a suspect or witness, seizure, searches etc.), other requests for additional information (such as excessive requests (e. g. entire case file), domestic judicial decision authorising a coercive investigative measure or available legal remedies) or issues in relation to compliance with certain formalities and procedures (such as formalities related to the hearing of a person, presence of police/judicial authorities, inadmissibility of evidence obtained without complying with formalities). Eurojust, Report on Eurojust's casework in the field of the European Investigation Order (Nov. 2020), pp. 21–27, <https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_EIO-Casework-Report_CORR_.pdf>, accessed 7 January 2022.

[7] For a complete analysis of the specific issues and help that was provided see Eurojust's casework report (n. 6).

[8] And preferably also criminal defence attorneys. See below, section XI.

[9] Such as the recently drafted Guidelines on how to fill in the European investigation order (EIO) form which are annexed to the General Secretariat of the Council Doc. No. 5291/20, COPEN 9, JAI 25, EUROJUST 5, EJN 5 (23 Jan 2020), <https://data.consilium.europa.eu/doc/document/ST-5291-2020-INIT/en/pdf>, accessed 7 January 2022.

(simplifying) the existing EIO form itself would also be beneficial, since cross-border gathering of evidence in the EU could be significantly facilitated if the EIO form was more user friendly.

III. Accepted Languages in Urgent Cases

With respect to the language(s) in which the incoming EIOs are accepted, the participating MSs did not show much flexibility. Most of them did not indicate any other language that would be accepted apart from the official language of the MS. Although the number of participating MSs was not high, the language regimes[10] differed significantly. Half of the participating MSs do not accept EIOs in any other language apart from the official language of the executing State and that applies also to requests in urgent matters. In one of these MSs, however, urgent requests in English are in practice often accepted. One MS accepts requests in English only in urgent matters, while the other based its language regime on reciprocity. Only one MS indicated that English language is also accepted in addition to official language of the State, without there being a need to indicate urgency of the request.[11]

These results are a bit at odds with results of Commission's report, which showed that more than half of MSs accept EIOs in languages other than their own (typically English),[12] while a few of them would accept EIOs in other languages only in cases of urgency of the request or on a basis of reciprocal commitment from the other MS in question. A small number of MSs, which established preferential language regimes for certain neighbouring MSs, was also identified.[13]

Participating MSs seem to be (mostly) on the other end of the spectrum regarding the language regime. However, by rigidly sticking to their own official languages the MSs actively contribute to translation-related issues,[14] delays in issuing and execution of EIOs and hampering of effective cooperation in criminal matters. We therefore urge MSs to show flexibility at least in urgent cases and accept EIOs in at least

[10] To identify the applicable language regimes in each MS, issuing authorities are advised to refer to updated version of EJN Document Competent authorities, languages accepted, urgent matters and scope of the EIO-Directive (10 May 2021), <https://www.ejn-crimjust.europa.eu/ejn/EJN_RegistryDoc/EN/3115/0/0>, accessed 7 January 2022.

[11] Šepec et al. (n. 1), p. 20.

[12] That the majority of MSs accept EIOs in additional language (often, but not always, English) was also one of the findings of Joint note of Eurojust and EJN. Eurojust and EJN (n. 4), p. 9.

[13] European Commission (n. 2), p. 6.

[14] To avoid issues with translation of the EIO form itself, we suggest that the practitioners use a compendium tool on the EJN website, <https://www.ejn-crimjust.europa.eu/ejn/CompendiumChooseCountry/EN>, accessed 16 January 2022.

one major European language (preferably English[15], as this is the language that is most widely accepted by MSs in urgent matters)[16], especially if the issuing authority indicates that a translated EIO will follow in due time. If executing authority does not respond to urgency requests in other languages,[17] we advise the issuing authorities to turn to EJN or Eurojust for help in order to expedite the execution of EIOs.[18]

IV. Transmission of EIOs and Electronic Evidence via (In-)Secure Communication Channels

Use of (in-)secure communication channels for transmission of EIOs and attached documents emerged as a pressing concern. While the EIO form itself is mostly transmitted by issuing authorities by postal mail (an arguably safe, but time-consuming method), the subsequent communication between the issuing and executing authorities is usually conducted via (not encrypted and sometimes not certified) email services or other insecure communication channels. In some cases, practitioners reported that this is because of maximum email size limitations introduced by email service providers, which makes it challenging to transmit requested documents when they contain a lot of data and are therefore voluminous.[19]

Practices of using insecure communication channels are concerning since EIOs and requested documents typically contain sensitive data related to the suspect or the accused. What is more, if insecure communication channels (for example Google services such as Gmail) are used, sensitive data is transferred via servers which are not located within the EU. Such transfer of data does not only present a concern for protection of personal data, but national security concerns as well. Last but not least, transmission of EIOs and other documents via non-certified email systems presents its own set of problems related to traceability, provenance and authenticity.

Depending on the nature, complexity and urgency of the case, there already exist different safe communication channels which can be used to expedite the transmission of EIOs and ensure their authenticity, for example EJN Secure Connection ser-

[15] This would also be in line with the best practice identified in Eurojust and EJN (n. 4), p. 13.

[16] Eurojust (n. 6), p. 13.

[17] Provided that urgency is appropriate.

[18] In very urgent cases the members of the National Desk at Eurojust are also able to provide themselves, within a few hours, translations from English into the required languages, so that EIOs can be executed immediately. Eurojust (n. 6), p. 19.

[19] *Šepec* et al. (n. 1), p. 19. Regarding issues and possible solutions related to transmission of large files, see European Commission, Cross-border Digital Criminal Justice, Final Report (June 2020), p. 214–223, <https://op.europa.eu/en/publication-detail/-/publication/e38795b5-f633-11ea-991b-01aa75ed71a1/language-en>, accessed 7 January 2022.

vice,[20] eEDES (which uses the IT infrastructure provided by e-CODEX[21] to connect member states)[22] and secure communication through Eurojust.[23] Unfortunately, none of these options are particularly convenient for practitioners since they are either not intended for direct communication between national authorities[24] (for example, EJN Secure Connection is intended for communication between EJN contact points) or not (yet) implemented and supported in all MSs (for example, not all MSs are connected to eEDES).[25]

We therefore strongly encourage all involved parties to facilitate the formation and implementation of a transnational online platform (communication hub) which would allow for encrypted and simplified communication as well as transfer of evidence and other documents (including large files)[26] directly between issuing and executing authorities. The European Commission in its Communication 'Digitalisation of justice in the European Union: A toolbox of opportunities'[27] already indicated that it sees eEDES as a comprehensive IT tool for secure exchange of European investigation orders, mutual legal assistance requests and associated evidence in digital format. It is also planning to further develop this platform.[28] It is now up to the MSs to connect to eEDES in order to facilitate the practical application of the EIO-

[20] For more on EJN Secure Connection see EJN Secure Communications Network – Quick Guide, 17 Oct. 2018, <https://www.ejn-crimjust.europa.eu/ejn/EJN_RegistryDoc/EN/2364/0/0>.

[21] E-CODEX offers a European digital infrastructure for secure cross-border communication in the field of justice. For more information, see: <https://www.e-codex.eu/>, accessed 7 January 2022. On this website, information regarding follow-up projects EVIDENCE2e-CODEX, EXEC and EXEC II is also available. E-CODEX and related projects are co-funded under the Justice Programme 2014–2020 and the CEF Programme.

[22] See *Carrera*, S./*Mitsilegas*, V./*Stefan*, M., Criminal Justice, Fundamental Rights and the Rule of law in the Digital Age: Report of CEPS and QMUL Task Force (Brussels: Centre for European Policy Studies (CEPS), May 2021) pp. 26–28, available at <https://www.ceps.eu/wp-content/uploads/2021/05/Criminal-Justice-Fundamental-Rights-and-the-Rule-of-law-in-the-Digital-Age.pdf>, accessed 7 January 2022.

[23] Eurojust (n. 6), pp. 29–30.

[24] See Eurojust and EJN (n. 4), p. 11.

[25] See Presidency of the Council of the European Union, The e-Evidence Digital Exchange System (eEDES): State of Play, Doc. No. 6429/1/20, REV 1, JAI 193, COPEN 63, EUROJUST 37, EJN 32, DROIPEN 11, CYBER 29, JAIEX 13, ENFOPOL 60, DATAPROTECT 24, TELECOM 26, MI 52, RELEX 167 (4 Mar. 2020), p. 3.

[26] On the importance of such initiatives for transmission of data gathered through interception of communication, see *Bachmaier*, L., 'Mutual recognition and cross-border interception of communications: the way ahead for the European Investigation Order', in: C. Brière/A. Weyembergh (eds.), The Needed Balances in EU Criminal Law: Past, Present and Future (Oxford: Hart publishing, 2017), 313, 325–329.

[27] European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions Digitalisation of justice in the European Union: A toolbox of opportunities, Doc. No. COM/2020/710 final (2 Dec 2020).

[28] On further development of eEDES, see *Carrera* et al. (n.22), p. 30.

Directive. Once the system is integrated, practitioners will need to be properly trained if the full potential of eEDES is to be reached. Further support of training initiatives such as project TREIO[29] is therefore of vital importance.

V. Video Conference Tools

The majority of the interviewed practitioners already had experience with video conferences, which were used mainly at trial level for hearing of witnesses.[30] The courts in participating MSs were reported to have the proper equipment for conducting video conference proceedings. Nevertheless, among the problems encountered were practical issues[31] (such as poor connection), lack of proper equipment at the courts on the periphery of some (even comparatively more developed) MSs and overall lack of video conference tools at public prosecutor's offices.[32] The latter was especially surprising, as important evidence-taking can also take place at public prosecutor's offices (to varying degrees, depending on national legislation).

The specific point of focus in this regard should be to ensure that there are available tools for conducting video conferences on all levels of judicial system. Video conferences have proved to be particularly useful in times of COVID-19 pandemic, when witnesses and suspects could not commute from one MSs to the other.[33] However, it would be beneficial to see a more widespread use of video conferences and digital technologies in proceedings, instead of a last resort solution as it had been so

[29] Project TREIO is funded by the European Union's Justice Programme (2014 – 2020). For more information, see <https://treio.eu/>, accessed 7 January 2022.

[30] But not so much the defendants. More on challenges for the rights of the defendant in video conference proceedings in *Grio*, A., 'The Defendant's Rights in the Hearing by Videoconference', in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe – Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases (Cham: Springer, 2014), 119.

[31] Similarly, according to Eurojust's casework the most frequent issues that Eurojust encountered when requested to facilitate the video conference were practical and/or technical issues (such as urgency, missing information, time and place of the hearing, coordination and cost issues), questions related to status of subject and videoconference during trial sessions and/or appeal proceedings. Eurojust (n. 6), pp. 37 – 41. Read more on practical issues that can occur when using video conference in cross-border proceedings, along with the best practices and solutions to solve these problems in AVIDICUS 3 project deliverable: *S. Braun/E. Davitti/S. Dicerto*, Research report: The use of Videoconferencing in Proceedings Conducted with the Assistence of an Interpreter (June 2016), available at <http://www.videoconference-interpreting.net/wp-content/uploads/2016/11/AVIDICUS3_Research_Report.pdf>, accessed 7 January 2022. For more information on AVIDICUS projects, see: <http://wp.videoconference-interpreting.net/>, accessed 7 January 2022. AVIDICUS projects are funded with support from the European Commission.

[32] Šepec et al. (n. 1), p. 37.

[33] Ibid.

far. Although this would not be without its own challenges[34], it is the right way forward in an increasingly digitalised society and also in line with the EU's vision for Digital Europe.[35]

VI. Responding to Requests for Inexistent Measures

According to transposition legislation of participating MSs, the use of measures that are inexistent in their legal systems would not be allowed (e. g. the issuing authority requested the use of Trojan viruses, drone surveillance, ankle monitors or other modern technology). The same would also apply to measures that do exists in their legal systems, but could not be ordered in the given case according to domestic rules (e. g. if the requested measure was restricted to a certain type of offence according to national rules, which was not the subject of the issuing State's procedure). Accordingly, majority of the executing authorities would in such cases consult with the issuing authority and try to find an alternative investigative measure that would reach the same objective.

What is concerning is the fact that some of the executing authorities reported refusing the execution of such EIOs right away, without prior consultation with issuing authority, while a few executing authorities reported that they would carry out a different investigative measure without prior consultation.[36] Such a practice is a cause for concern, as it is contrary to obligations laid down in Art. 10 EIO-Directive (2014/41/EU)[37] and even national transposition legislation.

While it is unclear why some of the executing authorities in certain MSs apply this practice, the Commission's Report also identified compliance issues in some MSs with regard to this question, as Art. 10 EIO-Directive (2014/41/EU) was not uniformly transposed in conform manner in all MSs. A few MSs transposed it as being discretionary instead of obligatory to have recourse to another investigative measure (Art. 10(1)), or obligatory instead of discretionary to have recourse to a less intrusive investigative measure (Art. 10(3)), while a few MSs transposed Art. 10(5) as a ground for non-recognition or non-execution.[38]

[34] See *Fekete*, G., 'Videoconference hearings after the times of pandemic', EU and Comparative Law Issues and Challenges Series, 5 (2021), 468, 483–484.

[35] Read more on Digital Europe programme in European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2030, Digital Compass: the European way for the Digital Decade, COM/2021/118 final (9 Mar. 2021), available at <https://eur-lex.europa.eu/resource.html?uri=cellar:12e835e2-81af-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF>.

[36] *Šepec* et al. (n. 1), p. 31.

[37] Art. 10 provides for obligation of the executing authority to have a recourse to a different investigative measure when the requested measure does not exist under national law.

[38] European Commission (n. 2), p. 7.

Although under the findings of the Comparative report all of the participating MSs have transposed this provision correctly, it is possible that certain executing authorities simply interpret national legislation provisions as discretionary. However, in such a case an action needs to be taken to further train and inform all executing authorities of their obligations under Art. 10 and to apply uniform practice in this regard.

VII. The *ne bis in idem* Non-Recognition Ground

Quite problematic in practice is the refusal of EIO execution on the ground of the *ne bis in idem* principle (ground defined in Art. 11(d). Some of the common dilemmas posed by the practice are the existence of confusion as to when the ground for refusal based on *ne bis in idem* can be invoked, and that the broad meaning of *ne bis in idem* can create problems when there are parallel investigations in two different states. The practitioners point out that there is no clarity as to whether the *ne bis in idem* ground for refusal can be invoked if the procedure has been interrupted at the investigation stage.

While the case law of the European Court of Human Rights (ECtHR) on the issue of the *ne bis in idem* was somewhat inconsistent, the court set new standards in 2009 by ruling in the case of *Zolotukhin v. Russia.*[39] Art. 4 of Protocol No. 7 of the ECHR prohibits the prosecution or trial of an individual if the prosecution stems from the same facts or facts that are substantially the same as in the first case. This safeguard is activated whenever a state initiates a new proceeding after it has already acquired the effect of res judicata in a previous acquittal or conviction. For example, a sentence of three days' detention, even if it is final in administrative or misdemeanor proceedings, prevents criminal proceedings from being instituted if they stem from the same or substantially similar facts. However, the ECtHR has taken the view that Art. 4 of Protocol No. 7 applies only to courts of the same country. The article does not prevent an individual from being tried even though he has already been acquitted or convicted in another State by a final judgment. Therefore, the ECtHR practice does not solve the aforementioned dilemmas regarding EIOs. They are however addressed by the ECJ.

Standards under EU commitments are higher when it comes to crimes with cross-border effects. In 2003, the European Court of Justice (ECJ) issued an important joint decision ruling that not only a final conviction or acquittal, but also an investigation abandoned by an authority or body not otherwise part of the judiciary prevented a

[39] ECtHR, Judgement of the 10 Feb. 2009, No. 14939/03 (*Zolotukhin v Russia*), ECLI:CE:ECHR:2009:0210JUD001493903; CJEU, Judgment of 1 Dec. 2008, No. C-388/08 (*Leymann and Pustovarov*), ECLI:EU:C:2008:669.

retrial within the European Community.[40] However, only if the investigation is linked to the fulfillment of a certain obligation set by the public prosecutor, and this obligation is in fact a punishment for the unlawful conduct of the accused. The rule of the first therefore applies – the decision of the state that first closed the case or issued a decision, which is not necessarily a court decision, applies. This higher standard of the *ne bis in idem* principle, set by the Schengen acquis, only applies to criminal offenses that have cross-border effects, that is when the judicial authorities of several countries are competent to prosecute these offences.

The doctrine presented was supplemented by the ECJ in the *Kossowski* case.[41] The court wondered whether the investigation, which had been halted by the Polish prosecutor's office, prevented Germany from prosecuting the same offence because of the *ne bis in idem* principle. The Court emphasizes that it is crucial whether the proceedings in a MS have finally been disposed of. It ruled that a formal definition of the finality of a decision of a judicial body terminating the proceedings was not sufficient, but that a substantive assessment has to be made in accordance with Art. 54 of the Schengen Acquis. If the reasoning of the decision shows that no detailed investigation has been carried out (e. g. neither the accused nor the witnesses have been questioned), then the investigation in that MS does not reach a level of finality which would prohibit another MS from instituting criminal proceedings in respect of the same criminal offence.

Therefore, in a case of doubt about the existence of a *ne bis in idem* ground for refusal, it would be advisable for the practitioners to request further information from the issuing authority on the type of circumstances in which the investigation was interrupted or what was substantially done during the investigation. The final answer if the *ne bis in idem* ground for refusal of EIO exists, must be derived from the reading and understanding of the aforementioned cases of the ECJ.

VIII. Coercive Measures

Although the EIO-Directive makes a distinction between coercive and non-coercive investigative measures,[42] this concept is not clearly defined in the legislation of most participating MSs.[43] It is interpreted, nevertheless, with respect to the intensity of interference with fundamental rights – coercive measures are the ones that entail a

[40] ECJ, Judgment of 11 Feb. 2003, Joined Cases No. C-187/01 and C-385/01 (*Gözütok and Brügge*), ECLI:EU:C:2003:87.

[41] ECJ, Judgement of 29 June 2016, No. SEU C-486/14 (*Kossowski*), ECLI:EU:C:2016:483.

[42] As indicated in Art. 10(2)(d) and Recital 16 EIO-Directive (2014/41/EU).

[43] Apart from one participating MS, where the implementation legislation defined non-coercive act as 'acts that do not affect personal freedom and the right to inviolability of the domicile'. *Šepec* et al. (n. 1), p. 35.

more severe interference with fundamental rights.[44] EJN and Eurojust came to similar conclusions in their report, seeing as most MSs see the term non-coercive measures as a common concept that is defined in everyday legal language, incorporating measures that do not affect fundamental rights, and often not requiring a court order.[45] Nonetheless, it should not be underestimated that referring to the non-coercive nature of a measure compared to *lex loci* might contribute to disparity in treatment, since a concrete measure qualifying as coercive in one MS might not qualify as such in another.[46]

Pursuant to Art. 10(2) EIO-Directive (2014/41/EU), some measures always need to be available under the law of the executing State. This applies, *inter alia*, to any non-coercive investigative measure as defined under the law of the executing State. This is a potentially troublesome provision, as it could allow for measures that are infringing the right to privacy but are not physically interfering with person's rights, to be classified as non-coercive measures. Hence, Recital 16 of the EIO-Directive clarifies that non-coercive measures cannot be measures that infringe the right to privacy.

Consequently, in cases where an investigative measure infringes the right to privacy, all exceptions regarding the grounds for non-recognition or non-execution provided in Art. 10(2) are applicable (including the double criminality exception and restricted use of investigative measures in the executing State due to a list or category of offences or to offences punishable by a minimal criminal sanction). This is especially relevant in case of electronic evidence, for example requests for IP addresses or traffic data.[47] Gathering of traffic data could be restricted to category of offences in executing State but not in the issuing State and this gives the executing State the ground to reject such EIOs, if it is clearly evident that there is no compliance with its catalogue of offences. This is particularly important in light of the fact that some MSs do not consider traffic data as contextual data, but rather as network information, and therefore consider it less invasive (also in the context of the right to privacy).[48]

[44] Ibid.

[45] Eurojust and EJN (n. 4), p. 12.

[46] *Siracusano*, F., 'The European Investigation Order for Evidence Gathering Abroad', in: T. Rafaraci/R. Belfiore (eds.), EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office (Cham: Springer 2018), 85, 94–95.

[47] We found that a discord exists between MSs regarding requests for dynamic IP addresses and request for historical telecommunication data in general, where some Member states consider such investigative measures to be coercive while others deem them to have a non-coercive nature. *Šepec* et al. (n. 1), p. 35–36.

[48] Lecture by *Erbežnik*, A., 'Dileme EPN z vidika evropskega prava', in: Seminar Evropski preiskovalni nalog: od tožilske prakse do smernic (Ljubljana, Hotel Slon, 23 Sep. 2021).

IX. Speciality Rule

Speciality rule (the use of evidence transferred under an EIO for other procedures not specified in the EIO) is not specifically provided in the EIO-Directive itself. As such it was subject to some controversy under the EIO-Directive: according to one view the speciality rule remains applicable as one of the traditional principles of international legal cooperation in criminal matters, whereas according to the other view the omission in the EIO-Directive was on purpose, since this principle has no place in the system of enhanced cooperation established by principles of mutual recognition and mutual trust within the EU.[49] While some argue that speciality rule is now clearly established and generally applicable even in the absence of specific provisions,[50] this view is not uniformly shared across the EU. This was clearly reflected in the answers of practitioners in participating MSs, as they had very conflicting opinions on the applicability of speciality rule (even among the practitioners from the same MS).[51] What is more, conflicting views of MSs on this issue were also reported by Eurojust and EJN in their reports.[52]

As a result of these different views, practitioners follow different approaches when issuing or executing EIOs. While some practitioners indicated that they would not use the transferred evidence for other purposes than originally stated in the EIO without the permission of executing authority, others indicated that they would use it without limitations.[53] Until the passing of explicit regulation on applicability of rule of speciality or definitive court decision on this issue[54], the best practice in this regard would be that the issuing authority issues a separate request and asks for

[49] More on this in *Barbosa e Silva*, J., 'The speciality rule in cross-border evidence gathering and in the European Investigation Order – let's clear the air', ERA Forum 19 (2019), 485–504.

[50] See for example *Ramos*, V. C./*Pons*, G., 'Freezing and confiscation under the EU – UK Trade and Cooperation Agreement', New journal of European Criminal Law 12 (2021), 233, 242.

[51] *Šepec* et al. (n. 1), pp. 8–9.

[52] Some executing authorities have a practice of explicitly mentioning that the evidence gathered under the EIO may only be used for the purpose of that specific investigation, while other executing authorities do not mention anything, but assume that the evidence will not be used for another purpose. Similarly, some issuing authorities consider that permission must always be sought from the executing authority before evidence is used in a different case, yet others consider that this step is not required, as the issuing authority makes a decision and executing authorities will transfer the evidence accordingly, subject to the applicable legal framework on data protection. Eurojust and EJN (n. 4), p. 16. With regards to this issue, the help of Eurojust was mostly needed by the issuing authorities to obtaining permission from the executing MS to use the evidence previously obtained for other purposes than initially requested in the EIO, to ensure the admissibility of the evidence at trial stage. Eurojust (n. 6), p. 31.

[53] *Šepec* et al. (n. 1), pp. 8–9.

[54] Such as in the case of European Arrest Warrant. See CJEU, Judgment of 1 Dec. 2008, No. C-388/08 (*Leymann and Pustovarov*), ECLI:EU:C:2008:669.

permission of the executing authority before using the evidence for purposes other than the purposes stated in the original EIO.[55]

X. Request for Issuing of EIOs by the Defence

Lastly, we strongly urge all involved parties on EU as well as on national levels to re-evaluate the impact of the EIO on the rights of the accused and its compatibility with the principle of equality of arms in criminal proceedings.[56] Significant problems were identified regarding the possibility of the defence to request issuing of an EIO. Some MSs lack specific regulation on the procedure to request issuing of EIOs on the behalf of the defence. Hence, a lack of awareness of this possibility amongst attorneys[57] was reported by some interviewees.[58]

What is more, in the light of the lack of specific national regulation, uncertainty regarding procedure after competent authorities decline the defence's request to issue an EIO was also reported.[59] Moreover, in cases where the prosecution is the competent issuing authority, it is unrealistic to expect that attorneys will ask for the use of the EIO. There is always a risk that the revealed evidence will be harmful to their clients and fall into the hands of the prosecution (issuing authority). The existing framework (or lack thereof) in some MS might therefore be at odds with the principle of equality of arms in criminal proceedings.[60]

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[55] This best practice was already identified in Eurojust and EJN (n. 4), p. 14 and EJN Conclusions 2018 On the European Investigation Order (EIO), annexed to the Council of European Union Doc. No. 14755/18, JAI 1204, COPEN 420, EUROJUST 163, EJN 56 (7 Dec. 2018), p. 5.

[56] Regarding problems of the EIO-Directive in light of rights of the defence to participate during collection of the evidence, see, *Jurka*, R./*Zajančkauskienė*, J., 'Movement of evidence in the European Union: challenges for the European investigation order', Baltic Journal of Law & Politics 9 (2016), 56, 75–77.

[57] Definition of 'attorneys' is not provided in the EIO-Directive (2014/41/EU). For the purpose of our research, we defined them as 'legal professionals who are legally qualified and licensed, according to national law, to represent a suspect/defendant in any types of proceedings for which an EIO can be issued according to Art. 4 of the EIO-Directive (2014/41/EU).'

[58] *Šepec* et al. (n. 1), p. 11.

[59] 'The authorities of the issuing MS are under the obligation to provide to the person concerned the possibility to request the issuing of a European Investigation Order, however, whether the request is complied with or not is left to the issuing authority.' *Dediu*, D., 'Protection of Fundamental Rights in the Light of the Directive Regarding the European Investigation Order', Conferinţa Internaţională de Drept, Studii Europene şi Relaţii Internaţionale 6 (2018), 298, 301.

[60] *Šepec*, M./*Erbežnik*, A./*Stajnko*, J./*Dugar*, T., European Investigation Order – legal analysis and practical dilemmas of international cooperation – EIO-LAPD: National Report: Slovenia (Maribor: Oct. 2020), pp. 37–38, <https://lapd.pf.um.si/materials/>, accessed 9 May 2022.

These findings are in line with the Commission's report from 2021 on the implementation of the EIO-Directive, which indicates that attorneys have very limited to no experience on challenging the issuing of an EIO or its recognition and execution. What is more, 'a small number of replies showed that requests from the defence to gather evidence from another MS (Article 1(3)) were rarely granted.'[61]

Hence, we strongly advocate for a formation of a working group tasked with providing a comparative report on the implementation of the EIO-Directive regarding the rights of the accused. Instead of the hands-off approach[62], clear guidelines should be presented to national lawgivers, explaining in more detail how to ensure for adequate implementation of the Directive, aimed at allowing the accused or suspect to request issuing of an EIO and to participate during the collection of evidence "within the framework of applicable defence rights" (Art. 1(3) EIO-Directive). What is more, additional awareness raising and training activities aimed specifically at attorneys (and not merely at issuing and executing authorities) are direly needed.

XI. Conclusion

The new EIO-Directive is the main instrument for gathering evidence in criminal matters in the EU. By relying on the principal of mutual recognition, EU Member states were provided with an effective instrument for gathering evidence from other Member states in an efficient time limit.

Although EIO is regarded as reliable and effective instrument for cooperation in criminal matters between MSs, it has its fair share of practical problems, as indicated by this chapter. The EU Commission is aware of this fact and is continuing to assess MS' compliance with the Directive, while also promoting and supporting transfer of best practices. The Commission has already organized three expert meetings on the topic of application of effective practices. It is also working on promoting and expending eEDES, an IT tool MS may use to swiftly and securely exchange EIOs in digital format in compliance with requirements set out in the Directive.[63]

In the near future, we can expect a facilitated development of eEDES as well as a push for its implementation in all MS, as digital evidence is ever more present in criminal law, and new problems of securing such data are constantly arising. As practitioners have expressed a major concern regarding digital evidence, we can expect that this will be the next stage of EU development on the topic of evidence exchange in criminal matters. This push to regulate the exchange of digital evidence should,

[61] European Commission (n. 2), p. 14.

[62] Regarding the hands-off approach when it comes to the possibility of the defence to request international cooperation in general see *Klip*, A., European criminal law: an integrative approach (Cambridge: Intersentia, 3rd edition 2016), pp. 467–468.

[63] European Commission (n. 2).

however, not come at a cost of amending other pressing issues of the EIO-Directive, such as rethinking the existing legal framework from the perspective of rights of the accused and the ne bis in idem principle.

Part II

Special Topics

Developments and Adaptations of the Principle of Mutual Recognition – Reflections on the Origins of the European Investigation Order with a View to a Practice-Oriented Understanding of the Mutual Recognition Principle

By *Kai Ambos* and *Peter Rackow**

I. To Which Extent Does the European Investigation Order Really Rest on the Principle of Mutual Recognition?

As is well known, the history proper of the European Investigation Order (EIO) began with an initiative launched by Belgium and six supporting States (Spain, Estonia, Bulgaria, Austria, Slovenia and Sweden), who submitted a proposal for a directive to the Council on 21 May 2010.[1] The proposed initiative set out what certainly appeared to be a consistent implementation of the principle of mutual recognition (conceived of in substantive terms). However, it should be borne in mind that the abovementioned States may have pressed ahead precisely in order to forestall a (possibly even further-reaching) proposal by the Commission.[2] In its 2009 Green Paper 'on obtaining evidence in criminal matters from one Member State to another and

* All translations from German by the authors.

[1] Council Doc. 9288/10, Interinstitutional File 2010/0817 (COD) <https://data.consilium.europa.eu/doc/document/ST-9288-2010-INIT/en/pdf>, accessed 24 December 2022.

[2] *Herrnfeld*, H.-H., 'Art. 76 AEUV', in: J. Schwarze et al. (eds.), EU-Kommentar (Baden-Baden: Nomos, 4th ed. 2019), mn. 5. Also see *Mitsilegas*, 'European Criminal Law and Resistance to Communautarisation after Lisbon', New Journal of European Criminal Law 1 (2010), 458, 468–67, who (without explicitly mentioning the Belgian initiative) points out that Member State initiatives can be seen as preventive measures against more far-reaching Commission proposals ('… initiatives can be seen [at] times as a pre-emptive response to more integrationist proposals due by the Commission') and *Leonhardt*, A., Die Europäische Ermittlungsanordnung in Strafsachen (Wiesbaden: Springer 2017), p. 207, according to whom 'the Commission's attempt to introduce the so-called "EBA II" was bulldozed by the Member States' initiative' (orig. '… die Kommission … bei ihrem Vorhaben die sogenannte "EBA II" einzuführen, von der Initiative der Mitgliedsstaaten überrollt wurde'). See furthermore also *Gleß*, S., 'Europäisches Beweisrecht', in: U. Sieber/H. Satzger/B. v. Heintschel-Heinegg (eds.), Europäisches Strafrecht (Baden-Baden: Nomos, 2nd ed. 2014), § 38 mn. 84a and *Busemann*, B., 'Strafprozess ohne Grenzen? Freie Verkehrsfähigkeit von Beweisen statt Garantien im Strafverfahren?', Zeitschrift für Internationale Strafrechtswissenschaft 5 (2010), 552, 554.

securing its admissibility', the Commission had already formulated the objective of 'replac[ing] 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'.[3] This set the development towards the EIO in motion.

In particular, the original proposal's Art. 8 on 'Recognition and execution' shows that the Belgian initiative aimed at the consistent implementation of a substantially understood principle of mutual recognition (and not mutual recognition in word only). Thus the executing authority was to 'recognise' the investigation orders transmitted to it 'without any further formality being required' and (in line with procedure in national cases) 'forthwith take the necessary measures for its execution', unless grounds for non-recognition or non-execution are invoked. Taken literally, this rule would mean in particular that the requirement for authorisation by a judge (to use the German term, *Richtervorbehalt*) under the law of the executing State would constitute a mere 'further formality' that would need to be waived according to the logic of (a strict understanding of) mutual recognition. For if the public prosecutor's office or even the police authorities in the issuing State have the power to order measures that in the executing State are subject to judicial authorisation,[4] it would of course be logical *in principle* for the executing State to accept, by way of mutual recognition, the order received from the public prosecutor's office (or the police) 'without any further formality', that is, without judicial review.[5] Moreover, Article 10 of the proposal for a directive provided only very limited 'Grounds for non-recognition or non-execution'.

Comparing the Directive's final version of spring 2014[6] with the original 2010 draft, it is clear that particularly the key points have been eroded considerably. As far as the question of judicial authorisation in the executing State is concerned, Article 9(1) of the adopted Directive is essentially the same as Article 8(1) of the original proposal. However, an addition made to the definitions of Art. 2 states that the

[3] COM(2009) 624 final, 5.

[4] According to the Explanatory Memorandum of the proposal for a Directive, Member States 'may for example designate a police authority as an issuing authority for the purpose of the EIO but only if that police authority has the power to order the investigative measure concerned at national level' (see Council Doc. 9288/10 ADD 1, p. 4, <https://data.consilium.europa.eu/doc/document/ST-9288-2010-ADD-1/en/pdf>, accessed 24 December 2022). Also *cf.* Council Doc. 13049/1/10 <https://db.eurocrim.org/db/de/doc/1409.pdf>, accessed 24 December 2022, p. 4 ff. which reveals that the conditions for the designation of police authorities existed in a number of Member States.

[5] *Schuster*, F. P., 'Die Europäische Ermittlungsanordnung – Möglichkeiten einer gesetzlichen Realisierung', Strafverteidiger 35 (2015), 393, 396: 'That would be pure, unadulterated mutual recognition, a real paradigm shift' (orig. 'Das wäre gegenseitige Anerkennung in Reinkultur, ein echter Paradigmenwechsel').

[6] 'Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters', 01 May 2014, OJ L 130/1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041&from=EN, accessed 24 December 2022.

execution of a received investigation order in accordance with the procedures applicable in national cases 'may require a court authorisation in the executing State where provided by its national law'. In the German interpretation in particular, this means that the several judicial authorisation requirements (*Richtervorbehalte*) of the German Code of Criminal Procedure (StPO) must be observed fully.[7] Furthermore, over the course of the negotiations on the Belgian initiative, the number of grounds for non-recognition or non-execution virtually went through the roof.[8] A clause has even been included (Art. 10(1)(b) in conjunction with (5) EIO Directive) that could be argued to constitute a comprehensive *de facto* ground for refusal, as it ultimately includes the requirement of double criminality.[9]

In light of all this, it can hardly be doubted that the principle of recognition – if one takes it at its word, so to speak, and does not understand it from the outset as hollow verbal shell that can be specified more or less at will – has not been implemented in a substantially consistent way in the context of the EIO Directive (in contrast to the proposal of 2010).[10] This assessment does not change significantly even if one

[7] BT-Drs. 18/9757, 20; *cf. Brahms*, K./*Gut*, T., 'Zur Umsetzung der Richtlinie Europäische Ermittlungsanordnung in das deutsche Recht – Ermittlungsmaßnahmen auf Bestellschein?', Neue Zeitschrift für Strafrecht 38 (2017), 388, 390 on the fact that the *explicit* anchoring of the requirement for judicial authorisation in a legal instrument of mutual recognition constitutes a novelty.

[8] Cf. *Leonhardt* (n. 2), p. 219 and 227.

[9] Thus, *Böse*, M., 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?', Zeitschrift für Internationale Strafrechtswissenschaft 9 (2014), 152, 156 with reference to the German implementation norm of Section 91f (1) no. 2 IRG.

[10] Cf. *e. g. Brahms/Gut* above (n. 7), 390; *Böse*, above (n. 9), 163; *Leonhardt*, above n. 2, p. 123 ('hybrid instrument between the old and the new system' [orig. 'Zwitterinstrument zwischen altem und neuem System']); *Ambos*, K., European Criminal Law (Cambridge: Cambridge University Press, 2018), p. 456 ('to a large extent following the principles of traditional mutual assistance'); *Daniele*, M., 'Evidence Gathering in the Realm of the European Investigation Order', New Journal of European Criminal Law 6 (2015), 179, 183 ('hard core of the Directive is composed of provisions often comparable to those contained in previous European regulations'); *Wörner*, L., 'Die Europäische Ermittlungsanordnung (RL EEA)', in: K. Ambos/S. König/P. Rackow (eds.), Rechtshilferecht in Strafsachen (Baden-Baden: Nomos, 2nd ed. 2020), p. 1089, mn. 400 ('the EIO Directive is not connected with a comprehensive reorganisation of mutual assistance' [orig. 'umfassende Neuordnung der Rechtshilfe ist mit der RL EEA … nicht verbunden']); *Gleß* (n. 2), § 38 mn. 84d ('EIO does not aim to create a completely automatic process despite its orientation towards mutual recognition' ['EEA zielt trotz der Ausrichtung auf eine gegenseitige Anerkennung nicht auf einen uneingeschränkten Automatismus']). See also *Zimmermann*, F., 'Die Europäische Ermittlungsanordnung: Schreckgespenst oder Zukunftsmodell für grenzüberschreitende Strafverfahren?', Zeitschrift für die gesamte Strafrechtswissenschaft 127 (2015), 143, 147–48, who (obviously touching upon the core of the principle of recognition) explains that 'where [in the executing State] different legal concepts may prevail, the principle of mutual recognition cannot apply without restriction' (orig. 'wo [im Vollstreckungsstaat] abweichende rechtliche Vorstellungen herrschen mögen, … der Grundsatz der gegenseitigen Anerkennung nicht uneingeschränkt gelten [kann]'); '… the differences to traditional law on mutual assistance law ultimately are not that great' (orig. '… die, Unterschiede zum klassischen Rechtshilferecht [sind] letztlich gar nicht so groß'). Finally the conclusion of *Schuster* above (n. 5), 398:

takes into account that the 2001 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters', for example, had pointed out cautiously that the principle of mutual recognition cannot be applied with the same rigour to all conceivable fields.[11] After all, this caution was not sustained over the further course of the Directive's development, particularly in the concrete preparatory stages. Thus, in particular the 2009 Green Paper postulated, as already mentioned above, that the problems associated with the instruments of traditional mutual assistance, which were 'regarded as slow and inefficient', could best be solved by a uniform switch to the recognition principle.[12] It is quite obvious that the further steps envisaged have been not merely formal or verbal, but substantial in nature. This did not pass unnoticed, of course, and accordingly the Green Paper and its forceful demands met with widespread and in part quite outspoken criticism.[13]

If, on the other hand, the principle of mutual recognition's capacity to resolve substantial problems is viewed with greater scepticism – in contrast to the view adopted in the Green Paper – a further question arises. What is the substantial value of moving from mutual assistance concerning evidence to the principle of mutual recognition (a process involving considerable effort) if mutual recognition then is interpreted in *such* an open way that ultimately it scarcely is reflected in *substantial* terms in the respective legal instrument? *That* this is the case is (rather remarkably) stated most explicitly in the explanatory memorandum of the German Implementation Act of 2017: while mutual assistance concerning evidence now is based on the principle of recognition, 'the actual details of the EIO Directive mean that the cross-border collection of evidence between the Member States of the European Union will continue to follow the rules of classical mutual assistance to a large extent'.[14] If one considers the 'actual details', one might even doubt whether the EIO Directive is a legal instrument based on the principle of mutual recognition (at least in a way

'Thinking of some of the first drafts (more or less blind mutual recognition), it really could have been much worse from the defence's point of view' (orig. 'Wenn man dann an erste Entwürfe denkt (mehr oder minder blinde gegenseitige Anerkennung) hätte es aus Sicht der Verteidigung wirklich weit schlimmer kommen können').

[11] See 2001/C 12/01 (15 January 2001), OJ C 12/10, p. 11 ('Thus mutual recognition comes in various shapes and must be sought at all stages of criminal proceedings, before, during or after conviction, but it is applied differently depending on the nature of the decision or the penalty imposed') and *passim*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001Y0115(02)&from=SL>, accessed 24 December 2022.

[12] COM(2009) 624 final, 4.

[13] Cf. *e. g.* the various contributions in the Zeitschrift für Internationale Strafrechtsdogmatik (now: Zeitschrift für Internationale Strafrechtswissenschaft) special edition 'From Academia and Practice: Transnational Evidence-Gathering – Comments on the Green Paper of the EU Commission', Zeitschrift für Internationale Strafrechtsdogmatik 5 (2010), 550 ff.

[14] BT-Drs. 18/9757, 17 (orig. 'führt allerdings … die tatsächliche Ausgestaltung der EIO-Directive dazu, dass die grenzüberschreitende Beweiserhebung zwischen den Mitgliedstaaten der Europäischen Union auch künftig in weiten Teilen den bisherigen Regeln der klassischen Rechtshilfe folgt').

that helps to shape the Directive) *at all*.[15] Indeed, it is difficult to identify any elements of the Directive finally adopted (or of the legislation implementing it) that definitely could not have been achieved by developing further the EU Mutual Assistance Convention (EUMAC) of 2000.[16] In particular, it is unclear why it should not have been possible to expand the deadline regulations of Art. 4 EUMAC and to supplement Art. 6 EUMAC with regulations that provide for the use of forms.[17] Not least in view of the key role that the Treaty of the Functioning of the European Union (TFEU) assigns to the principle of recognition (Art. 82(1) first sentence TFEU), and also in view of the practical significance of mutual assistance in the gathering of evidence, it seems pertinent to (once again) raise the question of *why* the radical change to mutual recognition was necessary.

II. Why Does the Mutual Recognition Principle Only Underpin the EIO in a Diluted Form?

So why is the *substance* of the EIO – to put it cautiously – not shaped much more deeply by the principle of mutual recognition? The answer to this question can be sought at various levels, *two* of which will be considered below (within the given framework). *Firstly*, the principle of recognition may well reach its inherent limits in the field of mutual assistance concerning evidence. If this is indeed the case, the EIO Directive (*regardless* of its legal policy framework or background) in a sense would be the best that can be achieved. Just as a criminal law against 'witchcraft' (as such) has to be ruled out *as a matter of principle if* one assumes that criminal laws are legitimised by their function of protecting legal interests (*Rechtsgüter*) (and if one further assumes that witchcraft cannot achieve the effects that the witch or her client expects it to),[18] it is not logically possible to base a legal instrument on the prin-

[15] Cf. *e. g.* the assessment of the German Judges' Association DRB-Stellungnahme Nr. 07/2016, A. 1., which follows on from the explanatory memorandum (above (n. 14)) and states that 'the EIO Directive, with its extensive grounds for recognition and refusal, is more akin to an instrument of classical mutual assistance than to one of mutual recognition' (orig. '… die RL EEA durch umfangreich ausgestaltete Anerkennungs- und Versagungsgründe eher einem Instrument der klassischen Rechtshilfe denn einem der gegenseitigen Anerkennung nahesteht') <https://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/18_wp/Rechtsh_Int_Strafs_2014_41/stellung_drb_refe.pdf?__blob=publicationFile&v=1>, accessed 24 December 2022.

[16] Cf. *Busemann* above (n. 2), 555–56.

[17] *Böse* above (n. 9), 163 sees the introduction of accelerated deadlines and of forms as 'the major innovations' (orig. '[d]ie wesentlichen Neuerungen'). Likewise *Ahlbrecht*, Die Europäische Ermittlungsanordnung – oder: EU-Durchsuchung leicht gemacht, StV 33 (2013), 114, 120, who sees the EIO's deadlines (only) as 'specifying the duty of Art. 4(2) of the EUMAC' (orig. 'eine Konkretisierung der Pflicht aus Art. 4 Abs. 2 EU-RhÜbk').

[18] In detail on questions of 'occult fraud' [orig. 'Okkultbetrugs'], superstitious attempts etc. *Dorn-Haag*, V. J., Hexerei und Magie im Strafrecht (Tübingen: Mohr Siebeck, 2016), pp. 208 ff.

ciple of mutual recognition (in a defining way) if this principle is unsuitable (or suitable only to a limited degree) with regard to the area to be regulated. To apply Weber's conceptuality[19] to the relationship between the *EU level* and the *(legal) political spheres in the Member States*, the *legitimacy* of the norms, legal instruments and legal principles originating at the EU level is (one) key factor for their *acceptance* at the level of Member State legal policy. And even though the actual influence of (legal) scholarship certainly should not be overestimated, particularly in the field of European criminal law, it also can be assumed that strong academic endorsement of the fundamental doctrinal quality of a norm, a legal instrument, or a legal principle (such as the principle of mutual recognition) at least tends to *increase legitimacy* and thus ultimately *increases* (or tends to increase) *acceptance.* If the foundation of the respective norm, instrument or principle is more uncertain, vague, and open to interpretation, the opposite will tend to be the case (see 1. below).

The fact that *acceptance* of the mutual recognition principle (in the legal policy sphere) is crucially important to the future development of European criminal law speaks in favour of focusing upon the *second* level of Member State legal policy in the following – in our case, considering statements from the German (legal) political sphere (see 2.). For the lower this *acceptance* is, the greater Member States' tendency will be to exploit the maximum scope possible when implementing legal instruments based upon the principle of recognition, making sure that new legal instruments verbally based upon mutual recognition offer the greatest possible room for manoeuvre in their implementation (meaning that their basis upon the mutual recognition principle is a mere formality).[20] The bold assertion that '[j]udicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition' (Art. 82(1) first sentence TFEU) then ultimately would not be worth the paper upon which it is printed.

1. Structural and Doctrinal Perspective – Is the Principle of Mutual Recognition Viable (for Mutual Assistance Concerning Evidence)?

As far as the first-mentioned level is concerned, it often has been pointed out that a principle of mutual recognition that goes beyond a merely formal concept must more or less inevitably reach its limits, *particularly* in the field of mutual assistance concerning evidence.[21] These concerns are based on the following well-known consid-

[19] Cf. *Schmid*, C., 'Legitimationsbedingungen eines Europäischen Zivilgesetzbuchs', Juristenzeitung 56 (2001), 674 incl. note 9 and further references.

[20] In this regard, the history of the creation and development of the EIO Directive stands as an example not to be underestimated, especially at EU level.

[21] Cf. *e. g. Ambos* (above (n. 10)), p. 21 with further references. Cf. also the clear words in *Vermeulen*, G./*De Bondt*, W./*Van Damme*, Y., EU cross-border gathering and use of evidence in criminal matters (Antwerp: Maklu, 2010), p. 18, according to whom '… the introduction of typical MR characteristics is fully incompatible with the functioning of MLA'.

erations. The core idea of the principle of mutual recognition – recognition that in principle is obligatory – requires that the *reference object* of mandatory recognition is defined with sufficient clarity. When applying the principle in the Common Market, the reference object is the *marketable product* in question.[22] If one accepts that the principle of recognition can be transferred from the area of market freedom, where it has the effect of expanding the freedom of movement of goods, to the area of transnational prosecution,[23] where it may allow for serious encroachments on fundamental rights,[24] one notices that an EIO ordering a specific evidence-gathering measure (in contrast to a European Arrest Warrant, EAW) is less of a 'finished' product that can be removed from or inserted into national criminal proceedings and

[22] The Cassis de Dijon Judgment (CJEU, No C-120/78, Judgement of 20 Feb. 1979, ECLI:EU:C:1979:42) dealt with currant liqueur, the Dassonville Judgment (CJEU, No C-8/74, Judgement of 11 July 1974, ECLI:EU:C:1974:82) concerned whisky, and CJEU, No C-178/84, Judgement of 12 Mar. 1987, ECLI:EU:C:1987:126 related to beer (that does not comply with German Purity Law), i. e. self-contained marketable products whose qualities and relevance to their consumers' health etc. can be determined fairly easily. For a fundamental account on the fact that the principle of mutual recognition can be traced back to the internal market *Böse*, M., 'Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege der EU – Die "Verkehrsfähigkeit" strafrechtlicher Entscheidungen', in: C. Momsen/R. Bloy/P. Rackow (eds.), Fragmentary Criminal Law (Frankfurt am Main: Lang, 2003), p. 233 (234 ff.); also *cf. Klimek*, L., Mutual Recognition of Judicial Decisions in European Criminal Law (Cham: Springer 2017), p. 4 and *passim.*

[23] The problems associated with this aspect are addressed for example by *Ambos*, K., 'Transnationale Beweiserlangung – 10 Thesen zum Grünbuch der Kommission "Erlangung verwertbarer Beweise in Strafsachen aus einem anderen Mitgliedsstaat"', Zeitschrift für Internationale Strafrechtswissenschaft 5 (2010), 557, 559; *Zimmermann*, F./*Glaser*, S./*Motz*, A., Mutual Recognition and its Implications for the Gathering of Evidence in Criminal Proceedings: A Critical Analysis of the Initiative for a European Investigation Order, European Criminal Law Review 1 (2011), 56, 63–4; also *cf. Satzger*, H., Internationales und Europäisches Strafrecht (Baden-Baden: Nomos, 9th ed. 2020), § 10 mn. 27.

[24] As is well known, even in cases involving the risk of individual rights violations, the CJEU only recognises 'limitations of the principles of mutual recognition and mutual trust between Member States … "in exceptional circumstances"' (CJEU, *Aranyosi*, No C-404/15 and *Căldăraru*, No C-659/715 PPU, Judgement of 5 Apr. 2016, ECLI:EU:C:2016:198, para. 82). Critically on the CJEU's weighing of interests *Swoboda*, S., 'Definitionsmacht und ambivalente justizielle Entscheidungen: Der Dialog der europäischen Gerichte über Grundrechtsschutzstandards und Belange der nationalen Verfassungsidentität', Zeitschrift für Internationale Strafrechtsdogmatik 13 (2018), 276, 294: 'When weighing up primacy of application and the principle of effectiveness on the one hand and the concerns of national constitutional identity and basic rights on the other hand, the CJEU prioritises effectiveness and the principle of primacy from the outset' (orig. 'In der Abwägung zwischen Anwendungsvorrang und Effektivitätsprinzip auf der einen Seite und den Belangen der nationalen Verfassungsidentität bzw. Grundrechten auf der anderen Seite räumt der EuGH den Belangen der Effektivität und dem Vorrangprinzip von vornherein Priorität ein'). By contrast, *Mitsilegas*, V., 'Resetting the Parameters of Mutual Trust: From Aranyosi to LM', in: V. Mitsilegas/A. di Martino/L. Mancano (eds.), The Court of Justice and European Criminal Law (Oxford: Hart, 2019), 421, p. 436 considers the judgments to constitute at least a step in the right direction ('*Aranyosi* and *LM* pave the way for a fundamental re-direction of EU criminal law').

rather part of an ongoing process whose outcome is by no means fixed.[25] In this respect, there is a clear difference both to marketable goods and to a (European) arrest warrant,[26] for compared with an arrest warrant it is much less easy to assess the weight and significance of a particular piece of evidence or, to be more precise, the significance that it will have in the further course of the proceedings.

As far as can be seen, there is no argument able to counter these concerns about the principle of mutual recognition's fitness particularly for the field of mutual assistance concerning evidence. No argument has been advanced so far which explains why this principle is able to do justice to this field or – *mutatis mutandis* – to the field of extradition. Instead, various *adaptations* are discussed that seek to bring mutual assistance concerning evidence into line with the principle of mutual recognition. However, it obviously lies in the nature of things that any 'solution'[27] to this issue (implicitly positing a *problem*) 'will fail to fully accept the principle of mutual recognition'.[28] In the end, modification proposals merely reformulate the finding that the principle of recognition ultimately is not really a good fit for the field of mutual assistance in gathering evidence and therefore needs to be made to fit.[29] Either way, this

[25] *Ambos* (above (n. 10)), p. 451 with further references; *id.*, above n. 23, 559; *Roger*, B., 'Europäisierung des Strafverfahrens – oder nur der Strafverfolgung?', Goltdammer's Archiv für Strafrecht 157 (2010), 27 (31); *Rackow*, P., 'Das Anerkennungsprinzip auf dem Prüfstein der Beweisrechtshilfe', in: K. Ambos (ed.), Europäisches Strafrecht post-Lissabon (Göttingen: Universitätsverlag Göttingen, 2011), p. 117 (120–21); *Birr*, C./*Rackow*, P., 'Recent Developments in Legal Assistance in Criminal Matters', Goettingen Journal of International Law 2 (2010), 1087, 1107; in detail also *Ronsfeld*, P., 'Anerkennung und Vertrauen – Die Europäische Ermittlungsanordnung' (Berlin: Duncker & Humblot, 2015), p. 121 with further references ('arrest warrant is issued in a closed, isolated procedure' [orig. 'Haftbefehl werde in einem abgeschlossenen, isolierten Haftverfahren erlassen']).

[26] The significance and the content of an arrest warrant is much clearer, particularly because an arrest warrant is (in principle) irrelevant to the outcome of the proceedings; the accused may be convicted, but he or she also may be acquitted (cf. *Rackow*, in: Ambos above (n. 25), p. 120). In the words of *Spencer*, The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer, Zeitschrift für Internationale Strafrechtsdogmatik 5 (2010), 602, 603: '… extradition involves something which in all countries is essentially the same'.

[27] As put aptly by *Ronsfeld* (above (n. 25)), p. 125 (orig. 'Lösungsansatz').

[28] Convincing summary in *Ronsfeld op. cit.* (orig. 'das Prinzip der gegenseitigen Anerkennung nicht uneingeschränkt gelten lässt').

[29] The validation procedure (cf. Art. 2(c)(ii) EIO Directive) exemplifies the scope that is created in this respect and then used by EU criminal policy. The explanatory memorandum of the 2010 draft directive had stated that a validation procedure could be dispensed with for cases of investigation orders issued by the police (according to the law of the issuing State), since such a procedure would be associated with 'additional complexities' and 'the solution proposed in the draft directive is in conformity with the principle of mutual recognition' (*cf.* Council Doc. 9288/10 ADD 1, p. 4, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209288%202010%20ADD%201>, accessed 24 December 2022). Not even two years later, an FAQ paper stated that a validation procedure now was envisaged after all following discussion of this matter in the Council, because such a procedure would offer more judicial

gives rise to the question of how much substantive content (and thus how much *potential for legitimation*) a principle that has been made to fit in this manner can have. The current scholarly debate on all of these issues gives the impression that the question of the suitability of the mutual recognition principle in particular for the field of mutual assistance in the gathering of evidence (and thus the question of this principle's explanatory and legitimating power) to a large extent is masked or absorbed by the question of the quality of the mutual trust[30] that, at least from an EU perspective, is both demanded and widely taken for granted.[31]

In this respect, our interim finding that the two camps – one assuming sufficient trust, the other denying such trust – scarcely can be reconciled, is certainly accurate.[32] The problem they both have in common, however, is that measures potentially involving significant intervention rest upon a foundation that ultimately is open to interpretation and has the character almost of a magic charm. In light of this, legal scholarship dealing with EU *criminal policy* and consequences should take into account the fact that – as will be shown below – at least within the German legal policy sphere a considerable amount of determination exists that in all likelihood will continue to have an effect in the future. Particularly when focusing upon the point of intersection between the *legitimacy of* judicial cooperation between the EU Member States and their norms and principles on the one hand and the *acceptance* of this judicial cooperation in the legal policy of the Member States on the other hand, it is difficult to arrive at any other interim conclusion than that the current situation now has become almost hopeless: without trust – however this trust is defined – having been restored,[33] the principle of mutual recognition should be used in a very restrained and nuanced manner, if at all.

control than *existing* mutual legal assistance instruments (Council Doc. 8182/12, p. 6 <https://db.eurocrim.org/db/en/doc/1733.pdf>, accessed 24 December 2022).

[30] Cf. by way of example in this regard the passages on the question of the principle's suitability in the field of mutual assistance concerning evidence on the one hand (pp. 121–125) and on the aspect of mutual trust on the other (pp. 194–244) in *Ronsfeld* (above (n. 25)).

[31] Cf. here *Klip*, A., European Criminal Law. An Integrative Approach (Cambridge: Intersentia, 3rd ed. 2016), p. 101 ('Whereas mutual trust can be regarded as a broad principle, mutual recognition is of a more specific nature').

[32] *Ronsfeld* (above (n. 25)), p. 198.

[33] Cf. *Ronsfeld* (above (n. 25)), p. 248. Also *cf. Trautmann*, S./*Zimmermann*, F., who in the German standard commentary on mutual legal assistance law specifically name two Eastern European countries, stating that 'in individual Member States, not even a total failure or complete elimination of the judicial system seems inconceivable' (W. Schomburg/O. Lagodny et al. (eds.), Internationale Rechtshilfe in Strafsachen (Munich: C.H. Beck, 6th ed. 2020), § 91b mn. 33 [orig. 'in einzelnen Mitgliedsstaaten nicht einmal mehr ein Totalversagen bzw. eine komplette Ausschaltung des Justizwesens undenkbar']).

2. The Level of German (Legal) Policy – A Lack of Trust in the Suitability of the Mutual Recognition Principle for the Field of Mutual Assistance in the Gathering of Evidence

a) The German Reaction to the EIO

This brings us to the level of legal policy. Here, it is striking *how* very quickly the initiative to create an EIO was followed by (extremely) clear reactions in Germany from 2010 onwards. It is difficult to escape the impression that the *full and systematic* transfer of the mutual recognition principle to mutual assistance in the gathering of evidence threatened to cross a red line of some kind. This section lists some of the groundbreaking positions adopted without claiming to be exhaustive.[34] Our aim is to make clear, beyond the German legal-political sphere, just *how* great the tangible scepticism in the relevant circles in Germany has become.

The *German Judges' Association* (*Deutscher Richterbund*, DRB) already responded to the May 2010 directive proposal in June 2010. The DRB concludes that the 'text hardly constitutes a suitable basis for negotiation'.[35] Its criticism hones in upon fundamental issues. Thus the 'draft … obviously assumes that "mutual recognition" does not require any preconditions'. Instead, '"mutual recognition" … is only possible if minimum standards that are binding for all Member States ensure that the court decision of the issuing Member State can be accepted by the executing Member State without any need for verification'.[36] According to the DRB, this condition has not yet been met.[37] What is required – and here the question of the suitability of the principle of recognition particularly for mutual assistance concerning evidence is raised – are 'concrete guidelines aligned to the individual gathering of evidence because of the special significance of evidence in criminal proceedings'. If necessary, 'national public prosecutors and courts would have to ensure their own standards in the individual proceedings in question by referring to Art. 6 of the Treaty of the European Union ("TEU")', which would of course contradict 'both the idea of mutual recognition and the intention of the Directive'.[38]

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[34] Cf. in the following *e. g.* the BRAK statement of January 2011, available at <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-europa/2011/januar/stellungnahme-der-brak-2011-10.pdf>, accessed 24 December 2022.

[35] DRB Stellungnahme 29/10, p. 4, available at <https://www.drb.de/fileadmin/DRB/pdf/Stellungnahmen/2010/100622_Stn_Nr_29_Europaeische_Ermittlungsanordnung.pdf>, accessed 24 December 2022; (orig. 'Text als Verhandlungsgrundlage … kaum eignet').

[36] DRB Stellungnahme 29/10, p. 2–3 (orig. 'Entwurf geht offensichtlich davon aus, dass "gegenseitige Anerkennung" keiner Voraussetzungen bedarf'; '"gegenseitige Anerkennung" … nur möglich, wenn für alle Mitgliedsstaaten verbindliche Mindeststandards gesichert sind, dass die Entscheidung des Gerichts des Anordnungsmitgliedstaates vom Vollstrekkungsmitgliedstaat ohne Prüfung übernommen werden kann').

[37] DRB Stellungnahme 29/10, p. 3.

[38] DRB Stellungnahme 29/10, p. 3 (orig. 'Wegen der besonderen Bedeutung von Beweisen im Strafverfahren … konkrete an der einzelnen Beweiserhebung orientierte Vorgaben'; 'müssten die nationalen Staatsanwaltschaften und Gerichte über die Verweisung auf Art. 6

On 4 June 2010, the German *Bundesrat* (chamber of the federal states) issued a similarly critical opinion pursuant to Sections 3 and 5 of the Act on Cooperation between the Federal Government and the Länder in European Union Affairs (Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union, 'EUZBLG'): 'the time is not yet ripe' for the principle of mutual recognition to be applied 'to almost the entire – highly complex – area of cross-border evidence gathering'.[39] The prerequisite for the obligatory recognition of investigation orders is 'that the requirements for the gathering of evidence and the conditions laid down for this are comparable in the national procedural regulations of the Member States. However, this is not the case thus far'.[40]

Likewise worthy of special mention is an essay by the (then) Minister of Justice of the Federal State of Lower Saxony, which is based on a contribution to a discussion at an event held at Lower Saxony's Representation in Brussels on 26 May 2010. *Busemann*, too, expresses reservations about changing precisely mutual assistance con-

EUV eigene Standards im jeweiligen Einzelverfahren sicherstellen … sowohl dem Gedanken der gegenseitigen Anerkennung wie auch der Intention der Richtlinie [widersprüche]'). The DRB's October 2011 statement on the Council's partial general approach of 17 July 2011 (Council Doc. 11735/11) is even clearer than its statement on the original proposal for a directive. In it, the DRB states its hope that 'in the course of further deliberations, the Council, and especially the European Parliament, will develop the European Investigation Order (EIO) in such a way that it can become an effective instrument of European criminal prosecution, while respecting the principles of the rule of law' (orig. 'dass im Zuge der weiteren Beratungen der Rat, aber insbesondere das Europäische Parlament die Europäische Ermittlungsanordnung (EEA) so ausgestalten wird, dass sie – unter Wahrung rechtsstaatlicher Grundsätze – zu einem wirkungsvollen Instrument der europäischen Strafverfolgung werden kann', DRB Stellungnahme 27/11, p. 1, available at <https://www.drb.de/fileadmin/DRB/pdf/Stellungnahmen/2011/DRB_111006_Stn_Nr_27_EEA_polit_Einigung.pdf>, accessed 24 December 2022). This clear appeal is supplemented by a more or less undisguised warning against the *Bundesverfassungsgericht* ('BVerfG'): it would be 'in accordance with the pure doctrine of mutual recognition' if, for example, a 'search warrant were recognised after merely examining the formalities, that is, whether the EIO form has been properly completed' (orig. 'entspräche es der reinen Lehre der gegenseitigen Anerkennung … Durchsuchungsanordnung nur nach Prüfung der Formalitäten, d. h. ob das Formular zur EEA ordnungsgemäß ausgefüllt wurde, anerkannt'). However, such a 'recognition practice would lead to the dissolution of the legal obligation to undertake investigative measures in the executing Member State and to even serious interventions becoming arbitrary … It is unlikely to prove acceptable to the German judiciary, especially after the experience with decisions of the higher courts on the European Arrest Warrant' (orig. 'Anerkennungspraxis würde jedoch zu einer Auflösung der Gesetzesbindung von Ermittlungsmaßnahmen im Vollstreckungsmitgliedstaat und einer Beliebigkeit auch von schweren Eingriffen führen […]. Sie dürfte, auch nach den Erfahrungen mit Entscheidungen von Obergerichten zum Europäischen Haftbefehl, von der deutschen Justiz kaum akzeptiert werden können', DRB Stellungnahme 27/11, p. 2).

[39] BR-Drs. 280/10, 2 (orig. 'auf den nahezu gesamten – sehr komplexen – Bereich der grenzüberschreitenden Beweisgewinnung ist die Zeit noch nicht reif').

[40] BR-Drs. 280/10 (Beschluss), 3 (orig. 'dass die Anforderungen an die Beweiserhebung und die dafür statuierten Voraussetzungen in den nationalen Verfahrensvorschriften der Mitgliedstaaten vergleichbar sind. Dies ist indes bislang nicht der Fall').

cerning evidence over to the principle of mutual recognition,[41] pointing to the possibility of developing the EUMAC of 2000 further instead of creating a recognition-based investigation order.[42]

On 6 October 2010, the *Legal Affairs Committee* (*Rechtsausschuss*) submitted its recommendation for a resolution to the German Bundestag, together with a report on the initiative to create an EIO.[43] Point 6 recommended that the Bundestag should state by resolution pursuant to Art. 23(3) Basic Law (Grundgesetz, 'GG') that 'an extension of the principle of mutual recognition to the collection of almost all types of evidence in criminal proceedings is premature at this point in time and … may prove to inhibit and counteract the integration of the European Union in the field of criminal law'.[44] Furthermore, it should be noted among other things that mutual recognition requires not only mutual trust between Member States, but also the trust of 'citizens in the institutions and legal acts of the European Union'. Such trust necessarily presupposes 'certain minimum standards in criminal procedural law'. In this respect, although the roadmap proposed by the Commission to strengthen the procedural rights of accused persons marks a step in the right direction, 'any premature extension of the principle of mutual recognition to the gathering of evidence before these common standards have been recognised and introduced is more likely to lead to a loss of the trust already built and therefore be counterproductive'.[45] In addition, the Legal Affairs Committee called on the Federal Government to 'secure [various] negotiation objectives'. Among other goals, the following objective should be ensured:[46]

> 'The extension of the principle of mutual recognition to the gathering of almost all types of evidence without sufficient common minimum standards in criminal procedural law must be rejected at this stage. The trust necessary for the effective implementation of the principle of mutual recognition needs to be gained and cannot be taken for granted'.

[41] *Busemann*, above (n. 2), 555: 'law of evidence a particularly sensitive point in criminal proceedings' (orig. 'Beweisrecht ein besonders neuralgischer Punkt im Strafverfahren').

[42] *Busemann* above (n. 2), 555–56.

[43] BT-Drs. 17/3234.

[44] BT-Drs. 17/3234, 4 (orig. 'ist eine Ausdehnung des Grundsatzes der gegenseitigen Anerkennung auf die Erhebung nahezu aller Beweisarten im Strafverfahren zum jetzigen Zeitpunkt verfrüht und kann sich für das Zusammenwachsen der Europäischen Union auf dem Gebiet des Strafrechts als hemmend und kontraproduktiv erweisen').

[45] BT-Drs. 17/3234, 4–5 (orig. 'Bürgerinnen und Bürger in die Institutionen und Rechtsakte der Europäischen Union'; 'bestimmte strafverfahrensrechtliche Mindeststandards'; '[e]ine vorschnelle Ausdehnung des Grundsatzes der gegenseitigen Anerkennung auf die Beweiserhebung noch vor Anerkennung und Einführung dieser gemeinsamen Standards … eher zum Verlust von bereits entstandenem Vertrauen führen und sich daher kontraproduktiv auswirken').

[46] BT-Drs. 17/3234, 6 (orig. 'Verhandlungsziele sicherzustellen'; 'Die Ausweitung des Grundsatzes der gegenseitigen Anerkennung auf die Erhebung nahezu aller Beweisarten, ohne dass es bislang hinreichende gemeinsame Mindeststandards im Strafverfahrensrecht gibt, ist zum gegenwärtigen Zeitpunkt abzulehnen. Das für die effektive Umsetzung des Grundsatzes der gegenseitigen Anerkennung notwendige Vertrauen muss erworben und kann nicht vorausgesetzt werden').

One needs to recognise (not least against the background of Art. 82(1) TFEU) that the German negotiators essentially were being instructed to avoid changing mutual assistance in the gathering of evidence over to the principle of mutual recognition, at least for the time being. Furthermore, the desideratum of a comprehensive ground for refusal brought into play by the Legal Affairs Committee was to have serious consequences. This desideratum was formulated as follows in the Committee's recommended resolution:

> 'If possible, … a general ground for refusal to execute an investigation warrant where it would be contrary to national law should be provided'.[47]

This closing of ranks against the Belgian initiative in the German legal-political sphere reached its spectacular culmination the very next day, 7 October 2010, with the *unanimous* acceptance of the recommended resolution by the *German Bundestag*. The minutes of the session contain the following comment by the President of the Bundestag, which is worth quoting in full, especially in light of future developments:[48]

> 'This is not a routine process. I would like to point this out expressly once again. Irrespective of the question of whether and when a quorum provided for in the Treaties will come about, this is the first time that the German Bundestag has unanimously expressed doubts about an intended regulation of the European Commission. We expect the European Commission to take this advice as seriously as it obviously is intended by this Parliament, irrespective of the statistical relations.
>
> (The entire House applauds).'

The self-confident and critical stance reflected both in the unanimous adoption of the recommended resolution and in the comment by the Bundestag President likely is related to a considerable extent to the experiences gathered in connection with the implementation of the EAW Framework Decision ('FD'). As is well known, the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) had declared the first, *comparatively* faithful implementation of the FD EAW null and void in 2005.[49] In a second attempt, the German legislator arrived at an implementation

[47] BT-Drs. 17/3234, 6 (orig. 'Es ist … möglichst ein allgemeiner Versagensgrund vorzusehen, wonach die Vollstreckung einer Ermittlungsanordnung versagt werden kann, wenn diese nach nationalem Recht unzulässig wäre').

[48] BT-PlPr 17/65, p. 6942 <http://dipbt.bundestag.de/dip21/btp/17/17065.pdf#P.6942>, accessed 24 December 2022 (orig. 'Hierbei handelt es sich um keinen Routinevorgang. Darauf möchte ich noch einmal ausdrücklich hinweisen. Unbeschadet der Frage, ob und wann ein dazu in den Verträgen vorgesehenes Quorum zustande kommt, macht damit der Deutsche Bundestag zum ersten Mal einvernehmlich Bedenken gegen eine Regelungsabsicht der Europäischen Kommission deutlich. Wir erwarten, dass unabhängig von den statistischen Relationen die Europäische Kommission diesen Hinweis so ernstnimmt, wie er von diesem Parlament offenkundig gemeint ist (Beifall im ganzen Hause)').

[49] BVerfG, 2 BvR 2236/04, Judgment (18 July 2005), in BVerfGE, 113, pp. 273; English translation available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidun

that took the complaints of the BVerfG into account and accordingly proved quite complicated.[50] In the given context, it is worth mentioning that the left-liberal Green Party MP Hans-Christian Ströbele (who certainly cannot be suspected of Member State presumptuousness) had declared in the course of the proceedings before the BVerfG that he 'not felt normatively free' when approving the first EAW Implementation Act. He had, however, relied on the fact that the Implementation Act was to be interpreted in conformity with the Constitution and that this would be sufficiently possible.[51] Ströbele stated that the situation of the Bundestag and its members at that time needed to be taken into account when evaluating the matter:

> 'Therefore – and with this I will conclude – I believe that the framework decisions as they stand … and the Member of the Bundestag who has to decide on them actually has no choice. What are we supposed to say? Europe tells us, you have to implement this, it is binding – the Federal Government executing the decisions tells us that this is binding, and then the German Bundestag says, we are not going to implement this, what happens then?'[52]

In light of all this, Ströbele stated, there is a need to ensure that Art. 23(3) GG[53] is actually put into action in future, because otherwise the Bundestag will

> '… repeatedly be reduced to an activity that I now, to use a highly polemical turn of phrase, call the notarisation of decisions implementing European framework decisions'.[54]

Looking at the (further) history of the EIO, it is hard to avoid the impression that Ströbele was not speaking for himself alone and that his words fell on fertile ground.

b) The (Further) Negotiations and Their Outcome

In view of the remarkably uniform rejection of the Belgian initiative in Germany, it was hardly surprising that the (further) negotiations revolved not least around the

gen/EN/2005/07/rs20050718_2bvr223604en.html;jsessionid=E68262CFAD511DBE5442F8CCCCCDA5EC.1_cid392>, accessed 24 December 2022.

[50] Cf. *e. g. Ambos* (above (n. 10)), pp. 444 ff.

[51] (Orig. 'normativ unfrei gefühlt'). Quoted from the minutes of the oral proceedings as reproduced in: *Schorkopf*, F. (ed.), Der Europäische Haftbefehl vor dem Bundesverfassungsgericht (Tübingen: Mohr Siebeck, 2006), p. 248.

[52] *Schorkopf* (n. 51), p. 248 (orig. 'Deshalb und damit will ich schließen, ich glaube, dass die Rahmenbeschlüsse, so wie sie sind …, und der Bundestagsabgeordnete, der darüber zu entscheiden hat, hat eigentlich keine Wahl. Also was sollen wir denn sagen? Europa sagt uns, Ihr müsst das umsetzen, das ist bindend – die Bundesregierung sagt uns in Ausführung der Beschlüsse, das ist bindend, und dann sagt der Deutsche Bundestag, wir setzen das nicht um, was passiert dann?').

[53] Art. 23(3) GG reads: 'Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.'

[54] *Schorkopf* (above (n. 51)), p. 248 (orig. '… immer wieder auf eine Tätigkeit reduziert werden, die ich jetzt mal ganz polemisch wirklich als notarielle Beurkundung der Umsetzungsbeschlüsse der europäischen Rahmenbeschlüsse bezeichne').

question of 'how markedly the principle of mutual recognition can and should be developed'.[55] According to the report by Brahms and Gut, the government officials entrusted with the negotiations on and the later implementation of the Directive on a ministerial level, Germany's negotiating objective was to 'include a general and broadly defined ground for refusal in the event that the recognition and enforcement of an EIO would be contrary to the national law of the executing State'.[56] Naturally, this objective then met with resistance from a clear majority of the other Member States, which saw such a solution as a 'backwards step in terms of European law'.[57] At this point, it is easy to see that the majority position reported is conclusive insofar as a comprehensive ground for rejection does not fit into a legal instrument (substantially) based on the principle of mutual recognition. In the end, the parties agreed on the more complicated solution of sneaking a disguised ground for refusal[58] into the provisions of Article 10 EIO Directive in paragraph 5, which concerns recourse to a different type of investigative measure, in addition to the grounds for refusal set out in Art. 11 EIO Directive. If, when an investigation order is received, the law of the executing State firstly does not provide for the measure in question or, more importantly, 'the investigative measure indicated in the EIO would not be available in a similar domestic case' and, secondly, the use of another measure 'would [not] have the same result as the investigative measure requested', the procedure will end with the issuing State being notified of this fact.[59] Brahms and Gut sum this up by saying that 'this procedure has the same effect in substance as a ground for refusal, even though it has a different name and location'.[60] In other words, *in substance* the German position prevailed in full.[61]

Besides the *de facto* establishment of a comprehensive ground for refusal, the attitude of German legal policy – which from the outset was extremely critical of changing mutual assistance concerning evidence over to the principle of mutual recognition – also finds reflection in the formal grounds for refusal (correctly designated

[55] *Brahms/Gut*, above (n. 7), 390 (orig. '[w]ie ausgeprägt der Grundsatz der gegenseitigen Anerkennung fortentwickelt werden kann und soll').

[56] *Brahms/Gut* (n. 7), 390 (orig. 'einen allgemeinen und weit gefassten Zurückweisungsgrund für den Fall aufzunehmen, dass die Anerkennung und Vollstreckung einer EIO gegen das nationale Recht des Vollstreckungsstaates verstoßen würde').

[57] *Brahms/Gut*, supra (n. 7), 390 (orig. 'europarechtlichen Rückschritt').

[58] Cf. BT-Drs. 18/9757, 72 ('ultimately a ground for refusal' [orig. 'letztlich ein Versagungsgrund']).

[59] *Brahms/Gut*, above (n. 7), 390.

[60] *Brahms/Gut*, above (n. 7), 390 (orig. 'Dieses Verfahren bewirkt in der Sache dasselbe wie ein Zurückweisungsgrund, wenngleich es einen anderen Namen und Standort hat').

[61] The extent to which Germany has prevailed in this matter is illustrated by the discussion on § 91f (5) IRG, the norm implementing Art. 10 (1)(b) in conjunction with (5) EIO Directive, on whether this, as some scholars claim (*cf.* above (n. 9)), results in a comprehensive requirement of double criminality (*cf. Zimmermann*, F., above (n. 33), § 91f mn. 18 with further references).

as such) of Art. 11 EIO Directive.[62] The explanatory memorandum on the German Implementation Act of 2017 explains that not all grounds for refusal should be implemented in the form of admissibility requirements, but that some should take the form of obstacles to approval to avoid falling back behind the previous legal standards.[63] This refers to the fact that the traditional system makes a distinction between the admissibility of mutual legal assistance and the granting of such assistance. If a condition of admissibility is not met, the request *must* be rejected; if there is an obstacle to approval, there is a wide *margin of discretion* within which the request can be complied with nevertheless.

As a result, the recognisably defensive German negotiation strategy, which aimed at eroding the mutual recognition principle and at negotiating grounds for refusal into the Directive, appears to have been so successful that the explanatory memorandum to the 2017 German Implementation Act – as already mentioned above – was able to state, and with good reason, that a '1:1 implementation of the European law provisions of the EIO Directive'[64] would lead to hardly any changes in the status quo, since 'the actual details of the EIO Directive mean that the cross-border collection of evidence among the Member States of the European Union will continue to follow the rules of classical mutual assistance to a large extent'.[65]

III. What Are the Consequences of the Fact That the Principle of Mutual Recognition Only Forms the Basis of the EIO in a Watered-Down Form?

1. Direct Practical Consequences

The fact that the EIO Directive implements the mutual recognition principle only in diluted form, if at all, and that this legal instrument can be read at best as a hybrid combining elements of 'classical' mutual legal assistance with mutual recognition, necessarily must have a direct practical effect when implementing provisions that need to be interpreted *in conformity with the Directive* in the case of ambiguity.[66] The more strongly a given mutual legal assistance instrument follows the principles of conventional mutual legal assistance (in substance), the less decisive it will be, within an interpretative framework in conformity with the Directive, that elements of the principle of mutual recognition also have been incorporated – as a secondary

[62] Cf. here also country report in Part I Chapter 3 II. 6. d) and e), pp. 44 ff.

[63] BT-Drs. 18/9757, 57.

[64] BT-Drs. 18/9757, 2 (orig. '1:1-Umsetzung der europarechtlichen Vorgaben der RL EEA').

[65] BT-Drs. 18/9757, 17 (orig. 'die tatsächliche Ausgestaltung der RL EEA dazu, dass die grenzüberschreitende Beweiserhebung zwischen den Mitgliedstaaten der Europäischen Union auch künftig in weiten Teilen den bisherigen Regeln der klassischen Rechtshilfe folgt').

[66] *Cf. Ambos*, above n. 10, p. 344 and *passim.*

factor, in the view of the German Judges' Association.[67] Of course, it is possible to argue at this point that in such cases it is up to the Court of Justice of the EU ('CJEU') to resolve any doubts by way of a preliminary ruling.[68] But this already takes us back to the path of criminal policy, particularly with a view to the future of the area of freedom, security and justice.[69] Imagine a constellation in which the CJEU is presented with a borderline case concerning the EIO, for example the case of an EIO that appears *disproportionate* but that is received from an issuing State without 'systemic deficiencies'. Imagine further that, in such a case, the CJEU were to apply its formula that 'limitations of the principles of mutual recognition and mutual trust between Member States' are to be limited to 'exceptional circumstances',[70] *without any* consideration of the fact that the EIO, at any rate in comparison with the EAW, has shifted (back) much closer to the field of classical mutual legal assistance.[71] Based on the standards applied by the German Federal Constitutional Court in its decision on the European Central Bank,[72] in such a case it should at least be possible to discuss whether such an understanding still can be attributed to 'recognised methodological principles and … is not arbitrary from an objective perspective'.[73]

However, the danger of such conflicts now seems to have been averted (for the area of the EIO), as the CJEU currently has already had the opportunity to clarify, in a field that relates very specifically to German circumstances, that *the principle of recognition needs to be treated in a differentiated and not merely formulaic manner.* Following the CJEU's decision in spring 2019 that the German Public Prosecutor is not a judicial authority within the meaning of Article 6(1) FD EAW because it is subject to external instruction,[74] the Court received a reference for a preliminary ruling from the Regional Criminal Court of Vienna concerning a German investigation

[67] *Cf.* main text on n. 15 above.

[68] *Cf. Ambos*, above n. 10, p. 342.

[69] *Cf.* above n. 24.

[70] Above n. 24.

[71] *Cf.* above n. 15. This would not least ignore the fact that Art. 11 (1)(f) of the EIO Directive expressly provides for a ground for refusal in the event that 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'. In this respect (as understood by the German legislator), the provision goes beyond the relevant CJEU rulings concerning the EAW (*cf.* above n. 24).

[72] *Cf.* BVerfG, Judgment of 5 May 2020 – 2 BvR 859/15 et al., mn. 112–3.

[73] *Cf.* BVerfG, 2 BvR 859/15 (n. 72), para. 112 (orig. 'auf anerkannte methodische Grundsätze zurückführen lässt und nicht objektiv willkürlich erscheint').

[74] CJEU, *OG*, No C-508/18 and *PI*, No C-82/19 PPU, Judgement (Grand Chamber) of 27 May 2019, ECLI:EU:C:2019:456, especially paras. 43 ff. and 65 ff.; on this decision cf. *Ambos*, K., 'Anmerkung zu EuGH, Urteil v. 27.5.2019 – verb. Rs. C-508/18 und C-82/19 PPU, OG, PI', Juristenzeitung 74 (2019), 732, 734 and *id.*, 'The German Public Prosecutor is (no) judicial authority within the meaning of the European Arrest Warrant: A case note on the CJEU's judgment in OG (C-508/18) and PI (C 82/19 PPU)', New Journal for European Criminal Law 10 (2019), 399, 404 each with reference to a possible transfer to the EIO.

order. The question referred[75] was – in the words of the German Judges' Association – to be decided based on 'whether the CJEU, in interpreting the EIO Directive, applies the *same* strict standards to the independence of the German Public Prosecutor as it did in connection with the European Arrest Warrant'.[76] If the CJEU had then (not at least in the grounds for its decision) not taken into account the specificities of the EIO – that is, first and foremost its proximity to traditional mutual legal assistance – and instead in a formulaic manner had achieved equal treatment of the EAW and the EIO,[77] this hardly could have been expected to lead to increased acceptance of recognition-based mutual legal assistance instruments. The specific problem that German public prosecutor's offices are subject to external instruction may be defused by abolishing or largely restricting the right to issue external instructions in individual cases.[78] However, this is unlikely to have had much of an impact on acceptance, especially since transferring the requirements developed for the FD EAW to the EIO (at least until the appropriate reforms have taken place) would have resulted in mutual legal assistance *outside* the scope of the EIO on the basis of Sec. 59 of the Act on International Mutual Assistance in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen, 'IRG')[79] being more flexible than that *within* the scope of the EIO.[80] In this respect, the German Judges' Association feared that the 'German public prosecutor's offices … run the risk of a considerable loss of trust and significance within Europe if they are no longer allowed even to make decisions in the field

[75] OJ C 383/41, p. 41, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2019:383:FULL&from=EN>, accessed 24 December 2022.

[76] DRB Stellungnahme 5/20, II. 3., available at <https://www.drb.de/fileadmin/DRB/pdf/Stellungnahmen/2020/DRB_200504_Stn_Nr_5_Unabhaengigkeit_StA.pdf>, accessed 24 December 2022 (orig. 'ob der EuGH in der Auslegung der Richtlinie zur EIO *dieselben* strengen Maßstäbe an die Unabhängigkeit der deutschen Staatsanwaltschaft anlegt wie im Zusammenhang mit dem Europäischen Haftbefehl', italics in the original text).

[77] The German Judges' Association suspected 'that the CJEU does not consider the existing differences between the EIO and the EAW to be significant' (orig. 'dass der EuGH die bestehenden Unterschiede der EEA zum Europäischem Haftbefehl nicht als wesentlich erachtet'; above n. 76), and III.

[78] Following the submission of a corresponding draft bill at the beginning of 2021 (<https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Unabhaengigkeit_Staatsanwaltschaften.pdf;jsessionid=675CE61686A6B3F7B69DC75D3CEE34BD.2_cid297?__blob=publicationFile&v=1>, accessed 24 December 2022), the new Federal Government also intends to adapt the legal status of public prosecutors' offices to the case law of the ECJ (see the coalition agreement between the SPD, the Green Party and the FDP p. 106 https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1, accessed 24 December 2022; on this, see *Weigend*, T., 'Kriminalpolitik bis 2025 – Erwartungen und Wünsche', Kriminalpolitische Zeitschrift 7 (2022), 1, 4–5).

[79] English translation available at <https://www.gesetze-im-internet.de/englisch_irg/index.html>, accessed 24 December 2022.

[80] *Cf. Ambos*, K./*Gronke*, A. M., 'Begriff der internationalen Rechtshilfe in Strafsachen', in: Ambos et al. (n. 10), pp. 64–5, mn. 11; in detail on the additional costs and effort resulting from the creation of an investigating judge (for mutual assistance), DRB Stellungnahme 5/20, in III.

of so-called small forms of legal assistance'.[81] It had to be expected that this feared loss of trust would not be one-sided, but would result in the German judicial landscape losing faith in an EU criminal policy that appears to be driven blindly by the principle of recognition.

However, the Grand Chamber of the ECJ has now ruled that public prosecutors' offices can be considered as judicial or issuing authorities within the meaning of Article 1(1) and Article 2(c) EIO Directive, 'regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order'.[82] Remarkably, the ECJ justified this less with the regularly lower degree of intrusion of the EIO compared to EAW measures,[83] but rather argued in a formalising manner with the wording of the Directive. Furthermore, the ECJ has substantively emphasised that the EIO Directive 'lays down specific provisions intended to ensure that the issuing or validation of a European investigation order by a public prosecutor such as that in Article 2(c) of that directive is accompanied by guarantees specific to the adoption of judicial decisions, specifically those relating to respect for the fundamental rights of the person concerned and, in particular, the right to effective judicial protection'.[84] In addition to this reference to the specific obligations of the issuing State,[85] the Grand Chamber then goes on to emphasise the possibilities of the executing State not to recognise or enforce an incoming EIO.[86] At the beginning of this passage, the Chamber makes it clear, with remarkable openness, that it is not at all crucial for the question to be decided that the EIO represents a legal instrument of mutual recognition. Instead, the concrete design of the respective legal instrument is to be decisive.[87]

[81] DRB Stellungnahme 5/20, in III. (orig. 'drohte deutschen Staatsanwaltschaften ein erheblicher Vertrauens- und Bedeutungsverlust innerhalb Europas, wenn sie noch nicht einmal mehr Entscheidungen im Bereich der sogenannten einfachen Rechtshilfe treffen dürften').

[82] CJEU, No C-584/19, Judgement (Grand Chamber) of 8 December 2020, ECLI:EU:C:2020:1002, especially para. 73.

[83] CJEU, No C-584/19, Judgement (Grand Chamber) of 8 December 2020, ECLI:EU:C:2020:1002, especially paras. 50 ff.

[84] CJEU, No C-584/19, Judgement (Grand Chamber) of 8 December 2020, ECLI:EU:C:2020:1002, especially paras. 56.

[85] CJEU, No C-584/19, Judgement (Grand Chamber) of 8 December 2020, ECLI:EU:C:2020:1002, especially paras. 56 ff.

[86] CJEU, No C-584/19, Judgement (Grand Chamber) of 8 December 2020, ECLI:EU:C:2020:1002, especially paras. 64 ff.

[87] CJEU, No C-584/19, Judgement (Grand Chamber) of 8 December 2020, ECLI:EU:C:2020:1002, especially para. 64: 'Secondly, although the European investigation order is indeed an instrument based on the principles of mutual trust and mutual recognition, the execution of which constitutes the rule and refusal to execute is intended to be an exception which must be interpreted strictly (see, by analogy, judgment of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), C-508/18 and C-82/19 PPU,

2. Consequences for Legal Policy and Strategy

Given the technical developments, the obtaining of e-evidence currently is the main focus of the further development of mutual assistance concerning evidence in the EU context. Thus the Commission presented a proposal for a *Regulation* on the European Production and Preservation Orders for electronic evidence in criminal matters in April 2018.[88] This time, a regulation is to be adopted to avoid 'divergent interpretation in the Member States and other transposition problems'.[89] A regulation is 'the most appropriate form to be used for this mutual recognition instrument'.[90] The proposal provides for an act of recognition by the competent authority of the executing State only if the addressee of such a regulation – that is, a 'service provider' (*cf.* Article 2 no. 3 of the proposal) – objects (*cf.* Article 14(2) and (3) of the proposal).[91] The principle of recognition thus is to be utilised for an instrument that does not even provide for a definable act of recognition in the expected cases of its application.[92]

Of course, one cannot ignore the need to design the rules on evidence-related mutual assistance within the EU in such a way that the investigating authorities of the Member States can access e-evidence across borders. However, this does not mean that precisely the application of principle of mutual recognition represents the right approach. Especially in light of the history of the EIO, it thus gives cause for concern that precisely the recognition principle is to be employed for an instrument of mutual assistance concerning evidence that appears even less appropriate than the EAW in this respect. Regarding the investigation order (despite doubts about the legitimacy of the principle of recognition in the field of mutual assistance in gathering evidence), it can at least be argued that the regulated *procedure* corresponds to the picture of the recognition principle insofar as Member State recognition (and subsequent enforcement) of received orders is provided for in each individual case. However, this is not the case under the proposed E-Evidence Regulation.[93]

EU:C:2019:456, paragraph 45 and the case-law cited), the provisions of Directive 2014/41 however allow the executing authority and, more broadly, the executing State to ensure that the principle of proportionality and the procedural and fundamental rights of the person concerned are respected'.

[88] COM(2018) 225 final.

[89] COM(2018) 225 final, 6.

[90] COM(2018) 225 final, 6.

[91] Above (n. 88).

[92] *Böse*, M., An assessment of the Commission's proposals on electronic evidence, Study, 2018, p. 36 <https://op.europa.eu/de/publication-detail/-/publication/be0532d4-c5ee-11e8-9424-01aa75ed71a1>, accessed 24 December 2022.

[93] Cf. main text on n. 88 ff. above.

IV. What Remains? What Might the Future Hold?

What remains is that the history of the development of the EIO confirms the principle of mutual recognition as an extremely *problematic concept of* EU primary law. In view of Art. 82(1) TFEU, however, it is obviously impossible to completely abandon the principle without amending primary law. If the moral of the EIO's somewhat strange history ultimately is that this history must be read as a necessary process of erosion, the question then arises of how much longer the citizens of the Union can be expected to tolerate this.[94] In 2010, a study initiated by the EU Commission already had produced the key finding that the principle of recognition is 'fully incompatible' with a comprehensive transfer to other types of mutual assistance.[95]

Against this background, the history of the EIO gives the impression that the principle of mutual recognition, now that one has let oneself in for it, is to be upheld *at all costs* (and with quite predictable results). However, it now seems virtually impossible – especially from the point of view of legal policy – to continue to take this line. For this reason, there needs to be a return (also with regard to the interpretation of recognition-based instruments) to the understanding that *the one* recognition principle as such does not exist. Instead, the European Arrest Warrant in particular can be seen as realising the central idea of a principle of mutual recognition in the narrower sense – no less, but no more, either.

It is more than doubtful whether the EIO is shaped substantially by the principle. At best, it is underpinned by a *recognition principle in the broader sense* in the sense of an orientation towards greater binding force, which could, however, also have been achieved within the framework of a classic intergovernmental instrument.[96] In this respect, taking a more cautious approach in the future could actually encourage fruitful further developments in a (sometimes well-nigh flippantly postulated) area of freedom, security and justice. In particular, the E-Evidence Regulation envisaged by the Commission should not be based on the recognition principle if the risk of losing sight of recognised methodological principles is to be avoided. Instead, both in this case and possibly beyond, it should be noted that Art. 82(1)(d) TFEU does offer the option to go back to a less radical *modus operandi.* At any rate, in order to avert a further erosion of trust in European criminal policy, which is likely to form a (significant) element of an even more comprehensive loss of trust, it appears imperative that the principle of recognition be used in a differentiated, responsible and more nuanced manner.

[94] Cf. *Rackow*, P., 'Überlegungen zu dem Gesetz zur Änderung des IRG vom 5.1.2017', Kriminalpolitische Zeitschrift 2 (2017), 79, 87. One shudders to imagine the catering costs alone that were incurred during the negotiating of the EIO Directive.

[95] Above (n. 21).

[96] Cf. above (n. 16).

Defend Yourself, by Contesting: Considerations on the Relationship Between the Right of Defence and the Right to Contest in the European Investigation Order

By *Laura Scomparin* and *Caroline Peloso*

I. Introduction: Legal Remedies and Fundamental Rights in the European Investigation Order

Directive 2014/41/EU on the European Investigation Order in criminal matters was approved in April 2014 and published in the Official Journal of the European Union on 1 May 2014.[1] It regulates a new instrument for the acquisition of evidence whose origin dates back to the adoption of the Stockholm Programme in which the European Commission expressed its intention to adopt a legislative text capable of implementing the mutual recognition method and achieving the objective of the free movement of evidence set out in Article 82(1) TFEU[2]. The Directive on the European Investigation Order (EIO) aims to establish a comprehensive instrument for gathering evidence in cross-border cases based on the principle of mutual recognition.

In doing so, the EIO represents a further step forward in the evolution of the mutual recognition programme and signals a break with traditional mutual legal assistance mechanisms, which had previously been fragmented through multiple instruments, in favour of greater simplification. In fact, in accordance with Article 34 EIO, the Directive replaced, as from 22 May 2017, the corresponding provisions of the Conventions applicable between the Member States bound by this Directive, without prejudice to their application in relationships between European Union States and

[1] Directive 2014/41/EU on the European Investigation Order (1 May 2014, OJ L 130/1, p. 1).

[2] This issue was the subject of an initial Green Paper on obtaining evidence in criminal matters between Member States and ensuring its admissibility (11 November 2009, COM(2009) 624 final), which was followed by the adoption of the Programme: *Belfiore*, R., 'La prova penale "raccolta" all'estero' (Rome: Aracne, 2014). The basis for European action from the evidentiary point of view is constituted by those directives pursuant to Art. 82(2) TFEU which tend to strengthen, indirectly, the effectiveness of judicial and police cooperation in the European Union through consolidation work of the guarantee, while, on the legal basis of Art. 82(1) TFEU, the European Order adopts legal acts that directly put this cooperation into practice, extending the principle of mutual recognition also to measures concerning the acquisition of evidence.

third countries[3]. It must be positively welcomed for the simplification it ensures, thanks to the fact that the EIO Directive replaces the numerous sources that previously regulated judicial cooperation in evidence matters. In fact, to some extent, the EIO is not intended to be innovative, as the Directive 2014/41/EU incorporates many features of previous legal instruments (e. g. the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters)[4].

The EIO, compared to the previous framework, is nevertheless characterised by its procedural simplification as well as by the all-inclusiveness of the evidence-gathering process, as it can be used for any evidence to be obtained from another system. The instrument, in line with the development of mutual recognition of judicial decisions, necessarily aims to balance the values at stake and seeks to achieve a useful interaction between domestic and European law.

The Directive evokes the need to safeguard fundamental rights, the central importance of which is reiterated several times by referring to Article 48 of the Charter of Fundamental Rights (CFR) and Article 6 of the Treaty on the Functioning of the European Union (TFEU), including international agreements, among them the European Convention on Human Rights (ECHR) and the constitutions of the Member States referred to in recital 39. Article 1(4) EIO, referred to in recital 18, also states that the EIO Directive does not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles enshrined in Article 6 of the Treaty on European Union (TEU) and in the Charter, thus including within the protection all fundamental rights laid down in the Nice Charter and, in particular, Article 47(1), which affirms the right to an effective remedy before a court. The Directives based on Article 82(2) TFEU on the strengthening of procedural guarantees in criminal proceedings should also be seen to apply: the three Directives on the right to interpretation and translation in criminal proceedings (Directive 2012/64/EU), on the right to information (Directive 2012/13/EU) and on the right to use a lawyer in criminal proceedings and in proceedings for the execution of the European Arrest Warrant (Directive 2013/48/EU) are expressly mentioned. In addition to this core of fundamental rights which came with the first road map, there is also a second road map to which the Directive 2012/29/EU on crime victims is linked; however, no reference is made to this in the text of the EIO Directive. As will be better explained later, if any

[3] The Council of Europe's European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (and its two additional protocols), the Convention implementing the Schengen Agreement; the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol; Framework Decision 2008/978/JHA on the European Evidence Warrant; Framework Decision 2003/577/JHA on the execution of orders freezing property or evidence. See *Fiorelli*, G. 'Nuovi orizzonti investigativi: l'ordine europeo d'indagine penale', Diritto Penale e Processo 6 (2013), p. 710.

[4] *Cabiale*, A., I limiti alla prova nella procedura penale (Milan: Cedam, 2019), p. 250; *Marafioti*, L., 'Orizzonti investigativi europei, assistenza giudiziaria e mutuo riconoscimento', in: T. Bene et al. (eds.), L'ordine europeo di indagine, Criticità e prospettive (Turin: Giappichelli, 2017), p. 16.

of the provisions of these Directives are violated, the corresponding remedy would work in favour of the defendant.

In the context of evidentiary cooperation, particular attention should be addressed to considerations concerning the relationship between the rights of defence and the provisions on legal remedies available to the parties in criminal proceedings involving an EIO.

In this relationship between the fundamental rights of the parties and appeals, some particularly significant aspects can be noted: the right of the parties to complain must be adequately guaranteed, while ensuring efficiency in the implementation of the EIO. It is not always easy to achieve a balance between these two aspects, as the acquisition of evidence in criminal proceedings, particularly those entailing transnational aspects, is a very sensitive issue in ensuring fundamental guarantees for the persons involved in the proceedings. It thus seems necessary and appropriate to provide adequate legal remedies to ensure the effective and concrete possibility of defence, without, however, affecting the efficiency of the instrument. This also requires that the remedies envisaged by the EIO Directive are applied in order to set limits on the use of evidence not only resulting from the violation of domestic rules but also from the violation of European rules. Thus, it must be ascertained if the Directive guarantees these rights for the suspect and his defence, but also for the victim in criminal proceedings.

II. Legal Remedies in European Evidence Cooperation Tools

The European Investigation Order – being part of a vast range of instruments related to European criminal judicial cooperation – has replaced the corresponding provisions of a number of cooperation instruments concerning evidence, in particular, Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant (so-called EEW)[5]. This instrument, establishing rules for the acquisition of objects, documents and data for use in criminal proceedings, was a considerable step towards the effective implementation of the principle of mutual recognition, although it was considered insufficient, having limited scope[6]. According to the EEW, States have the discretionary power to restrict legal remedies to those cases in which the execution of an EEW entails the use of coercive means (Art. 18(1)).

[5] Council Framework Decision 2008/978/HA 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. *Vervaele*, J. A. E. (ed.), European Evidence Warrant: Transnational Judicial Inquiries in the EU (Antwerp et al.: Intersentia, 2005).

[6] *Belfiore*, R., 'Movement of Evidence in the EU: The Present Scenario and Possible Future Developments', European Journal of Crime, Criminal Law and Criminal Justice 17 (2009), 1, 2 – 12; *Mangiaracina*, A., 'A new controversial scenario in the gathering of evidence at the European level: the proposal for a Directive on the European Investigation Order', Utrecht Law Review, 10 (2014), 113, 116.

Moreover, Art. 18(2) of the EEW Framework Decision states that the Member States involved in the procedure should take the necessary measures to ensure that any person involved in the proceedings – including a third person in good faith – is able to submit an appeal to a court in the executing State, whereas the substantive reasons on which the warrant is based can only be appealed in the issuing State.

Subsequently, the rules on appeals were first taken up in a laconic Article 13 – initially contained in the proposed EIO Directive – which merely referred to the applicable national provisions and specified the need for the substantive grounds of appeal to be challenged only before the courts of the issuing State[7]. The matter was subsequently examined by the European Council and finally regulated in Article 14 of the final text of the EIO Directive. This Article adopts the structure of Article 18 of the EEW, while further enhancing its content.

Article 14 EIO provides an equivalence clause in paragraph 1, which states that Member States 'shall ensure that the investigative measures referred to in the EIO are subject to remedies equivalent to those available in a similar case under national law'. Consequently, the identification of the acts that can be challenged depends on what is laid down in individual national law[8]. The reference to appeal procedures already existing in domestic law, which must thus be applied against acts requested from abroad, therefore implies the application of the relevant provisions in terms of information on the possibility of exercising such actions, the qualified parties and the deadline by which to proceed, also requiring compliance with the rules contained in the European Directives on the rights of the accused applicable to criminal proceedings. The equivalence principle set out in Article 14(1) EIO provides a clear willingness to make the right of appeal effective in the executing State, although the remaining provisions of the Article reveal a diametrically opposed intention to limit the number of remedies available in the executing State while, at the same time, restricting both the exercise and the effects of that right (which it was intended to ensure) to safeguard the efficiency of the EIO. To this end, the Directive limits the scope of remedies by establishing a difference between the remedies available in the issuing and

[7] *Arena*, A., 'The Rules on Legal Remedies: Legal Lacunas and Risks for Individual Rights', in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-Border Cases (Cham et al.: Springer, 2014), p. 111, 113.

[8] *Lorenzetto*, E., 'L'assetto delle impugnazioni', in: M. Daniele/R. E. Kostoris (eds.), L'ordine europeo di indagine penale (Turin: Giappichelli, 2018), 151, 157; *Giacometti*, M./*Neveu*, S., 'La décision d'enquête européenne: un nouvel instrument destiné à révolutionner la récolte des preuves au sein de l'UE?', Revue de droit pénal et de criminologie 10 (2016), 861, 862 ff.: 'This choice is explained by the fact that it was not possible to provide for a single system of remedies in the Directive, which was only intended to establish a general regulatory framework without distinguishing between investigative measures'. Also in EU Council, Doc. No. 8036/11 (25 Mar. 2011), p. 5–6 'were of the opinion that the directive should not be understood as imposing upon the Member States any obligation to provide more legal remedies than what is available in respect of the same investigative measures carried out in a similar national case'; 'the principal rule reflected in paragraph 1 of Article 13 is that Member States should ensure the applicability of legal remedies which already exist in their national law'.

the executing State. The substantive reasons for issuing the EIO can only be challenged in the context of an action brought in the issuing State (Art. 14(2) EIO), which means that any action would be possible in proceedings in the issuing State, whereas the remedies available in the executing State are limited to the necessity to ensure the guarantee of fundamental rights only[9].

This provision, which follows the same mechanism envisaged for the EEW with regard to the issuing State and without prejudice to the guarantees of fundamental rights, reflects the typical approach of the division of functions between the cooperating authorities, confirming the willingness of the European legislator to consult directly the national issuing authority that carried out the criminal political assessments in terms of opportunities for issuing the EIO, in order to avoid inappropriate interference in this area by the executing State[10]. The door is thus opened – with respect to elements inherent to the merits of the EIO as well as to reasons connected to possible defects in the form of the decree itself or related to its communication – to providing the suspect, his defendant and third parties – with the possibility of protecting their rights, recovering judicial protection with respect to the assessment made by the issuing authority.

At the same time, however, this distribution between issuing and executing States could lead to a significant breach of defendants' rights, given the costs and difficulties of lodging an appeal in a foreign State. In this sense, mutual recognition affects the balance of criminal proceedings and places the accused in a position of inferiority when faced with a charge not applied within the territorial borders of his state of residence. Fortunately, the peremptory nature of the first paragraph of Art. 14 EIO is mitigated by its second paragraph, which states '*without prejudice to the guarantees of the fundamental rights of the executing State*'.

On the other hand, and precisely in order to guarantee the effectiveness of appeals, the Directive also protects the right to information on the possibilities of remedy. The issue of information on the means of appeal is, in fact, closely linked to the effects of appeals on individual rights. In fact, paragraph 3 of Art. 14 EIO requires the issuing and executing authorities to adopt appropriate measures to ensure that information is provided on the appeal possibilities available under domestic law, where applicable and in time for them to be used effectively, on the condition that they do not compromise the confidentiality of an investigation under Art. 19 of the Directive.

Such information must be given with regard to the means of appeal, where applicable, while the wording – already present in Article 13(4) of the proposed EIO Directive in which legal remedies '*become applicable*' – has been abandoned. However, this clarification did not seem useful since the duty to provide this information could not be conditional on the moment when the information becomes applicable.

[9] *Montero*, R. G., 'The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations', Eurcrim 1 (2017), p. 46.

[10] *Schünemann*, B., 'The European Investigation Order: A Rush into the Wrong Direction', in: (n. 7), 29.

Therefore, once the decision to give effect to a request for an EIO has been made, this information must be provided in order to clarify that the obligation to inform the parties concerned belongs to the executing authority even before evidence is acquired[11]. In such a case, the person concerned, informed prior to the execution of the measure, may be in a position to appeal against the decision before it is executed; the appeal is thus more likely to have an impact on the execution or non-execution of the measure. The only case where information on appeals may arrive at a later stage is when there are reasons to maintain the confidentiality of the investigation, as envisaged by Article 14(3), for example, in the case of a search, where it must be ensured that the persons concerned are only informed of the possibility of appeal after the evidence has been gathered. In this regard, coordinated action by the cooperating authority is of fundamental importance as it provides the interested parties with all relevant and necessary information to obtain an effective remedy[12].

In addition, the right of information regarding legal remedies is particularly important when considering that the EIO Directive – contrary to the EEW rules, which gave the executing State the power to suspend the appeal – provides for the non-suspension of the investigative measure (Article 14(6)) except where this has such a consequence in similar domestic cases. Although the issuing State is still required to consider, in accordance with national law, a decision taken in the executing State – after the transfer of evidence – that a request should not have been recognised (Art. 14(7) EIO), this situation may create serious prejudice to the rights of the suspect pending an appeal, leading to the risk of illegal use of evidence in the issuing State. On the other hand, the suspension of the transfer could considerably affect the speed of the cross-border investigation. Precisely with a view to safeguarding this delicate balance between the need of effective legal protection and the effective transnational prosecution, the Directive has set some criteria aimed at balancing the efficiency of the transnational procedure and the protection of rights.

In the event that an appeal is lodged when evidence is transferred, Article 14(7) of the Directive requires the issuing State to take into account the positive outcome of the appeal against the recognition or execution of an EIO, in accordance with its national law without however specifying if there is an explicit obligation on the executing State to withhold the evidence gathered or, in the case of the issuing State, which

[11] *Arena*, in: (n. 7), 114.

[12] A third situation may arise where the law of the executing State does not provide for any obligation to inform of the investigative act or allows the suspect to be informed only at the end of the investigation. In this case, the outcome of the investigation will only be accessible once the evidence has been transferred to the issuing State and therefore the appeal will be exercised in the issuing State, as it may be the case that the appeal has already been exercised in the executing State. In this circumstance, two types of situation should have been verified in advance: a situation in which it is concluded that the EIO should not have been recognized by the executing authority, *e. g.* it could have raised a ground for refusal, or a situation where the EIO should have been executed, even though there was some irregularity in the way the evidence was collected in accordance with the national law of the executing State in this regard: *Arena*, in: (n. 7), 115. For considerations on the defense of suspects, see IV.

would already have obtained it, to prohibit its use by its courts. Furthermore, Article 14(7) EIO specifies that Member States must ensure that the rights of defence are respected in criminal proceedings in the issuing State and that a fair trial is guaranteed in the evaluation of the evidence obtained through the EIO. However, the formulation of the provision, according to some authors, suggests that the judge's assessment is based on the evaluation of the evidence in light of respect for fundamental rights and a "fair trial" established by the European Court of Human Rights case law, being requirements that have to be observed anyway.[13]

Also with regard to the validity of evidence transmitted as a result of an EIO request, greater protection is offered by confirming that the presence of the appeal may suspend the transfer of evidence, unless there are reasons for the immediate transfer being considered essential for the proper conduct of the investigation or the protection of individual rights (Art. 13(2) EIO. However, this transfer is prohibited only if it is liable to cause serious and irreversible damage to the person concerned (Art. 13(2) EIO). There is no specification in relation to the usability regime of transferred evidence when the outcome of the appeal has been successful, which is consistent with the lack of a usability regime for evidence gathered abroad in domestic proceedings

The new approach enshrined in the EIO Directive, which aims to ensure a fair balance between the need for efficiency and the protection of the rights of persons involved in the investigative measure on cross-border proceedings, may have gaps in protection.

III. Issues Concerning the Equivalence of Legal Remedies and the Protection of Fundamental Rights in Court of Justice Case Law

The equivalence clause, however, gives rise to the risk that there will be no corresponding remedy in the relevant country against an EIO issued to request the completion of a particular investigative measure, thus constituting a case of 'absence' of appeals that could significantly frustrate the fundamental rights of the persons involved.

Such a situation arose in the first judgment of the Court of Justice of the European Union (CJEU) on EIOs, where the Court of Justice confirmed its strong commitment to ensure the effectiveness of judicial cooperation even at the expense of guarantees. The judgment, delivered on 24 October 2019 in case C-324/173[14], was the consequence of a preliminary ruling made by the Spetsializiran nakazatelen (i. e. the Spe-

[13] *Cabiale*, in: (n. 4), 269; *Lorenzetto*, in: (n. 8), p. 157.

[14] CJEU, Judgment of 24 Oct. 2019, No. C-324/17 (*Gavanozov*), ECLI:EU:C:2019:892; *Wahl*, T., 'First case on the interpretation of the EIO brought before the CJEU', News in eucrim (6 June 2018), <https://eucrim.eu/news/first-case-interpretation-eio-brought-cjeu/>, accessed 25 January 2022.

cial Court for Bulgarian Criminal Proceedings) which was preparing to issue an EIO for the execution, in the Czech Republic, of search and seizure acts on premises owned by a 'third party' with respect to the criminal trial, as well as to hear the latter as a witness. It questions the compatibility of the domestic transposition rules with the directive. In fact, just as occurs in corresponding internal cases, this excludes the opportunity for both the parties to the proceedings and the third parties concerned to appeal against measures concerning the search, seizure or hearing of a declarative source.

If the Court of Justice had complied with the questions raised by the Bulgarian judge, it would certainly have had to opt for the incompatibility of the Bulgarian transposing legislation with Article 14 EIO interpreted in light of Article 47 of the Charter which guarantees the right to appeal within the European framework. Bulgaria, in fact, has been condemned on several occasions by the European Court of Human Rights (ECtHR) for its lack of legislation regarding the absence of ex-post judicial control of the search and seizure order at the request of the persons affected by such measures. Moreover, Bulgarian legislation also lacks a mechanism for obtaining compensation for damages. While, on one hand, the possibility of disputing the substantive reasons for the criminal investigation does not coincide with the possibility of obtaining compensation for damages caused by such measures, on the other hand, the Advocate General pointed out that it was clear from the case law of the ECtHR that the possibility of obtaining compensation where a search or seizure has been unlawfully ordered or executed is an integral part of the right to an effective remedy under Article 13 ECHR.

The Court of Justice – as anticipated – has, in fact, preferred to avoid the question, shifting its attention to issues of pure form as to the difficulties expressed by the judge in the compilation of Annex A, Section J of the Directive, since the answer to the real question would have had negative repercussions on the effectiveness of judicial cooperation.

The Court response was, in fact, very disappointing from the perspective of protecting the rights of defence, as it did not follow the Advocate General's broad opinion[15]. Indeed, the Advocate General has widely stressed that the need for effective judicial review to ensure respect for fundamental rights by national courts appears to be stronger in the area of judicial cooperation in criminal matters. It follows that, although Article 14 of the Directive does not oblige Member States to provide further means of redress in addition to those existing in a similar domestic case, it nevertheless obliges them, in what the Advocate General has labelled a 'game of mir-

[15] *Wahl*, T., 'First CJEU Judgment on the European Investigation Order', News in eucrim (12 Jan. 2020), <https://eucrim.eu/news/first-cjeu-judgment-european-investigation-order/>, accessed 25 January 2022.

rors'[16] to provide means of redress applicable to investigative measures requested in a European Investigation Order. The Advocate General concluded that the use of the EIO by that Member State should be frozen until the respective legislation on redress enters into force[17].

With this reasoning, the Advocate General confirms that the creation of an area of freedom, security and justice in the Union which integrates the EIO is based on a presumption of conformity by all Member States with Union law and fundamental rights, but that this presumption remains relative[18]. This is also linked to the provision of a specific ground for refusal, allowing the executing State – on the basis of Article 11(f) – to oppose the execution of the EIO where there are serious reasons to consider that the execution of the requested investigative measure is incompatible with the obligations of the executing State under Article 6 TEU and the Charter.

The CJEU reduced the dispute to a mere formal issue, excusing Bulgaria and considering it unnecessary to interpret Article 14 in that case. However, this not only harms the rights of the accused but is also detrimental to the other enforcing States which, in future, when receiving requests for measures by States that have failed to object to the Directive from the point of view of guarantees of defence – thus failing to respect the balance between the invasive nature of the acts of investigation and the possibility of challenging them – risk being held liable for an infringement under Art. 13 ECHR.

IV. The Position of Defence and Victim in Relation to Legal Remedies in the European Investigation Order Matter

The defence plays a key role in protecting the suspect, particularly in transnational proceedings where the defence often has to juggle systems having different rules, practices and languages. The whole European discipline – as was already the case for the EEW and the traditional legal assistance regime – has failed to focus special attention on coordinating criminal assistance between issuing and executing countries[19]. This undoubtedly undermines some principles, such as the equality of

[16] Opinion of Advocate General Bot, delivered on 11 Apr. 2019, Case C-324/17 (*Gavanozov*), ECLI:EU:C:2019:312, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CC0324&from=EN>, accessed 25 January 2022, para. 55.

[17] *Wahl*, T., 'AG: Bulgaria Must Bring its Law in Line with the EIO Directive', *News in eurcrim* (4 June 2019), <https://eucrim.eu/news/ag-bulgaria-must-bring-its-law-line-eio-directive/>, accessed 25 January 2022.

[18] *Borgia*, G., 'La prima volta dell'ordine europeo di indagine penale davanti alla Corte di giustizia UE: strumento nuovo, approccio di sempre', Archivio penale 11 (2020), 1, 5–6.

[19] The rights of the defense have been defined as 'watermark rights' in order to emphasize how Directive 41 leaves them somewhat in the background, given the tendency to move towards a statement of principles in terms of the efficiency of the instrument: *Lorenzetto*, E., 'I diritti della difesa nelle dinamiche dell'ordine europeo di indagine penale', in: M. R. Mar-

arms between defence and prosecution, the objective of efficient legal assistance and the right to effective legal redress. In fact, no particular rights are granted to the defence, neither to request the collection of evidence from a foreign judicial authority nor to participate in the collection of evidence abroad, which also has an impact on the appeal structure since the Directive merely provides in Art. 1(3) a reference to the possibility of the issuing of an EIO requested by the lawyer on behalf of the suspected or accused within the framework of applicable defence rights in conformity with national criminal procedure. For example, Italian law recognises the possibility of the EIO being requested by the accused person's defence counsel in Article 31 of the Legislative Decree n. 108 of 21 June 2017[20], but this provision does not appear to be sufficient. First of all, the request for the issuance of an EIO by the defence, within the framework of the Italian transposing legislation, implies a step of judicial scrutiny: the defence lawyer's request must be approved by the public prosecutor, which therefore has to take the final decision on the issuance of the EIO. If the request is rejected, the public prosecutor must give reasons for that in a motivate decree. However, there is no provision for a possible appeal against the rejection of the EIO by the defence.

More in general, and except for the provision in Art. 31 Legislative Decree n. 108, in Italian implementation legislation there is considerably an absence of provisions aimed at completing the framework of actions granted to the defence with regard both to the active and to the passive procedure, *i. e.* in relation to outgoing and incoming EIOs respectively.

In addition, from the point of view of the active procedure, problems arise due to the general exclusion of the defence from the evidence-gathering activity abroad. This situation firstly presents the problem of disclosure, *i. e.* the possibility for the defence to be able to rely upon the evidence collected by the investigators. However, it should be noted that the issue of disclosure must always be viewed within the limits of the principle of confidentiality set out in Article 19 of the Directive and must always be respected since it is a matter for the judicial authorities in accordance with their national law.

The right to disclosure of procedural documents is strongly affirmed by the jurisprudence of the ECtHR, based on the principle of equality of arms and fairness of proceedings in accordance with Art. 6(1) ECHR[21]. If this right is not guaranteed,

chetti/E. Selvaggi (eds.), La nuova cooperazione giudiziaria penale, (Milan: Cedam, 2019), 337 ff. The fragility of defence rights aspects are also underlined by *Alesci*, T., 'Le garanzie difensive e il ruolo del difensore nello spazio giudiziario europeo alla luce della Direttiva OEI', in: T. Bene et al. (eds.), (n. 4), p. 113.

[20] Italian Legislative Decree of 21 June 2017, n. 108, Norme di attuazione della direttiva 2014/41/UE del Parlamento europeo e del Consiglio, del 3 aprile 2014, relativa all'ordine europeo di indagine penale, in GU Serie Generale n. 162 del 13-07-2017.

[21] ECtHR, 16 Feb. 2000, 29777/96 (*Fitt v. United Kingdom)*, para. 43. *Allegrezza*, S., 'La conoscenza degli atti nel processo penale fra ordinamento interno e Convenzione europea', in:

the defence risks not only not having the necessary technical knowledge to be able to cultivate any procedural exception, but it cannot even count on some elements that typically precede the transmission of legal assistance acts, such as information exchanged between the investigating authorities in order to challenge such acts and question their relevance or necessity. Such informative deficits translate into a real risk of violation of fundamental rights and the principle of proportionality. However, an effective dialogue between the issuing and executing judicial authorities needs to be prioritised: such a need also arises in relation to the establishment of specific information mechanisms regarding the issuance and execution of an EIO also for the suspect, as required by Directive 2012/13/EU[22], and also concerns the legal remedies against an EIO. Some forms of guarantee in these senses are provided in paragraph 3 of Art. 14 EIO, which obliges the issuing and executing authorities to provide information in good time on the possibilities of appeal available under national law.

Secondly, the exclusion of the lawyer from the activities carried out abroad within the framework of a passive EIO risks concretely undermining the right to an effective remedy, expressly envisaged by the Directive and based on Art. 47 CFR, given that the defence has no possibility of concretely verifying how the act was carried out abroad[23]. Therefore, the EIO Directive should have provided guidance on the need to ensure full disclosure of the evidence thus obtained by the authorities, always in accordance with the principle of confidentiality, as well as on the need to ensure dual defence. In fact, the EIO Directive does not take account of some defensive guarantees whose utility is evident in the context of transnational proceedings as, for example, provisions on the possibility of a *double defence* in the state of issuance and in the state of the execution of the EIO, which the EIO does not foresee in contrast to other European cooperation instruments, such as the European Arrest Warrant (EAW), which has guaranteed the right to dual defence under Art. 10 of Directive 2013/48/EU, and the need for transnational legal aid for concrete and specific application on instruments that have a transnational vocation[24].

Following the European Directives on procedural rights, the EIO Directive could also have provided more operational indications on the need to establish the methods

A. Balsamo/R. E. Kostoris (eds.,), Giurisprudenza europea e processo penale italiano, (Turin: Giappichelli, 2008), p. 143–4.

[22] *Camaldo*, L., 'La direttiva sull'ordine europeo di indagine penale: un congegno di acquisizione della prova dotato di molteplici potenzialità, ma di non facile attuazione', Diritto penale contemporaneo online (27 May 2014), <https://archiviodpc.dirittopenaleuomo.org/d/3078-la-direttiva-sull-ordine-europeo-di-indagine-penale-oei-un-congegno-di-acquisizione-della-prova-dot>, accessed 25 January 2022.

[23] *Belfiore*, R., 'Critical remarks on the proposal for a European Investigation Order and some considerations on the issue of mutual admissibility of evidence', in: (n. 7), 91, 102.

[24] With regard to this point, Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings can also provide inspiration for application in the field of evidence; see, also, *Mangiaracina*, A., 'Il procedimento di esecuzione dell'OEI e I margini nazionali di rifiuto', in: Daniele/Kostoris (eds.), (n. 8), 105, 133.

by which the lawyer can access the case file in cross-border cases. The Directive should therefore have focused on certain aspects already addressed by other European texts: in this sense, Directive 2013/48/EU on the right to use a lawyer in criminal proceedings required, for the first time, the appointment of a lawyer in the State of execution of the warrant (Article 10), while Directive 2012/13/EU outlined, albeit in general terms (Art. 7(4)), the lines of coordination between the defences operating in different legal systems[25].

From a passive point of view, the Directive – supplemented by some poor internal provisions – offers little in the field of guarantees to the defence in relation to the power of appeal. Art. 13 of the Italian legislation [26] states that the suspect or his defence counsel may bring an opposition against the decree of recognition, before the preliminary investigation judge, expressly stating that if the opposition is upheld the decree of recognition of the EIO must be annulled.

We refer here also to the fact that Art. 14 of the Directive implies the possibility of disputing not only the investigative act but also the act by which an EIO is issued or recognised. However, the appeal, resuming the provisions already indicated in this case by the Directive, has no suspensive effect on the execution of the investigation order or on the transmission of the results of the activities carried out, as the authority can decide not to send the results of the activities carried out only if it considers that this may cause serious and irreparable damage to the suspect, the accused or even the person otherwise affected by the act (Art. 13(2) EIO). This has important practical consequences in terms of the effects that may stem from the transmission of evidence abroad, without the appropriate guarantee that the successful outcome of the appeal will block its use in the foreign proceedings.

At domestic level, defensive applications have their proper place: the Italian Supreme Court has intervened to outline the importance of communicating the recognition of the EIO carried out by the enforcement authority. In a procedure in which an EIO was requested by a German judicial authority for Italy to carry out certain acts of search and seizure against a person suspected of tax evasion, the order of recognition of the EIO by the Italian authority, issued by the competent prosecutor on 16 April 2018, was communicated to the defence only on 28 June. In the meantime, the prosecution had carried out the requested activities, performing the searches and seizures before the communication of the recognition of the EIO to the defence and ordering, on 5 June, non-repeatable technical assessments for the copying of the seized computer equipment (sending, on that date, the required notice to the suspect). This behaviour constitutes a breach of the internal legislation transposing the EIO Directive which provides, in Art. 4 of the Decree n. 108/2017, that the measure recognising the EIO called '*decreto di riconoscimento*' should be communicated '*at the moment when the act is carried out*' or, at least, '*immediately after*' while Italian law ratifies

[25] *Caianello*, M., 'The new directive on the European Investigation Order between mutual recognition and mutual admissibility of evidence', Processo penale e giustizia 3 (2015), 1, 9.

[26] Italian Legislative Decree of 21 June 2017, n. 108.

'*the right of the defender to attend the execution of the act*'. Without such notification a prompt lodging of the opposition before the preliminary investigation judge is not possible. Although being unlikely to suspend the execution of the investigative measures, a timely opposition may, however, increase the chances of interrupting the execution of the EIO or, in any case, of avoiding the transmission of the seized property to the foreign authority[27].

It should also be noted that, following this willingness to improve the situation of the defence and the fundamental rights of the parties, the Italian Court of Cassation broadened its position on the need to separate the procedure for recognising the EIO from the subsequent implementation of the measure, rejecting any tendency to assimilate the two phases which remain the subject of two very different disputes[28]. Since the recognition of the EIO is aimed at ascertaining the conformity of the EIO with the fundamental principles of the law of the executing State and the fundamental rights of the persons involved in the investigation operations, it must be duly motivated and transmitted to the defence in time for a fruitful challenge by way of opposition before the judge.

Finally, in order to ensure respect for fundamental rights in the execution of the EIO, Art. 13(1) of the Legislative Decree n. 108 provides that only the suspect or accused person can challenge an EIO while if the decree recognizing the investigation order concerns a seizure for the purpose of evidence, this decree can be challenged also by the person to whom the evidence or property was seized and the one that would have the right to their restitution (Art. 13(7)).

However, it can be observed that Italian domestic legislation leaves aside legal remedies in favour of victims. Instead, Member States should take the necessary measures to ensure that any interested party, including *bona fide* third parties, has adequate means of redress to protect their legitimate interests in the presence of an EIO, in order to align the EIO Directive with other European cooperation instruments. In this sense, Art. 8(2) of Framework Decision 2006/783/JHA on confiscation orders includes, as a ground for refusal, the fact that under the legal system of the executing State, execution is prevented by the rights of the parties concerned, including bona fide third parties. By this measure, this Framework Decision aims to compensate third parties for any deprivation of their fundamental right to be heard in criminal proceedings leading to the issuance of an order to confiscate part of their

[27] Cass., Sez. VI, 31 Jan. 2019 no. 8320, ECLI:IT:CASS:2019:8320PEN; *Daniele*, M., 'Ordine europeo di indagine e ritardata comunicazione alla difesa del decreto di riconoscimento: una censura della cassazione', Diritto penale contemporaneo online (11 Mar. 2019), <https://archiviodpc.dirittopenaleuomo.org/d/6532-ordine-europeo-di-indagine-e-ritardata-comunicazione-alla-difesa-del-decreto-di-riconoscimento-una>.

[28] Also in Cass., Sez. VI, sent. 7 Feb. 2019 (dep. 2 Apr. 2019), no. 14413, ECLI:IT:CASS:2019:14413PEN, Pres. Petruzzellis, Est. De Amicis, ric. Brega the Italian Supreme Court of Cassation has condemned the practice of proceeding with a factual recognition of the EIO, noting the importance of distinguishing the phases in order to facilitate a correct appeal against each act.

property. The executing judge must determine the extent to which the existence of the rights was taken into account by the issuing authority at the time of the confiscation order, as the executing authority cannot review the merits of the decision to be executed.

Despite the silence of the EIO Directive, which refers in general terms to the importance of respecting the fundamental rights of the suspect without, however, establishing special safeguards with regard to the victim, internal rules have instead revealed some sensitivity towards recognising the scope for action for victims' rights. As noted, this constitutes a difference also with regard to Art. 18 of the EEW, which expressly states that the Member States shall ensure access to legal remedies to all interested parties as well as third parties affected; however, an express statement may not be essential as the duty to provide full access to courts and to legal remedies against judicial measures is implied in the procedural and fundamental rights expressly cited in the Directive[29].

V. Final Remarks

The aspect of appeals in the European Investigation Order appears to be an issue to which the European legislator could have paid more attention. Even though the EIO Directive invokes the respect of fundamental rights and the right to defence, legal remedies seem to be an issue approached somewhat superficially. The latter remains at a stage of declamation without, however, intending to go further into the actual implications related to appeals with a view to creating a further and autonomous European Union remedy, which is also supported by the use of the expression 'legal remedies' instead of 'effective remedies'.

Although the respect of fundamental rights is contained and repeated several times in the text of the EIO Directive, it risks not being completely reassuring if the important captive capacities of the instrument do not envisage sufficient caution with regard, in particular, to the position of the defence and the protection of the rights of persons involved in proceedings subject to a European Investigation Order. Moreover, from an institutional perspective, the Court of Justice halts the expansion of individual rights that could frustrate the aims of cooperation and the effectiveness of Union law, as in the first cited EIO judgment.

In this sense, the establishment of European defence mechanisms and the disclosure of elements useful for the defence, as well as the concrete strengthening of legal aid, are elements to be bolstered in order to ensure the greater potential of European cooperation on the actual fates of individuals. While the circulation of evidence in accordance with more simplified and immediate mechanisms is a consequence of the principle of mutual recognition – which is the real procedural core of the matter –

[29] *Bachmaier Winter*, L., 'European investigation order for obtaining evidence in criminal proceedings. Study of the proposal for a European directive', ZIS 5 (2010), 580.

the lack of complementary reinforcement of the defence risks being a serious obstacle to the right to an effective judicial remedy, which is protected by numerous articles, including Art. 47 of the Nice Charter and Art. 13 of the ECHR.

Interception of Telecommunications: Strengths and Weaknesses of the European Investigation Order Directive (2014/41/EU)

By *Caroline Peloso* and *Oscar Calavita*

I. Introduction

Public Prosecutors are attempting to address the rapid development of technology through, *inter alia*, the interception of (tele)communications, which can assist in discovering and punishing the most varied forms of 'normal' and 'digital' criminality across the EU. [1]

The European Union, by adopting 'Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters' (EIO Directive), has expressly regulated the international interception of telecommunications as an investigative tool (Art. 30 and 31 EIO Directive).

Previously, interception was enshrined in Arts. 17 to 22 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union ('Brussels Convention' or 'Convention'), which continues to apply to those States not bound by the EIO Directive (Denmark and Ireland).

The purpose of this essay is to discuss the various issues concerning the practical application of this evidence-gathering instrument in order to comprehend its boundaries in practical application among EU Countries.[2] The initial part will focus on the relevant regulations of the EIO Directive, comparing it with the 'older' Brussels Convention. This comparison will form the foundation for the second part in which we will attempt to clarify the meaning of 'interception' and 'telecommunications'. Thereafter, the third part will analyse the interception of telecommunications in re-

[1] Another tool, if approved, could be the recently presented 'Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters (com(2018) 225 final)', which is currently being discussed by the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) of the European Parliament.

[2] We refer to the 25 EU Countries bound by the EIO Directive. Denmark and Ireland are still bound by the Brussels Convention.

lation to the principle set forth by the European Court of Human Rights ('ECtHR'). Finally, the last part will summarise the content of this essay and provide conclusions.

II. The Regulations on Interception of Telecommunications in the EIO Directive: A Comparative Interpretation with the 'Older' Brussels Convention

Even though the EIO Directive should be considered a mutual recognition ('MR') tool, while the Brussels Convention embodies the classic Mutual Legal Assistance ('MLA') technique, the two instruments present common characteristics. For a clearer understanding of them, we will briefly focus on some technical aspects of the interception of telecommunications.

As highlighted in doctrine, telecommunications across the EU can be intercepted both with and without the technical assistance of the requested Member State.[3]

In the first case (case A), the authorities of a Member State (for example, Italy) can directly intercept a subject located in another Member State (for example, France) either because the telecommunications use a satellite whose gateway is in Italy or because the target, communicating using a mobile phone network, is in a border location between the two Member States and is connected to the Italian network or even because the intercepted subject in the foreign State uses a national telephone operator (and there is a roaming agreement).

This technique (routing or gateway technique), although not permitted by the Brussels Convention, was used by those States that had not ratified the Convention before the approval, and implementation, of the EIO Directive. For instance, in Italy, the Supreme Court ('Corte di Cassazione') admitted using the *instradamento* (gateway technique) given that the interception activity took place within the national territory.[4] With the ratification of the Convention and the implementation of the EIO Directive, Member States must follow the procedures envisaged by Art. 20 of the Convention or Art. 31 of the EIO Directive, as implemented by every single State. To do so, they should request legal (but not technical) assistance from another Member State by means of a 'simple' notification procedure[5] which imposes to the intercepting Member State to notify the competent authority of the notified Member State

[3] *Weyembergh*, A./*de Biolley*, S., 'The EU Mutual Legal Assistance Convention of 2000 and the Interception of Telecommunications', European Journal of Law Reform 8 (2006), 285, 289 ff.

[4] *Inter alia* Cass., Judgement of 10 Nov. 2015, no. 5818.

[5] See *Daniele*, M., 'Intercettazioni ed indagini informatiche', in: R. E. Kostoris (ed.), Manuale di procedura penale europea (Milano: Giuffrè, 2019), 481, p. 486; *Grassia*, R. G., 'La disciplina delle intercettazioni: l'incidenza della direttiva 2014/41/UE sulla normativa italiana ed europea', in: T. Bene et al. (eds.), L'ordine europeo di indagine. Criticità e prospettive (Torino: Giappichelli, 2016), 199, p. 209.

of the interception in two situations: I) prior to the interception in cases where the competent authority of the intercepting Member State knows at the time of ordering the interception that the subject of the interception is or will be on the territory of the notified Member State; II) during the interception or after it has been carried out, immediately after it becomes aware that the subject of the interception is or has been during the interception, on the territory of the notified Member State. In other words, it is now prohibited to use the aforementioned gateway technique (*instradamento*[6]).

There are, moreover, three options of interception which require the necessary assistance of another Member State.[7]

The first concerns a State aiming to intercept a subject on its territory but having no satellite gateway to it (case B). In this case, the requesting State must ask another State to perform wiretapping. For example, Italy has no gateway on its territory, so it must ask France for technical assistance (Art. 18(2) lit. a Brussels Convention and Art. 30 EIO Directive).

Technical (and legal) assistance is required even if a State (e. g. Germany) needs to intercept a subject located in the territory of another Member State in which there is no satellite gateway (e. g. Italy); it is therefore mandatory to request technical assistance from a third Member State (e. g. France). In this case (case C), dual assistance is required by the requesting State: legal assistance from the State in which the subject is located and technical assistance from the State in which the satellite gateway exists (Art. 18(2) lit. c Brussels Convention and Art. 30 EIO Directive).

The third option (case D) concerns a State (Italy) intending to intercept a target located in another Member State (France) and this requires the technical assistance of the latter (France) (Art. 18(2) lit. c Brussels Convention and Art. 30 EIO Directive).

Technical assistance under case B could be avoided by referring to the provision envisaged by Art. 19 Brussels Convention. Indeed, it states that 'Member States shall ensure that systems of telecommunications services operated via a gateway on their territory, […] may be made directly accessible for the lawful interception' by another Member State in which there is no gateway connection 'through the intermediary of a designated service provider present on its territory'. By doing so, the State in which the subject is present can directly use a gateway of another Member State, through a private provider operating with a Remote Control System operation ('RCS'), without submitting any formal request.

Even though it is not expressly permitted by Art. 19 Brussels Convention, RCS can also be used in case C, where State A requests an interception from State B

[6] On the Italian regulation see also *Parodi*, C., 'Ordine di indagine europeo: la disciplina delle intercettazioni', Cassazione Penale 60 (2020), 1314, 1320 ff.

[7] The aforementioned hypotheses are described clearly in *Weyembergh/de Biolley*, (n. 3), pp. 292 ff.

which must request technical assistance from State C.[8] To this end, State A could ask State B to invoke Art. 19 of the Convention, in order to intercept directly the subject present on the territory of the latter and avoid involving State C.

Such a provision is not found in the EIO Directive, given that neither its Art. 30 (concerning 'interception of telecommunications with technical assistance of another Member State') nor Art. 31 (regarding 'notification of the Member State where the subject of the interception is located from which no technical assistance is needed'), nor its recitals foresee such an RCS instrument.

Despite the (suitable) silence of the EIO Directive on technological aspects,[9] such a tool could in any case be adopted by Public Prosecutors. Indeed, these days (twenty years after the Brussels Convention) digital evidence increasingly crosses borders and service providers are accustomed to such operations and can easily connect to a satellite present in another Member State. Irrespective of whether or not the target is present in the territory of the prosecuting authority, the investigation must be considered a domestic one, even if the interception is made with the technical assistance of a service provider connected to a foreign satellite.

This interpretation is *a contrario* confirmed by Art. 31 Directive 2014/41/EU, which allows the intercepting Member State – which needs no technical assistance – to intercept a subject present in another EU country, merely with the responsibility to notify that State of the execution of the wiretapping.

1. The Competent Requesting Authority

The first major difference between the Brussels Convention and the EIO Directive concerns the authority entitled to issue an interception order.

To this end, Art. 17 Brussels Convention states that the 'competent authority' is a 'judicial authority, or, where judicial authorities have no competence in the area covered by those provisions, an equivalent competent authority'.

The EIO Directive takes a different approach and, instead of defining 'competent authority', provides an explanation of a European Investigation Order (EIO). Indeed, according to Art. 1 EIO Directive, the latter is 'a judicial decision which has been issued or validated by a judicial authority of a Member State'.

It is remarkable that the EIO Directive best preserves the right of the defendant or the intercepted subject, given that a reserve of jurisdiction is envisaged. On the one side, indeed, it is necessary for an EIO to be adopted by a judicial authority, while, on the other side, it fails to make any reference to an 'equivalent competent authority'.

[8] See *Weyembergh/de Biolley* (n. 3), p. 295.

[9] An excessive regulation of technological aspects could be counter-productive with reference to the rapid technological progress in interception matters. On the topic, see *Nanni*, F., 'Le intercettazioni telefoniche', in: M. R. Marchetti/E. Selvaggi (eds.), La nuova cooperazione giudiziaria penale (Padova: Cedam, 2019), 459, p. 462.

The judicial control, as envisaged by the EIO Directive, may be preventive or subsequent. In the former case, the judge, in order to issue an EIO, must verify the compliance with the requirements imposed by the EIO Directive and by national legislation. In the latter case, and in the event of urgency which may harm the investigation, the judge will generally subsequently supervise the interception EIO just adopted by another authority (even the 'equivalent competent authority'), which, in most cases, is the Public Prosecutor.

Even if the reference to a judicial authority may seem inconsequential, it does, however, raise questions about the actual definition of a judicial authority.[10] In providing a response, the jurisprudence of the Court of Justice of the European Union ('CJEU'), developed with reference to the European Arrest Warrant ('EAW'),[11] whose Art. 1 defines it as a judicial decision, may be of assistance. In brief, the aforementioned case law states that the term 'judicial authority' 'is an autonomous concept of EU law'[12] which needs an uniform interpretation throughout the EU and is 'not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administrating justice in the legal system concerned'[13], preserving the principle of separation of power[14] and excluding '*inter alia*, administrative authorities or police authorities, which are within the province of the executive'[15]. As a consequence, from this perspective, neither the Ministry of Justice nor the police service is entitled to issue an EIO with regard to interception, while this power is attributed to the Public Prosecution, which'constitutes a Member State authority responsible for administering criminal justice'.[16]

[10] In doctrine see, *ex multis*, *Mancano*, L., 'European Arrest Warrant and Independence of the Judiciary. Evolution or Revolution?', Diritti Comparati (2 Sep. 2019) <https://www.diritticomparati.it/european-arrest-warrant-independence-judiciary-evolution-revolution/>, accessed 21 January 2022; *Armada*, I., 'The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a Fundamental Rights-Based Refusal the Solution?', New Journal of European Criminal Law 6 (2015), 8, 11–12.

[11] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States no. 2002/584/JHA. For a broader discussion of CJEU sentences regarding the EAW, see *Sacchetti*, V., 'La nozione di autorità giudiziaria nel mandato di arresto europeo, tra mutuo riconoscimento e tutela dei diritti fondamentali', *Aisdue* (2019), <https://www.aisdue.eu/bibliografia-aisdue-2019/>, accessed 21 January 2022.

[12] CJEU, Judgement of 10 Nov. 2016, No. C-452/16 (*Poltorak*), ECLI:EU:C:2016:858, para. 52.

[13] CJEU (n. 12), para. 33.

[14] CJEU, Judgement of 10 Nov. 2016, No. C-477/19 (*Kovalkovas*), ECLI:EU:C:2020:517, para. 36.

[15] CJEU (n. 12), para. 35.

[16] CJEU, Judgement of 10 Nov. 2016, No. C-453/16 (*Özçelik*), ECLI:EU:C:2016:860, para. 34.

2. The Requesting Procedure

With reference to the requesting procedure, both the Brussels Convention (Art. 18 and 20) and the EIO Directive (Art. 30 and 31) establish a difference between interception with or without the assistance of the requested State.

For the first time in criminal cooperation, Art. 4 Brussels Convention applies the rule of *lex fori* rather than the classic *lex loci*, requiring the requested Member State to 'comply with the formalities […] expressly indicated by the requesting State' even in the case of interception of telecommunications.

Even though the Brussels Convention betrays an MLA perspective, it is not hugely different from the new instrument adopted in 2014 and we can, for simplicity, examine only the latter, with some reference to the former.

From an initial general approach, it is remarkable to note that an interception EIO can be issued in criminal proceedings (Art. 4 EIO Directive) and only if it is 'necessary and proportionate for the purpose of the proceedings' (Art. 6(1) lit. a EIO Directive) and if the interception 'could have been ordered under the same conditions in a similar domestic case' (Art. 6(1) lit. b EIO Directive).

The first provision establishes a legal basis for interceptions and limits the use of this evidence-gathering tool only to those situations in which wiretappings are proportionate[17] to the scope pursued and necessary for the investigation in a democratic society. The second regulation, in turn, avoids *ab origine* a warped use of the EIO consisting of using it as a way of bypassing national rules. In other words, if a crime does not permit the use of interception, it is prohibited to resort to the EIO in order to admit in domestic criminal proceedings unpermitted wiretapping.

Aside from whether or not the aforementioned conditions are met, the issuing authority can issue an interception EIO which must comply with particular, identified content and a required form, according to Art. 5, 30 and 31. The EIO should follow the form set out in Annex A to the Directive, should be translated into an official language of the executing State and 'shall, in particular, contain the following information:

a) data about the issuing authority and, where applicable, the validating authority;

b) the object of and reasons for the EIO;

c) the necessary information available on the person(s) concerned;

d) a description of the criminal act, which is the subject of the investigation or proceedings, and the applicable provisions of the criminal law of the issuing State;

e) a description of the investigative measure(s) requested and the evidence to be obtained' (Art. 5 of the EIO Directive).

[17] With regard to the principle of proportionality in the EIO see *Scomparin*, L./*Cabiale*, A., below Part II pp. 225 ff.

In addition to the requirements contained in Art. 5, Art. 30 of the EIO Directive – which concerns interception of telecommunications with technical assistance of another Member State – establishes that the issuing authority should also indicate:

a) information for the purpose of identifying the subject of the interception;

b) the desired duration of the interception; and

c) sufficient technical data, in particular the target identifier, to ensure that the EIO can be executed.

The aforementioned letters a) and c) appear not to raise any issues. Conversely, letter b) entails a dilemma concerning the different duration of the interception in the EU Member States. It may be the case that the Criminal Procedure Code (CPC) of State A envisages that the interception should last for 'x' amount of days, while the CPC of State B establishes that the interception should be valid for only 'y' days.

As an example, consider that France issues an EIO asking to intercept a subject located in Italy for four months, according to Art. 100(2) CPC, while, in Italy, the maximum duration of the interception is fifteen days, renewable for another fifteen days each time (Art. 266(3) CPC). The question to be answered is whether the Italian authority is able to execute the interceptive EIO.

To answer the question, we must examine Arts. 10, 11 and 30 EIO Directive.

Art. 11 provides eight grounds for non-recognition or non-execution of the EIO which do not allow an order concerning the duration of an investigative measure to be refused. Only lit. f) of that article may provide a possibility of non-recognition if the 'measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'. The latter reference is to the Charter of Fundamental Rights of the European Union (CFR) which regulates the right to respect for private and family life (Art. 7). Art. 7 CFR states that 'everyone has the right to respect for his or her private and family life, home and communications' and must be interpreted in accordance to the jurisprudence of Article 8 of the ECHR[18], which requires a State to set 'a limit on the duration of telephone tapping'.[19]

Therefore, according to Art. 11(1) lit. f EIO Directive, the requested State may refuse an interceptive EIO only if there is no indication of the telephone tapping duration. Conversely, if the requesting authority fulfils the provisions of Art. 30(3) lit. b, there is no reason to refuse the order.

[18] On which see *Kostoris*, R. E., 'La tutela dei diritti fondamentali', in: (n. 5), 81, pp. 83 ff.; and ECtHR, Grand Chamber, Judgement of 30 June 2005, No. 45036/98 (*Bosphorus v. Ireland*), ECLI:CE:ECHR:2005:0630JUD004503698.

[19] ECtHR, Judgement of 4 Dec. 2015, No. 47143/06 (*Zakharov v. Russia*), ECLI:CE:ECHR:2015:1204JUD004714306, para. 231.

In addition to the aforementioned general grounds for non-recognition or non-execution, Art. 30(5) EIO Directive establishes that an order 'may also be refused where the investigative measure would not have been authorised in a similar domestic case'. It is, therefore, essential to understand the meaning of the expression '*would not have been authorised* in a similar domestic case', which must be interpreted in conjunction with Art. 10(1), whose lit. b) permits the recourse to an investigative measure other than that envisaged by the EIO where it '*would not be available* in a similar domestic case'.

In this latter case, the investigative measure does exist under the national law of the executing State (otherwise, the provision of Art. 10(1) lit. a would apply) but it does not permit the recourse to interception, for example, because it does not reach the threshold of minimum punishment or because the criminal offence does not allow interception.

The provision of Art. 30(5) EIO Directive does not refer to the *availability* of the measure but to the *authorisation* of the same. Telephone tapping, therefore, exists under the national law of the executing State and it is available in a similar domestic case (State A and State B permit interception for, by way of example, rape) but it is not permissible.

In order to ascertain if interception could be authorised, recital 32 EIO Directive states that 'in an EIO containing the request for interception of telecommunications the issuing authority should provide the executing authority with sufficient information, such as details of the criminal conduct under investigation, in order to allow the executing authority to assess whether that investigative measure would be authorised in a similar domestic case'. The Directive thereby seems to permit a verification by the executing authority with regard to the EIO, in order to check – in relation to a criminal offence for which telephone tapping is available – if it would actually be authorised under its domestic law.

Consider, again, that France demands an order from Italy. In France, Art. 100(1) CPC states that the interception could be authorised if it is *necessary* for the proceedings[20], while, in Italy, Art. 267 CPC establishes stricter requirements: the interception must be *absolutely indispensable* for the *continuation of the investigation*[21]. It may, therefore, be the case that a *necessary* interception in France is not *absolutely indispensable* in Italy and thus the executing State may (but not must) refuse to recognise or execute the order.

In other words, the aforementioned Arts. 10 and 35 EIO Directive act in synergy, as the first one rules on the abstract plan of criminal disposition, while the latter in-

[20] Art. 100(1): 'La décision prise en application de l'article 100 est motivée par référence aux éléments de fait et de droit justifiant que ces opérations sont necessaries'.

[21] Art. 267: 'L'autorizzazione è data con decreto motivato quando vi sono gravi indizi di reato e l'intercettazione è assolutamente indispensabile ai fini della prosecuzione delle indagini'.

tervenes in the subsequent, real time of the proceedings. This latter exception to the general rule of 'automatic' recognition and execution of the orders seems to result from the level of intrusion of fundamental rights that the interception entails, given that telephone tapping intrudes into the everyday life of a person.[22]

Turning back to the main issue of the differing durations of interception across EU countries, it does appear that the duration is enshrined under the provision of Art. 35 concerning the authorisation in a similar domestic case. Indeed, the duration – far from being just a temporal way of executing an EIO – is a requisite of the interception. The executing State, however, instead of refusing to recognise or execute the order, may 'make its consent subject to any conditions which would be observed in a similar domestic case' (Art. 30(5) EIO Directive). In doing so, the executing and the issuing authority may have an informal meeting by telephone call or email, in order to reach an agreement about the duration of the interception.

These acts of 'international courtesy' accord with the spirit of the Directive, which attempts to strengthen the mutual cooperation between Member States and depicts a faint and weak sort of 'principle of conservation' of evidence.

The reticence of the Directive originates from the use of the modal verb 'may' rather than 'should' or 'must' in Art. 30(5) and from the failure to codify the 'principle of conservation' of evidence. Indeed, these days Public Prosecutors attempt to contact the issuing authority if there is a problem with the EIO only if there are grounds for non-recognition as envisaged by Art. 11(1) lit. a), b), d), f) (Art. 11(4) EIO Directive), while only the most virtuous Public Prosecutors contact the issuing authority in other cases.

The codification of the principle, in other words, would have avoided different practical applications of the interceptive EIO as a result of the 'diligence level' of the Public Prosecutors. It may have been better if the Directive had ruled on the aforementioned 'principle of conservation' and the obligation to contact the issuing authority, in order to make an EIO otherwise non-recognisable or non-executable in the requested State executable domestically.

In awareness of this, therefore, and returning to the theme of the duration of the interception, it can be concluded that:

I. if the issuing authority does not indicate the duration of the interception, the requested State may refuse to recognise or execute the order in accordance with both Art. 11(1) lit. f and Art. 30(5) EIO Directive;

[22] Practitioners 'discussed to what extent a notified authority should check whether 'the interception would not be authorised in a similar domestic case'. While most participants agreed that this should merely be a formal, procedural check, several participants indicated that in some Member States it is a very substantive examination whereby additional information is requested to perform the assessment and it often leads to decisions requiring the termination of the interception (if it is still ongoing) and/or prohibiting the use of the intercepted material' (Outcome report of the Eurojust meeting on the European Investigation Order, The Hague, 19–20 Sep. 2018, p. 13).

II. if the issuing authority does indicate the duration of the interception but such duration is longer than the duration permitted in the executing State, the latter may give its consent subject to any conditions that would apply in a similar domestic case. Generally, the two States may reach an agreement on the duration through informal channels;

III. if the issuing authority does indicate the duration of the interception, and this is the same as or shorter than the duration in the executing State, the latter should recognise the order without any further formality.

If, on the other hand, the issuing State does not require technical assistance (consider roaming agreements), it should notify an interceptive EIO using the form found at Annex C to the EIO Directive either prior to the interception or during the interception, in order to permit the notified State to order the interruption or prohibition of the interception.

3. The Execution Procedure

Like the procedure for issuing the order, the execution procedure differs if the issuing authority requires technical assistance or if it can proceed autonomously.[23]

In the former case, the requested authority, in agreement with the issuing one, may either transmit telecommunications immediately (direct transmission) or intercept, record and subsequently transmit the outcome of the interception of telecommunications (indirect transmission – Art. 30(6) EIO Directive).

Direct transmission appears to be more expensive, in terms of economic and human costs, given that the requested State must assign a police officer to listen to the communications that are transmitted in real time to the issuing State, in which another police officer is listening to the same communications. This transmission method can be useful in cases where the national law permits lengthy tapping durations, as some investigations require speed of interception (for example, terrorism crimes).

Indirect transmission, in turn, is less costly but requires the issuing authority to wait for the results of the investigation. The adverb 'subsequently', however, does not indicate an exact time for the transmission: there is no specification as to whether the transmission will be made every hour, every day, every week or at the end of the investigation. In the absence of further information in that regard from the Directive, the agreement between the issuing and executing authority, envisaged by Art. 30(6), can be interpreted not only with reference to the choice of direct or indirect transmission, but also to the frequency of the 'subsequent' transmission.

[23] In any case, telecommunications interception should comply with the standards of the European Telecommunications Standard Institute (ETSI).

In any case, the choice between direct or indirect transmission could be conditioned by both the needs of the authorities – which should consider mutual urgencies – and also by the technological aspects of their equipment. In fact, one Member State may be much more cutting-edge than another, making direct transmission impossible: in such situations the choice of indirect transmission is compulsory.

Another particular way of executing the order is envisaged by Art. 30(7) EIO Directive, which states that the issuing authority may, 'where it has a particular reason to do so, also request a transcription, decoding or decrypting of the recording subject to the agreement of the executing authority'.

This is clearly an exceptional executing procedure, given that the issuing State has the right to request from the executing authority a transcript, decoding or decryption of the investigation, only in presence of a 'particular reason'. Such a reason may relate to technological aspects, as a particular Member State may use specific interception software that cannot be transcripted, decoded or decrypted.

The exceptional nature of this option is heightened by the fact that a transcription, decoding or decrypting carried out in the executing State may lead to the invalidity of the evidence in the issuing Member State, especially in those cases where the transcription procedure in one Member State is less guaranteed than in the other. This exception thus refers to operations that are to be ruled upon by the issuing State, otherwise there would be a risk of performing an onerous operation that may have to be repeated in the issuing Member State, in compliance with its domestic law and its defensive guarantees.[24]

Consider, once again, for example, Italy and France. In France, the transcription is made by the judge, or by a delegated police officer, in the absence – it seems – of any formality (Art. 100(6) CPC).[25] In Italy, on the other hand, particular expertise is required in order to obtain a valid and usable transcription. Therefore, a French transcription would be invalid (and unusable) in Italy.

To avoid these problems, it can therefore be argued that a State would prefer to transcript, decode or decrypt an interception itself.

In the cases envisaged by Art. 31 EIO Directive, no execution procedure is needed, since the issuing authority merely notifies – prior to or during the investigative measure – another Member State that an interception of telecommunications is taking place in the territory of the latter.

If the interception would not be authorised in a similar domestic case in the notified State, the latter has 96 hours (a term that appears to be final) to notify the competent authority of the intercepting State to avoid carrying out the tapping or to ter-

[24] *Marinelli*, C., 'Le intercettazioni di comunicazioni', in: R. E. Kostoris/M. Daniele (eds.), L'ordine europeo di indagine penale (Torino: Giappichelli, 2018), 221, p. 235.

[25] Art. 100(6): 'Le juge d'instruction ou l'officier de police judiciaire commis par lui transcrit la correspondance utile à la manifestation de la vérité. Il en est dressé procès-verbal. Cette transcription est versée au dossier'.

minate it. After the termination order, the notified State can also, as a direct consequence, require the issuing authority, if necessary, not to use the intercepted material recorded on its territory, or authorise its use only under certain conditions.[26]

III. The Notion of 'Interception of Telecommunications'

Both the Brussels Convention and the EIO Directive regulate the interception of telecommunications, but do not give a definition of interception or of telecommunications.

An interception is commonly defined as an investigative measure characterised by three features:[27]

I. the conversation must be private and the interlocutors want to exclude other people from it. The knowledge and/or consent of one of the interlocutors to the interception are/is not sufficient to make an unauthorised interception lawful. In fact, the secrecy of the (tele)communications of all participants in the conversation must be guaranteed[28]. On the contrary, if the conversation takes place over the air, on an open wavelength, secrecy is absent and there is, therefore, no interception;[29]

II. the interception must be carried out by third parties to the conversation. Otherwise, if the conversation is recorded by one of the attendees, the registration must be seen as a document rather than an interception;[30]

III. the interception must take place at the same time as the communication and use mechanic or electronic tools suitable to bypass sensitive capacities. Conversely, if a concealed individual personally hears a conversation and records it, this is not a case of an interception, as it does not bypass sensitive capacities.[31]

The notion of 'telecommunications' appears to be much more difficult to interpret. The Cambridge Dictionary defines it as 'the sending and receiving of messages over distance, especially by phone, radio and television'. The Oxford Dictionary,

[26] This prohibition on using interception is the only case of special 'unusability' envisaged by the EIO Directive.

[27] See *Nappi*, A., '*Sub* art. 266 c.p.p.', in: G. Lattanzi/E. Lupo (eds.), Codice di procedura penale, Vol. III (Milano: Giuffrè, 2003), p. 382, 384; *Caprioli*, F., 'Intercettazioni e registrazione di colloquio tra persone presenti nel passaggio dal vecchio al nuovo codice di procedura penale, Rivista Italiana di Diritto e procedura penale, 1991, I, 143.

[28] *Filippi*, L., 'Intercettazioni, tabulati e altre limitazioni della segretezza delle comunicazioni', in: G. Spangher et al., Procedura penale. Teoria e pratica del processo, Vol. I (Torino: Utet, 2015), 973, pp. 976–977.

[29] *Filippi* (n. 28), p. 979.

[30] *Filippi* (n. 28), p. 979. See also ECtHR, Judgement of 25 Oct. 2007, No. 38258/03 (*Van Vondel v. The Netherlands*), para. 49.

[31] *Filippi* (n. 28), p. 978.

meanwhile, describes it as 'the technology of sending signals, images and messages over long distances by radio, phone, television, satellite, etc.'

As can immediately be seen, the main identifying feature of telecommunications is a communication that takes place over (long) distances using an Information Technology (IT) System. The latter allows two or more persons to exchange, *inter alia*, telephone calls, e-mails, messages, signals, images, and videos, even via the internet. In other words, 'compared to the "classic" notion of the interception of telephone calls, the interception of telecommunications is broader, because it takes into account and allows for the incorporation of new technologies'.[32]

In any case, a telecommunication must be made at a distance and therefore a telephone, smartphone, laptop or any other technological instrument that allows people to communicate is required. The notion of telecommunications thus includes not only telephone calls but also computer and electronic communications, the latter meaning online flows that are constantly evolving.

Eurojust expressed an opinion on this topic.[33] First of all, it highlights that the EIO Directive does not refer at all to national legislations for determining the meaning of 'telecommunication'. Consequently, there must be 'an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question'.[34]

In order to understand the meaning of the term telecommunication, Eurojust bore in mind the Council resolution of 1995 on the lawful interception of telecommunications, the Brussels Convention and its explanatory report. It therefore concludes as previously argued: 'it seems that the term 'telecommunication', as opposed to the more general term 'communication', requires the use of some type of telecommunications technology and does not seem to cover direct live communication between two people, without the use of any technological means'.[35]

In the awareness of all this, we can now investigate if, pursuant to the EIO Directive, audio surveillance, Trojan horse interception, preventive interception and interception to track fugitives are allowed.

1. Interception of Telecommunications and Audio Surveillance

As briefly highlighted, an interception of telecommunications is an investigative tool that takes place secretly, using technological instruments (telephone, computer, etc.), over a (long) distance conversation.

[32] *Weyembergh/de Biolley* (n. 3), p. 285.

[33] Eurojust, Report on Eurojust's casework in the field of the European Investigation Order (Nov. 2020), available at <https://www.eurojust.europa.eu/report-eurojusts-casework-field-european-investigation-order-0>, accessed 21 January 2022.

[34] Eurojust (n. 33), p. 45.

[35] Eurojust (n. 33), p. 45.

The Directive, referring to 'telecommunications', and not to 'communications' *tout court*, raises a question regarding the interception of communications *inter praesentes* ('audio surveillance') carried out using both a technological device – such as a smartphone – or a hidden microphone ('bug'). In this case, the technological device acts as an interceptive tool, rather than one of transmission.

The reference in Art. 30 and 31 EIO Directive seems to be clear: no audio surveillance is permitted.[36-37]

However, it must be considered that the previous Art. 28 envisages 'investigative measure[s] requiring the gathering of evidence in real time, continuously and over a certain period of time'. It must be questioned, therefore, if audio surveillance can be included within the notion of gathering of evidence in real time.

According to part of Italian doctrine, the answer is negative, since if the EIO Directive had intended to regulate audio surveillance, it would have used both the terms telecommunications and communications (*ubi lex dixit voluit, ubi noluit tacuit*); moreover, the examples envisaged by Art. 28 concern operations other than *inter praesentes* interceptions. Consequently, if a State needs to resort to audio surveillance, it must ask the requested State for an ordinary rogatory.[38]

We disagree with this interpretation.

Indeed, the title of the Article and its first paragraph refer to measures implying the gathering of evidence having three characteristics: I) in real time; II) continuously; III) over a certain period of time.[39]

Audio surveillance – carried out using a bug or any other technological device – displays all three of these features. Firstly, it is gathered in real time, given that the audio interception is heard by police operators at the same time it takes place. Moreover, the audio can be heard twenty-four hours a day over a certain period of time.

Neither is the reference to monitoring of banking or to controlled deliveries (Art. 28(1) lit. a and b EIO Directive) sufficient to prohibit an EIO concerning audio surveillance. Indeed, both hypothesises are only indicated as examples of the concept of gathering of evidence in real time, as highlighted in Art. 28(1) EIO Directive which uses the words 'such as' before the list of letters a) and b).

It must be concluded, therefore, that an EIO concerning audio surveillance must be permitted. According to Eurojust, indeed, 'there is no indication whatsoever that it

[36] *Nanni* (n. 9), p. 461.

[37] According to part of doctrine, 'parimenti criticabile – avuto riguardo all'oggetto di apprensione – è il riferimento alle 'telecomunicazioni' che, inteso letteralmente, lascerebbe al di fuori della sfera di operatività le comunicazioni tra presenti' (*Marinelli* (n. 24), p. 232).

[38] *Nanni* (n. 9), p. 466.

[39] It has been said that a term of maximum duration of interception has been omitted, with the consequent violation of the right to privacy guaranteed by Art. 8 ECHR (*Camaldo*, L./*Cerqua*, F., 'La Direttiva sull'Ordine Europeo di Indagine penale: le nuove frontiere per la libera circolazione delle prove', Cassazione Penale 54 (2014), 3511, 3525).

was the EIO legislature's aim to exclude surveillance measures from the EIO DIR'.[40] In reaching this conclusion, moreover, we resort to two different cooperation tools – the rogatory and the EIO – for investigative measures which have common characteristics and which need, generally, to be executed as quickly as possible, also considering the increasing use and importance of the instrument.[41]

2. The Use of the Trojan Horse

The Trojan horse is a type of malware that can be inserted into a device connected to the Internet through which it is possible to control the target device remotely, in order to intercept telecommunications or to use audio and video surveillance.

Firstly, we must investigate the use of Trojans for an EIO concerning interception of telecommunications.

In the end, the result is the same if the interceptive EIO is carried out 'normally' or using a Trojan: the communication is heard secretly and at the same time as it takes place. The difference consists of the way in which the signal is received. In 'normal' interceptions, the public authority asks the service provider to split the signal, diverting it both to the interlocutor and to the authority. With the Trojan, the authority does not need to obtain cooperation from the service provider as it hears the conversation directly, given that it controls the device.

The two different ways have a substantial consequence: 'normal' tappings cannot intercept encrypted messages, such as WhatsApp messages, which use an end-to-end connection. Indeed, end-to-end technology requires a unique decryption password that is known only by the connected devices. Third parties, such as the public authority and the service providers themselves, are at most aware that two devices are exchanging information, but they cannot know the content of the communication. By way of example, the end-to-end communication is like a courier: it knows that the package exists but it does not know what it contains.

[40] Eurojust (n. 33), p. 46. Moreover, Eurojust argued that 'although the methods of interception are different in wiretapping (interception of communication by telephone or other telecommunication technology) and bugging (installation of a small microphone in the place to be bugged and transmission to some nearby receiver), both types of electronic surveillance have the same purpose and effect: the secret interception of communications. Accordingly, they also entail the same level of interference with the right to privacy. It seems illogical that the safeguards and rights set by the EU legislature would apply to the former but not the latter and/or other more intrusive measures'.

[41] *Nanni* (n. 9), p. 467. On the topic see also *Guerra*, J. E./*Janssens*, C., 'Legal and practical challenges in the application of the European Investigation Order', Eucrim 14 (2019), 46, 48, <https://eucrim.eu/articles/legal-and-practical-challenges-application-european-investigation-order/>, accessed 21 January 2022: 'on the subject of the gathering of evidence in real time (art. 28 EIO DIR), most participants believed that the wording of this provision is sufficiently broad as to leave room for measures such as video/audio surveillance'.

The Directive is silent on technological aspects and, in particular, on the Trojan, probably due to the rapid technological development which risks making the law outdated in a short space of time.

Encrypted communications could be considered to be 'telecommunications', given that they take place over (long) distances using an Information Technology ('IT') System, and therefore it is arguable that an EIO Trojan interception order may be requested according to Art. 30 or notified according to Art. 31 EIO Directive.

One problem may arise with regard to the laws of the Member State, as some of them regulate the Trojan in many different ways, while others are silent on the subject. In these cases, if a Member State does not allow the use of Trojans or permits it under certain conditions, it may be non-recognised or non-executed according to either Art. 11 (the investigative measure does not exist in the executing State or it is not allowable in a similar domestic case) or Art. 30(5) (the investigative measure would not have been authorised in a similar domestic case) or if it violates the proportionality principle or the fundamental rights of the executing State.

In short, it appears that the EIO Directive – albeit silent on the point – may permit the use of Trojans as a technological interception tool, but the practitioner should look at each individual Member State law in order to ascertain if it exists, it is allowable and it is authorised in the requested or notified State.

The same arguments apply to the audio surveillance investigation. Indeed, Art. 28 EIO Directive envisages measures that involve the gathering of evidence in real time, continuously and over a certain period of time, but it does not refer to the type of measure that can be used. Therefore, audio Trojan surveillance seems to be permissible under the Directive, keeping in mind the grounds for non-recognition or non-execution, the proportionality principle and the respect for fundamental rights in the executing or notified State.

Considering all functionalities of Trojans, which are much broader than those we have been able briefly to illustrate, their main issue is the intrusion of fundamental rights of individuals, particularly the right to private life, envisaged by Art. 7 CFR and Art. 8 ECHR (European Convention of Human Rights). From this point of view, the practitioner should be careful when using Trojans for interception. Indeed, once inserted, everything contained in the device can be seen, significantly injuring fundamental rights. In this field, the principle of proportionality and the respect for fundamental rights of the law of the State act as guarantees for citizens, and States should pay great attention to them.

3. Preventive Interception and Interception for Tracking Fugitives

Some States, such as Italy,[42] Malta[43] and Germany,[44] allow the use of interception of telecommunications before the start of criminal proceedings, in order to discover a

[42] Decreto Legge 27 July 2005, n. 144 as amended by Law 7 Aug. 2012, n. 133.

notitia criminis concerning crimes causing social alarm, such as terrorism, organised crime and those involving the Mafia.

Preventive interception acts in the same way as 'normal' interception but this type of interception does not appear to be permitted in the EIO Directive.

Indeed, Art. 1 Directive 2014/41/EU describes the EIO as a judicial decision, issued to have a specific investigative measure carried out to 'obtain evidence'. It is clear that an interception which takes place before the proceedings, in order to discover crimes, has purposes other than evidence gathering.[45]

At most, a sort of preventive interception could be admitted under the provision of Art. 4(1) lit. b and c EIO Directive. The latter permits the issuance of an EIO in proceedings brought by administrative or judicial authorities, other than the criminal authority, when the decision may give rise to proceedings before a court having jurisdiction in criminal matters. In these cases, the (interceptive) EIO seems to be directed towards obtaining evidence before the start of criminal proceedings and appears to lie outside the purpose of the search for *notitiae criminis.*

The same arguments partly apply to interception for tracking fugitives. Indeed, this type of interception may take place during criminal proceedings or at their conclusion. In the first case, the interceptive EIO is used in proceedings to obtain evidence; there should thus be no issue concerning its admissibility. The conclusion is different for interceptive EIOs used after the end of proceedings, given that the purpose of the interception is no longer than of obtaining evidence.[46]

However, a different interpretation may be reached if we consider executive criminal proceedings as a part of the overall criminal proceedings. According to this reasoning, it could be concluded that an EIO is admissible, since the interception would be aimed at obtaining evidence for the executive proceedings and the subsequent execution of the sentence.

4. Collection of Traffic and Location Data

The collection of (historical) traffic and location data is frequently associated with interception of telecommunications, but it differs from the latter for many reasons.

The collection of traffic data does not focus on the content of the communication; it takes place after the communication and merely indicates the existence of a previous communication between two telephone numbers. It does not reveal who actually took part in the conversation (perhaps, for example, Jordan lent his phone to John).

[43] Chapter 391, Art. 3, Security Service Act.

[44] Art. 10 Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses (Artikel 10-Gesetz – G 10).

[45] See *Marinelli* (n. 24), p. 231; *Nanni* (n. 9), p. 475.

[46] *Nanni* (n. 9), p. 476.

In other words, 'it is likewise essential to distinguish between, on the one hand, interception that takes place in real time and which is concerned with telecommunications content, and, on the other hand, notions which imply less of an intrusion in a person's private life. These could consist of identification or tracking, in which communication content is not considered'.[47]

In short, the collection of traffic data is a document produced by internet service providers ('ISP'), which is less intrusive to the fundamental rights of individuals.

Recital 30 EIO Directive expressly provides for this investigative measure: 'the interception of telecommunications should not be limited to the content of the telecommunications, but also cover collection of traffic and location data associated with such telecommunications, allowing competent authority to issue an EIO for the purpose of obtaining less intrusive data on telecommunications'. Consequently, 'an EIO issued to obtain historical traffic and location data related to telecommunications should be dealt with under the general regime to the execution of the EIO'.[48]

A 'normal' EIO, therefore, can be adopted to collect traffic and location data.

On the subject, we must highlight a proposal of the European Commission for a 'Regulation of the European Parliament and of the Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters' (the Proposal or EPO Proposal), still being examined by the LIBE Commission (Committee on Civil Liberties, Justice and Home Affaires) of the EU Parliament.[49]

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[47] *Weyembergh and de Biolley* (n. 3), p. 285.

[48] On the subject see *Rusu*, I., 'European investigation order in criminal matters in the European Union: general considerations. Some critical opinions', Juridicial Tribune 6 (2016), 56, 65. *Marinelli* (n. 24), p. 232 observes the ambiguity of the provision that seems to be suitable for operations not autonomously executed, but 'associated' with the actual interceptions, i. e. carried out on the occasion of these and simultaneously with them.

[49] For some initial readings, see *Daniele*, M., 'L'aqcuisizione delle prove digitali dai service provider: un preoccupante cambio di paradigma nella cooperazione internazionale', Revista Brasilera de Direito Processual Penal 5 (2019), 1277 ff.; *Geraci*, R. M., 'La circolazione transfrontaliera delle prove digitali in UE: la proposta di Regolamento e-evidence', Cassazione Penale 59 (2019), 1340, 1359; *Franssen*, V., 'The European Commission's e-Evidence Proposal: toward an EU-wide obligation for service providers to cooperate with law enforcement?', Europeanlawblog (12 Oct. 2018), <https://europeanlawblog.eu/2018/10/12/the-european-commissions-e-evidence-proposal-toward-an-eu-wide-obligation-for-service-providers-to-cooperate-with-law-enforcement/>, accessed 22 January 2022; *Gialuz*, M./*Della Torre*, J., 'Lotta alla criminalità nel cyberspazio: la Commissione presenta due proposte per facilitare la circolazione delle prove elettroniche nei processi penali', Diritto Penale Contemporaneo (2018), 277 ff., available at <https://archiviodpc.dirittopenaleuomo.org/d/6080-lotta-alla-criminalita-nel-cyberspazio-la-commissione-presenta-due-proposte-per-facilitare-la-circo>, accessed 21 January 2022; *Jeppesen*, J. H./*Nojeim*, G., 'Initial Observations on the European Commission's e-Evidence Proposals', Center for Democracy and Technology (18 Apr. 2018), <https://cdt.org/insights/initial-observations-on-the-european-commissions-e-evidence-proposals/>, accessed 21 January 2022; *Moxley*, L., 'EU Releases e-Evidence Proposal for Cross-Border Data Access', Insideprivacy (2019), <https://www.natlawreview.com/article/eu-releases-e-evidence-proposal-cross-border-data-access>, accessed 22 January 2022; *Pollicino*, O./

The Proposal 'seeks to adapt cooperation mechanisms to the digital age, giving the judiciary and law enforcement tools to address the way criminals communicate today and to counter modern forms of criminality'[50]. In other words, it aims to secure EU criminal cooperation in the field of electronic evidence, in which traffic and location data are one of the main players.

To do so, it envisages that the issuing authority may directly order a service provider offering services in the EU to preserve or to produce subscriber, access, transactional and content data. On its side, the service provider must comply with the request or production within 10 days or, in urgent cases, within 6 hours (Art. 9 EPO Proposal); while, in the case of a request for preservation, it must comply 'without undue delay' (Art. 10 EPO Proposal) and preserve the data for 60 days.

It is clear that this mechanism is much faster than the EIO, given that the State in which the service provider is located has a part to play only if the latter does not comply with the order. On the other side, the Proposal may lead to problems concerning the safeguarding of fundamental rights, as the latter is left to a private operator.

In any case, if the Proposal is approved, the issuing authority may choose between an EIO and a European Production or Preservation Order (EPO). Indeed, the measures based on the Proposal 'should not supersede European Investigation Orders in accordance with Directive 2014/41/EU of the European Parliament and of the Council to obtain electronic evidence' (recital 61 EPO Proposal). Moreover, EIO and EPO could integrate with each other, given that, according to Art. 6 of the Proposal, an EPO may be issued in view of a subsequent request for production via mutual legal assistance, via EIO or via European Production Order.

IV. Interceptive EIO and Fundamental Rights

Recital 18 EIO Directive states that 'the Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (TEU) and the Charter'.

As is known, Art. 6 TEU refers to the CFR, Art. 7 of which states that 'everyone has the right to respect for his or her private and family life, home and communica-

Bassini, M., 'La proposta di regolamento e-Evidence: osservazioni a caldo e possibili sviluppi'; *Medialaws* (26 Oct. 2018), pp. 1 ff., <https://www.medialaws.eu/la-proposta-di-regolamento-e-evidence-osservazioni-a-caldo-e-possibili-sviluppi/>, accessed 21 January 2022; *Ruggeri*, F., 'Novità. Il protocollo 16 alla Cedu in vigore dal 1° agosto 2018. La proposta per l'ordine europeo di conservazione o di produzione della prova digitale', Cassazione Penale 58 (2018), 2660 ff.

[50] See p. 2 of the explanatory memorandum of the proposal: <https://eur-lex.europa.eu/resource.html?uri=cellar:639c80c9-4322-11e8-a9f4-01aa75ed71a1.0001.02/DOC_1&format=PDF>, accessed 21 January 2022.

tions' and which should be interpreted according to European Court of Human Rights decisions referring to Art. 8 ECHR.[51]

First of all, the ECtHR has established that wiretappings and audio surveillance are covered by the notion of correspondence and private life under Art. 8 ECHR.[52]

Interception represents a serious interference with correspondence and private life. Therefore, the Grand Chamber of the ECtHR noted that three conditions are necessary for the purposes of a legitimate interception: 1) the interception must be 'in accordance with the law',[53] which must be accessible and foreseeable;[54] 2) it should 'pursue one or more legitimate aims to which paragraph 2 of Article 8 refers'; 3) it must be 'necessary in a democratic society'.[55] Moreover, an interceptive warrant should state the intercepted subject's name, in order to identify the person to whom the measure is to be applied.[56]

With specific regard to the rule of law, Member States should 'provide the following minimum safeguards against abuses of power: a definition of the nature of offen-

[51] In this regard, see Council of Europe, Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence. Last update 31 Aug. 2020, available at <https://www.echr.coe.int/documents/guide_art_8_eng.pdf>, accessed 15 Oct. 2021; *Boroi*, A., 'Interception of communications from the perspective of ECHR jurisprudence', International Conference Education and Creativity for Knowledge-Based Society – Law (8th edition, 2014), pp. 37 ff.; *Mihail*, S., 'Interception of Telecommunications and Emails Seizure: what are the EU Charter's Limitations?', European Data Protection Law 2 (2016), 258 ff.

[52] ECtHR, Judgement of 25 June 1997, No. 20605/92 (*Halford v. the United Kingdom*), ECLI:CE:ECHR:1997:0625JUD002060592, para. 44; ECtHR, Judgement of 2 Aug. 1984, No. 8691/79 (*Malone v. the United Kingdom*), ECLI:CE:ECHR:1984:0802JUD000869179, para. 64; ECtHR, Judgement of 29 June 2006, No. 54934/00 (*Weber and Saravia v. Germany*), ECLI:CE:ECHR:2006:0629DEC005493400, para. 76 ff.

[53] The phrase 'in accordance with the law' not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law (ECtHR (n. 52) *Halford v. the United Kingdom*, para. 49).

[54] 'In the context of the interception of communications, 'foreseeability' cannot be understood in the same way as in many other fields. Foreseeability in the special context of secret measures of surveillance cannot mean that individuals should be able to foresee when the authorities are likely to intercept their communications so that they can adapt their conduct accordingly (*Weber and Saravia v. Germany* (n. 52), para. 93). However, to avoid arbitrary interference, it is essential to have clear, detailed rules on the interception of telephone conversations. The law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such secret measures (*Roman Zakharov v. Russia* [GC] [n. 19], para. 229)' (Council of Europe (n. 51), para. 592).

[55] ECtHR (n. 19), para. 227; ECtHR Judgment of 12 Jan. 2016, No. 37138/14 (*Szabó and Vissy v. Hungary*), ECLI:CE:ECHR:2016:0112JUD003713814, para. 54; ECtHR Judgement of 18 May 2010, No. 26839/05 (*Kennedy v. the United Kingdom*), ECLI:CE:ECHR:2010:0518JUD002683905, para. 130.

[56] ECtHR Judgement of 5 Dec. 2019, No. 43478/11 (*Hambardzumyan v. Armenia*), ECLI:CE:ECHR:2019:1205JUD004347811, paras. 63 ff.

ces which may give rise to an interception order and the categories of people liable to have their telephones tapped; a limit on the duration of the measure; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed'.[57]

The EIO Directive, when read alongside national laws, seems to comply with the recommendations of the ECtHR.

At first instance, the EIO Directive accords with the law, as it is written, accessible and foreseeable. Indeed, the EIO Directive and national systems give adequate indication as to the circumstances and the conditions of interception. The nature of the offence is ruled by each Member State, so possible violations of the ECHR and of the Charter are referable to the latter.[58] Art. 30(3) lit. a EIO Directive states that an interceptive EIO shall provide 'information for the purpose of identifying the subject of interception' and each Member State is entitled to define it. The indication of the limits to the duration of the measure is envisaged by Art. 30(3) lit. b EIO Directive. The procedure to be followed for examining, using and storing the data obtained, as well as the precautions to be taken when communicating the data to other parties are envisaged by Art. 20 and recital 42, which states that 'personal data obtained under this Directive should only be processed when necessary and should be proportionate to the purposes compatible with the preventions, investigation, detection and prosecution of crime or enforcement of criminal sanctions and the exercise of the rights of defence. Only authorised persons should have access to information containing personal data which may be obtained through authentication processes'. Finally, the circumstances in which recordings may or must be erased or destroyed are left to the Member States.

As we have seen, interception must pursue one or more legitimate aims, which, under the EIO Directive, are prevention, investigation, detection and prosecution of crime.

Finally, in order to be necessary in a democratic society, an interception should not 'undermine or even destroy democracy under the cloak of defending it' and there must be 'adequate and effective guarantees against abuse'.[59] On this topic, Art. 14 EIO Directive ('legal remedies') states that Member States 'shall ensure that legal

[57] Council of Europe (n. 51), para. 593; ECtHR (n. 19), paras. 231 and 238 ff.; ECtHR Judgment of 16 Feb. 2000, No. 27798/95 (*Amann v. Switzerland*), ECLI:CE:ECHR: 2000:0216JUD002779895, paras. 56 ff.

[58] According to *Mangiaracina*, A., 'A new and controversial scenario in the gathering of evidence at the European level: the proposal for a Directive on the European Investigation Order', Utrecht Law Review 10 (2014), 113, 118 'in the current scenario, in order to avoid the risk of infringing the "fairness" of national proceedings, with relevant consequences for the rights of the accused (and the victims), the mutual recognition principle in the field of evidence should be preceded by the harmonisation of national legal systems, interpreted as the creation of "common minimum rules"'.

[59] ECtHR (n. 19), para. 232.

remedies equivalent to those available in a similar domestic case, are applicable to the investigative measure indicated in the EIO' and that the substantive reasons for issuing an EIO may be challenged in the issuing State. Therefore, it seems that the EIO Directive prevents democratic undermining or destroying actions and provides effective guarantees against abuse.

In conclusion, it can be said that the EIO Directive, with particular regard to the interception of telecommunications, complies with the safeguarding of fundamental rights.

V. Conclusions

At the end of this paper, we can focus on some critical aspects.

First of all, pursuant to Chapter V EIO Directive, some criticisms arise with reference to the term 'interception of telecommunications'. Indeed, it seems that interception concerning 'normal' communications lies outside the Directive, even if an extensive interpretation of Art. 28 EIO Directive may allow it. It may be more appropriate to refer both to 'telecommunications' and to 'communications', in order to avoid the above problems.

Greater attention should also have been paid to the predetermination of subjective limits on the interception of third parties unrelated to the investigation.[60] Consider the privileges and immunities – envisaged by Art. 29 of the Regulation establishing the European Public Prosecutor's Office (EPPO Regulation)[61] and Art. 18 EPO Proposal – and regarding 'certain categories of persons or professionals who are legally bound by an obligation of confidentiality' (Art. 29(2) EPPO Regulation).

According to ECtHR case law, in order to guarantee individual rights more securely, more specific references should have been made to the limit on the duration of the measure; to the procedure to be followed for examining, using and storing the data obtained; to the precautions to be taken when communicating the data to other parties; and to the circumstances in which recordings may or must be erased or destroyed.

Moreover, especially in the field of interception of telecommunications a common framework on the characteristics and on the use[62] of evidence would be required. In-

[60] *Marinelli* (n. 24), p. 232.

[61] Council Regulations 2017/1939/EU of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO).

[62] According to *Daniele* (n. 5), p. 482 'the discipline appears incomplete, in particular from the point of view of the usability regime of the collected evidence'. *Grassia* (n. 5), p. 216, in turn, states that 'the prospect of procedural harmonization has not been enhanced in relation to the definition of the minimum characters that the evidence must possess in order to be 'usable' and thus be able to 'circulate' freely within the entire territory of the European Union'. See also *Kusak*, M., 'Common Minimum standards for enhancing mutual admissibility of evidence

deed, interception is an unrepeatable investigative measure which is intrusive to fundamental rights, and the lack of a common framework leaves to national judges a complex and uncertain exegesis in order to rescue the proceedings.[63] Therefore, evidence with harmonised quality characteristics is required.

In any case, the avoidance in terms of providing a precise regulation on technological aspects is remarkable: technological progress, indeed, would rapidly make the rule obsolete.[64]

gathered in criminal matters?', *European Journal on Criminal Policy and Research* 23 (2017), 337 ff.

[63] *Marinelli* (n. 24), p. 250.

[64] *Nanni* (n. 9), p. 462.

Special Part of EU Criminal Law: The Level of Harmonization of the Categories of Offences Listed in Annex D in EU Legislation and Across Selected Member States

By *Miha Šepec* and *Lara Schalk-Unger*

I. Introduction

The European Union itself – with a few exceptions[1] – cannot create original supranational criminal law. However, the EU has far-reaching powers to harmonize criminal law of the Member States. This harmonization takes place, on the one hand, through an assimilation obligation on the part of the Member States and, on the other hand, through the harmonization of substantive criminal law by means of the EU's competence to approximate and annex criminal law pursuant to Art. 83(1) and (2) TFEU (Treaty on the Functioning of the European Union). Based on these competences the EU has issued several directives[2] aiming at harmonizing national criminal law. However, particularly the area of criminal law is considered 'extremely sensitive', therefore interventions in national law are only to be made if absolutely necessary and the respective basic principles of the Member States are to be respected.[3] For this reason, actual harmonization of national criminal law takes place only in a few selected areas.

Nevertheless, European procedural instruments like the European Arrest Warrant,[4] the supervision of probation measures and alternative sanctions,[5] Europol,[6]

[1] Art. 325(4) TFEU and potentially Art. 33 TFEU.

[2] For example 'Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU', 19 June 2018, OJ L 156/43, pp. 43 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN>, accessed 23 January 2022.

[3] *Satzger*, H., International and European Criminal Law (*Munich* et al.: C.H. Beck/Hart, 2nd edition 2018), p. 75.

[4] 'Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)', 18 July 2002, OJ L 190/1, pp. 1 ff., available at <https://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF>, accessed 23 January 2022.

or especially the European Investigation Order make it necessary to reference criminal offences.

Annex D of the Directive 2014/41/EU of the European Parliament and of the Council of 3 Apr. 2014 regarding the European Investigation Order in criminal matters[7] (henceforth: EIO Directive) contains such a reference to substantive criminal law in the form of a list of 32 offences. If an issued investigation order concerns one of the 32 offences listed in Annex D the lack of double criminality does not constitute a ground for non-recognition or non-execution if the offence is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.[8]

The 32 offences can be grouped into crimes defined in EU law, typical crimes in national laws and crimes within the jurisdiction of the International Criminal Court, and range from crimes such as terrorism to swindling and arson.

This list of offences, which can be also be found in other acts of EU legislation, was first compiled in the legislative procedure concerning the European Arrest Warrant. The initial proposal of the commission included an abolishment of the principle of double criminality in general replacing it by the possibility for Member States to define a negative list of offences for which they can refuse to execute an arrest warrant.[9] The possibility to draw up the negative list was created for controversial offences like euthanasia, abortion or drug use, which are regulated very differently in the Member States.[10]

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[5] 'Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions', 16 Dec. 2008, OJ L 337/102, pp. 102 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0947&from=EN>, accessed 23 January 2022.

[6] 'Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA', 24 May 2016, OJ L 135/53, pp. 53 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0794&from=EN>, accessed 23 January 2022.

[7] 'Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters',1 May 2014, OJ L 130/1, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041&from=EN>, accessed 23 January 2022.

[8] Art. 11 (1)(g) EIO Directive (2014/41/EU).

[9] COM (2001) 0522 final, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2001:0522:FIN>, accessed 23 January 2022.

[10] Explanatory Memorandum to the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM (2001) 0522 final, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001PC0522:EN:HTML>, accessed 24 January 2022.

During the single reading of the proposal, the Committee of the European Parliament approved the concept of a negative list but specified that it should not include crimes harmonized at EU level.[11] However, the Council rejected the idea of a negative list and the abolition of double criminality in favour of a positive list of offences where double criminality is not required.[12]

Therefore, the list of 32 offences was created by the Justice and Home Affairs Council in cooperation with the former Article 36 Committee (now known as the Coordinating Committee in the area of police and judicial cooperation in criminal matters) and the Permanent Representatives Committee. The list of offences was inspired by the Annex of the Europol Convention[13] that lists "serious forms of international crime which Europol could deal with". A limitation to the list in the Europol Convention was made in that an organized criminal structure must be involved, two or more Member Sates affected and a common approach needed.[14] Europol's mandate was designed with an expansion in mind; therefore, the list in the Annex was expansive.[15]

In the deliberations concerning the European Arrest Warrant, the Council members mostly agreed to adopt the list of offences from the Europol Convention and expand it further. The only reservation came from the Italian delegation, which proposed only the first six offences (participation in a criminal organization, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances and illicit trafficking in weapons, munitions and explosives) to be included.[16] The reservation of the Italian delegation was eventually withdrawn.[17]

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[11] Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Report on the Commission proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States, A5/2001/397, <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2001-0397+0+DOC+PDF+V0//EN>, accessed 24 January 2022.

[12] 2385th Council Meeting, Justice, Home Affairs and Civil Protection, PRES (2001) 409, <https://ec.europa.eu/commission/presscorner/detail/en/PRES_01_409>, accessed 24 January 2022.

[13] 'Council Act of 26 July 1995 drawing up the Convention based on Art. K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention)', 95/C 316/01 (27 Nov. 1995), OJ C 316/01, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127(01)&from=EN>, accessed 23 January 2022. The Europol Convention was eventually replaced by the Europol Regulation (EU) 2016/794, 24 May 2016, OJ L 135/53, pp. 53 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0794&from=EN>, accessed 24 January 2022.

[14] Art. 2(1) Europol Convention.

[15] *Knelangen*, W., Das Politikfeld innere Sicherheit im Integrationsprozess (Opladen: Leske+Budrich 2001), p. 238.

[16] Council of the European Union, 'Note of the Permanent Representatives Committee, 14867/01 LIMITE COPEN 79 CATS 50', <https://data.consilium.europa.eu/doc/document/ST-14867-2001-INIT/en/pdf>, accessed 24 January 2022.

The lack of harmonization of some of these offences was also discussed at this stage in the legislative process. The Luxembourg delegation was in favour of increasing the benchmark of the imposed custodial sentence to a maximum of at least four years for offences not yet harmonized under EU law.[18] Concerns were also raised in the following debate in the European Parliament especially regarding the extensive scope of the list, the lack of international definitions and cross-border elements of some offences.[19]

The CJEU (Court of Justice of the European Union) also had to deal with the question of the conformity of the list of offences with the principle of legality and the principle of equality and non-discrimination following a reference for a preliminary ruling submitted by the Belgian Court of Arbitration.[20] The CJEU concluded that the list of offences does not breach the principles of equality and legality. According to the CJEU, the disregarding of the verification of double criminality is justified in the case of the listed offences, because they have the potential to seriously and adversely affect public order and public safety. The objective of the Framework Decision is not to harmonize substantive criminal law and the requirements of the principle of legality are met because the definitions of the offences follow from the law of the issuing Member State.[21]

During the legislative procedure regarding the EIO Directive, the question of double criminality arose again. The Member States Initiative[22] only included the principle of double criminality as a non-recognition ground for the obtainment of information on bank accounts.[23] The general non-recognition grounds did not include the lack of double criminality. During the first reading, the Council added additional grounds for non-recognition including the lack of double criminality for all investigative measures with the goal of avoiding a regression compared to the acquis of MLA

[17] Council of the European Union, 'Addendum to the outcome of proceedings, 14867/1/01 REV 1 ADD 1 COPEN 79 CATS 50', <https://www.asser.nl/upload/eurowarrant-webroot/documents/cms_eaw_88_1_Council%20doc%2014867.1.01.12.12.2001.pdf>, accessed 24 January 2022.

[18] Council of the European Union, 'Note of the Permanent Representatives Committee, 14867/01 LIMITE COPEN 79 CATS 50', (n. 16).

[19] Remarks of Johannes Blokland, MEP in the Debate in the Parliament on the 6th of February 2002, <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20020206+ITEM-003+DOC+XML+V0//EN>, accessed 24 January 2022.

[20] CJEU, Judgement of 3 May 2007, No. C-305/05 (*Advocaten voor de Wereld VZW*), ECLI:EU:C:2007:261.

[21] CJEU (n. 20), para. 52 and 57 – 60.

[22] 'Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of … regarding the European Investigation Order in criminal matters', 2010/C 165/02 (24 June 2010), OJ C 165/22, pp. 22 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010IG0624(01)&from=EN>, accessed 23 January 2022.

[23] Art. 23 (n. 22), EIO Directive (2014/41/EU).

and mutual recognition instruments. The Council agreed that the grounds for refusal should be specific and narrow. Therefore, the limitation of the double criminality refusal ground regarding the 'serious offences' listed in Art. 2(2) Framework Decision on the European Arrest Warrant was included in the amended legislative draft.[24]

Despite the CJEU judgement, academics and practitioners still heavily criticize the list of offences. The points of criticism include the lack of a system behind the seemingly random listing of offences, the multiple mention of very similar or identical offences ('fraud' and 'swindling'; 'counterfeiting currency' and 'forgery of means of payment') and the fact that some offences (e. g. 'computer-related crime') contain a multitude of different offences within them.[25] Despite the CJEU decision, the lack of common definitions and therefore the difficulty to determine whether an offence falls under the headings and a possible conflict with the principle of legality are still a concern.

The principle of legality, often expressed in the Latin form *nullum crimen sine lege, nulla poena sine lege*, is the basic and most important principle of criminal law. As such, it represents the foundation of the modern rule of law, as it provides residents with legal security and protection against the arbitrariness of the ruler or the ruling elite, and even against arbitrary judicial decisions. The principle also includes the principle of legal certainty that demands the law to be certain, in that it is clear and precise, and its legal implications foreseeable.

In our opinion, the principle of legality in relation to the categories of offences listed in the Annex D of the EIO Directive can be fully respected only when a clear legal definition of each categorically listed offence can be found in the EU legislation. If there is no clear normative content provided by the EU, then the differences between the legal definitions of certain offences can vary between member states to such extent, that there is no clear legal definition of the offence at all. Furthermore, it can be assumed that clear legal definitions in EU law would also lead to a harmonisation and the creation of a corresponding standard of offences by national legislators that would further justify the waiver of double criminality for the offences in Annex D. Meaning that when there is a binding harmonisation requirement regarding an offence, the national legislators will create a corresponding offence that will be similar in every EU MS. Therefore, there will be a much smaller chance of a breach of the principle of legality on a national level regarding the offences listed in Annex D of the EIO Directive.

This article compares selected offences of the list in Annex D of the EIO Directive that are defined in EU law to offences that are not defined in EU law to illustrate the

[24] Council of the European Union, 'Note from Presidency, 16868/10 COPEN 266 EJN 68 EUROJUST 135 CODEC 1369', <https://data.consilium.europa.eu/doc/document/ST-16868-2010-INIT/en/pdf>, accessed 24 January 2022.

[25] *Satzger* (n. 3), p. 141; *Ambos*, K., European Criminal Law (Cambridge: Cambridge University Press, 2018), p. 435; *Schallmoser*, N. M., Europäischer Haftbefehl und Grundrechte (Vienna: Manz, 2012), pp. 77 – 78.

implications of the lack of common definitions. For the offences not defined under EU law a legal comparison between Austrian and Slovenian criminal law legislation is conducted to highlight further where common definitions are lacking, the varying concretization of the offences by the Member States and the resulting concerns regarding the principle of legality.

II. The Categories of Offences

1. Offences Defined in EU Law

a) Trafficking in Human Beings

The offence of trafficking in human beings is harmonized by the Directive 2011/36/EU.[26] Human trafficking is considered a particularly serious crime with a cross-border dimension and is therefore harmonized under Art. 83(1) TFEU. Member States are obligated to ensure the punishability of offences concerning human trafficking. The intentional acts that have to be punishable are the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons.[27] These acts constitute an offence if they are committed by means of the threat or use of force or other forms of coercion, like abduction, fraud, deception, the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Furthermore the acts have to be committed for the purpose of exploitation, which includes sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, criminal activities, or the removal of organs.[28] The Anti-trafficking Directive also asks the Member States to consider criminalizing the use of such services with the knowledge that the person conducting the services was trafficked.[29] Member States are obligated to ensure that inciting, aiding and abetting or attempting to commit such an offence are punishable.[30] The Commission's 2016 Progress Report showed that all Member States criminalized the offences provided for in the directive.[31] The offence traffick-

[26] 'Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA', 15 Apr. 2011, OJ L 101/1, pp. 1 ff. (Anti-trafficking Directive), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en>, accessed 24 January 2022.

[27] Art. 2(1) Anti-trafficking Directive (2011/36/EU).

[28] Art. 2 3) Anti-trafficking Directive (2011/36/EU).

[29] Art. 18(4) Anti-trafficking Directive (2011/36/EU).

[30] Art. 3 Anti-Trafficking Directive (2011/36/EU).

[31] 'Report from the Commission to the European Parliament and the Council assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combating trafficking in human beings and pro-

ing in human beings is clearly defined in the Directive, therefore the principle of legality has been met.

b) Sexual Exploitation of Children and Child Pornography

Sexual exploitation of children can be any kind of taking advantage of a child for sexual gratification on the perpetrator, while child pornography includes pornographic material that visually depicts a minor engaged in sexually explicit conduct; a person appearing to be a minor engaged in sexually explicit conduct; and even realistic images representing a minor engaged in sexually explicit conduct.[32]

Sexual abuse, sexual exploitation of children and child pornography have all been clearly defined in the Directive 2011/92/EU.[33] The Directive differentiates between offences concerning sexual abuse (Art. 3), offences concerning sexual exploitation (Art. 4), offences concerning child pornography (Art. 5), and solicitation of children for sexual purposes (Art. 6). Undoubtedly, there will be some legislation diversity between EU member states, as some offences in the Directive are up to the discretion of the Member states (e. g. possession of pseudo-child pornography, meaning pornography, where the person appearing to be a child was in fact 18 years of age or older at the time of depiction). However, as legal definitions in the Directive are quite precise and thorough, there is no doubt that the principle of legality regarding this category in Annex D of the EIO Directive has clearly been meet.

c) Illicit Trafficking in Narcotic Drugs and Psychotropic Substances

Illicit drugs were covered by the United Nations Single Convention on Narcotic Drugs in 1971, which was amended by the 1972 Protocol, and later by the 1971 United Nations Convention on Psychotropic Substances. The main legal act of the EU was Council framework decision of 25 Oct. 2004[34] that was in 2017 repealed by the EU

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tecting its victims in accordance with Art. 23 (1), COM (2016) 0722' final p. 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0722&from=DE>, accessed 24 January 2022.

[32] Art. 9 Convention of Cybercrime, Council of Europe, CETS No. 185, Budapest, 23 Nov. 2001.

[33] 'Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision (2004/68/JHA)', 17 Dec. 2011, OJ L 335/1, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0093&from=EN>, accessed 23 January 2022.

[34] 'Council framework decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (2004/757/JHA)', 11 Nov. 2004, OJ L 335/8, pp. 8 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004F0757&from=EN>, accessed 23 January 2022.

Directive 2017/2103.[35] The goal of the latter was to provide a common approach to tackle illicit drug trafficking in the EU. As new psychoactive substances are emerging frequently, the definition of 'drug' should be covered by the Union criminal law provisions on illicit drug trafficking. According to the Directive 2017/2103 'illicit drugs' are substances covered by the previously mentioned United Nations Conventions, as well as substances listed in the Annex of the Directive, which the Commission will be able to amend to new psychoactive substances which pose severe public health risks. This will provide a universally accepted list of drugs in the EU member states and therefore facilitate the EIO requests for this type of offences. As the Directive 2017/2103 also provides definition of crimes linked to trafficking in drugs and precursors, the principle of legality is met, as it is clear for what drug related offences EIO can be requested.

d) Fraud, Including That Affecting the Financial Interests of the European Union Within the Meaning of the Convention of 26 July 1995 on the Protection of the European Communities' Financial Interests

The EU Directive 2017/1371[36] requires the Member States to criminalize fraud and other illegal activities affecting the EU's financial interests.[37] Art. 3(2) of the PIF Directive defines fraud as acts or omissions relating to the use or presentation of false, incorrect or incomplete statements or documents, or the non-disclosure of information in violation of a specific obligation. These acts have to cause the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf. The PIF Directive also considers the misapplication of such funds or assets for purposes other than those for which they were originally granted as fraud. Whereas fraud affecting the financial interests of the EU[38] is harmonized throughout the Member States, there is no EU legislation harmonizing a purely 'national' fraud. However, within the scope of EU law (e. g. in cross-border movement of goods) the EU jurisdiction concerning the 'average consumer who is

[35] 'Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of "drug" and repealing Council Decision (2005/387/JHA)', 21 Nov. 2017, OJ L 305/12, pp. 12 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L2103&from=EN>, accessed 23 January 2022.

[36] 'Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law', 28 July 2017 OJ L 198/29, pp. 34 ff. (PIF Directive), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=EN>, accessed 23 January 2022.

[37] Art. 3(1) PIF-Directive (2017/1371).

[38] Art. 2(1) lit a PIF Directive defines the 'Union's financial interests' as all revenues, expenditure and assets covered by, acquired through, or due to the Union budget or the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

reasonably well informed and reasonably observant and circumspect'[39] can be relevant to determine the fraudulent act's suitability for deception.[40] Sec. 146 Austrian Criminal Code defines fraud as the deception of another person about material facts and the resulting inducement to do, tolerate or omit an act that results in a financial or other material loss to them or a third person with the intent to gain an unlawful material benefit. A fraud is considered aggravated *e. g.* when the perpetrator uses a false or forged legal document, non-cash means of payment, data or other such pieces of evidence (Sec. 147 Austrian Criminal Code). The Fraud to the detriment of the European Union is implemented in Sec. 168c Austrian Criminal Code. Slovenian legislation is similar (fraud is defined in Art. 211 of the Criminal Code). The Slovenian Criminal Code also defines a specific type of business fraud in Art. 228 and Fraud to the detriment of the European Union in Art. 229. However, since the constituent elements of fraud are defined in EU law, there is no conflict with the principle of legality.

e) Laundering of the Proceeds of a Crime

Proceeds are defined in the EU Directive 2014/42/EU[41] in Art. 2 as any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefit. Money laundering is defined in the EU Directive 2018/1673/EU[42] as the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action. Money laundering includes the concealment or disguise of the true nature of the property, and the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity. As both directives are very thorough about money laundering offences and the freezing and confiscation of the proceeds of a crime, there is no doubt that principle of legality is respected regarding this category.

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[39] For example CJEU, Judgement of 13. Jan. 2000, C-220/98 (*Estéé Lauder Cosmetics GmbH & Co. OHG*), ECLI:EU:C:2000:8 and CJEU, Judgement of 16 July 1998, No. C-210/96 (*Gut Springenheide GmbH*), ECLI:EU:C:1998:369.

[40] *Satzger* (n. 3) pp. 119 – 120.

[41] 'Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union', 29 Apr. 2014, OJ L 127/39, pp. 39 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN>, accessed 23 January 2022.

[42] 'Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (PE/30/2018/REV/1)', 12 Nov. 2018, OJ L 284, pp. 22 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1673&from=EN>, accessed 23 January 2022.

f) Environmental Crime, Including Illicit Trafficking in Endangered Animal Species and in Endangered Plant Species and Varieties

The Member States' environmental crime is harmonized by Directive 2008/99/EC.[43] The Directive is based on the annex competence of the EU according to Art. 83(2) TFEU. Art. 3 of the Directive contains a catalogue of nine different types of action that the Member States must criminalize in their national criminal law. Achieving a consensus across the EU on a catalogue of offences was a focus of the harmonization process, as there was previously a great deal of disagreement about which actions should be punishable under criminal law.[44] The actions that constitute an environmental crime concern the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water (Art. 3 lit. a of the Directive), the handling (lit. b) and the shipment of waste (lit. c), the operation of a dangerous plant (lit. d), the handling of nuclear materials or other hazardous radioactive substances (lit e), the killing, destruction, possession or taking of (lit. f) and trading in specimens of protected wild fauna or flora species (lit. g), any conduct which causes the significant deterioration of a habitat within a protected site (lit. h) and the production, importation, exportation, placing on the market or use of ozone-depleting substances (lit. g). Environmental crime is well defined by this Directive, therefore the principle of legality has clearly been met.

g) Facilitation of Unauthorised Entry and Residence

The EU has an interest to protect its border from illegal immigration. Therefore, the Council adopted a Directive 2002/90/EC[45] defining the facilitation of unauthorised entry, transit and residence and a Framework Decision 2002/946/JHA[46] on the strengthening of the penal framework to prevent the facilitation of unauthorised

[43] 'Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law', 6 Dec. 2008, OJ L 328, pp. 28 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN>, accessed 23 January 2022. In December of 2022 the Commission proposed a new Derective on the protection of the environment through criminal law that would replace Directive 2008/99/EC, COM (2022) 851. The legislative proposal is currently undergoing the first reading.

[44] *EU Commission*, Accompanying document to the Direction of the European Parliament and of the Council on the protection of the environment through criminal law, Impact Assessment, COM (2007) 51 final. SEC (2007) 160, p. 25 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0161&from=EN>, accessed 24 January 2022.

[45] 'Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence', 5 Dec. 2012, OJ L 328/17, pp. 17 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090&from=EN>, accessed 24 January 2022.

[46] 'Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA)', 5 Dec. 2002, OJ L 328/1, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0946&from=EN>, accessed 23 January 2022.

entry, transit and residence. The goal of the Directive is that each Member State shall adopt appropriate sanctions on any person who intentionally assists a person who is not a national of a Member State to illegally enter, or transit across, the territory of a Member State; and any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside illegally within the territory of a Member State. Framework decision broadens this definition to include liability in legal sanctions for legal persons, confiscating means of transport, and deportation. As there is thorough EU legal basis for facilitation of unauthorised entry and residence, this offence does not seem problematic from the aspect of principle of legality.

h) Illicit Trade in Human Organ and Tissue

Trafficking in human organs is internationally defined in the Council of Europe Convention against Trafficking in Human Organs.[47] Offences included in the Convention are Illicit removal of human organs (Art. 4), Use of illicitly removed organs for purposes of implantation or other purposes than implantation (Art. 5), Implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law (Art. 6), Illicit solicitation, recruitment, offering and requesting of undue advantages (Art. 7) and Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs (Art. 8). On the EU level Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims is the main legal document that defines not only human trafficking, but also covers trafficking in human beings for the purpose of the removal of organs (Art. 2 para. 3). The act of the removal of organs is not defined clearly in the Directive, however it can be understood as it is defined in the before mentioned Convention in Art. 4 as the removal performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law; or where, in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage. We therefore see no problems with the principle of legality regarding this category of offences.

i) Kidnapping, Illegal Restraint and Hostage-Taking

In 2002 the Council of the European Union adopted a Framework Decision on combating trafficking in human beings[48] where the offences were described in

[47] Convention against Trafficking in Human Organs, Council of Europe, CETS No. 216, Santiago de Compostela 25 Mar. 2015.

[48] 'Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)', 1 Aug. 2002 OJ L 203/1, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0629&from=EN>, accessed 23 January 2022.

Art. 1 titled Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation. This approach was also adopted in the Directive 2011/35/EU[49] that replaced the Framework Decision. The Directive defines offences concerning trafficking in human beings in Art. 2 as recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Therefore, there is enough legal foundation on the EU level, that the principle of legality is meet regarding this type of offences.

j) Illicit Trafficking in Hormonal Substances and Other Growth Promoters

Beside the EU Directive 2017/2103,[50] which covers illicit drugs, hormonal substances and growth promotors are covered as illegal substances in sport, or as endocrine disruptors. The first are covered by the Anti-Doping Convention of the Council of Europe,[51] specifically in the appendix to the Convention. Endocrine disruptors on the other hand are chemical substances that alter the functioning of the endocrine (hormonal) system and, consequently, negatively affect the health of humans and animals in different ways (that includes unnatural growth or hormonal disruptions). Endocrine disruptors are regulated under different areas of EU law, but most importantly in the REACH Regulation (Regulations onpesticides and biocides, chemicals in general, medical devices and water).[52] As illicit tracking is already covered by the EU Directive 2017/2103 regarding illicit drugs, and as there is a vast EU legislation basis for hormonal substances and growth promotors, the principle of legality is met regarding this category.

[49] 'Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision (2002/629/JHA)', (n. 26), pp. 1 ff.

[50] 'Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision (2005/387/JHA)', (n. 35), pp. 12 ff.

[51] Anti-Doping Convention, Council of Europe, CETS No. 135, Strasbourg 16 Nov. 1989.

[52] Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH). 'Regulation (EU) 2019/1148 of the European Parliament and of the Council of 20 June 2019 on the marketing and use of explosives precursors, amending Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013', 11 July 2019, OJ L 186/1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1148>, accessed 23 January 2022 amended by Regulation (EU) 2019/1148 of the European Parliament and of the Council of 20 June 2019 on the marketing and use of explosives precursors, amending Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013.

k) Illicit Trafficking in Nuclear or Radioactive Materials

The term nuclear or radioactive materials is defined in Art. 197 of the EAEC or Euratom Treaty.[53] These definitions are also consistent with the IAEA Safeguards Glossary.[54] As early as 1994, the European Parliament called on the Commission to propose a common EU strategy to combat the growing problem of illegal trafficking in nuclear materials in the non-binding Resolution of the European Parliament from 29 Sep. 1994.[55] Art. 3 of the Environmental Crime Directive requires Member States to criminalize – among other things – the transport, import or export of nuclear materials or other hazardous radioactive substances but only when these acts cause or are likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants. There is no obligation to criminalize the illicit trafficking of nuclear or radioactive materials when it does not pose a threat to persons or environmental media. Due to the large EU legal framework defining nuclear and radioactive materials and trafficking, the principle of legality is met.

2. Offences Not Clearly Defined in EU Law

a) Illicit Trafficking in Weapons, Munitions and Explosives

The offence of illicit arms trafficking is considered a particularly serious crime with a cross-border dimension and could therefore be harmonized under Art. 83(1) TFEU. Although illicit trafficking of firearms is considered 'a high threat',[56] there is no EU legislation harmonizing the offence in the Member States, despite the authorization to do so. However, there is EU legislation regulating the acquisition, possession and transfer of weapons in general.[57] The Directive (EU)

[53] 'Consolidated Version of the Treaty Establishing the European Atomic Energy Community', 2012/C 327/01 (26 Oct. 2012), OJ C 327, 26. 10. 2012, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012A/TXT&from=EN>, accessed 23 January 2022.

[54] IAEA Safeguards Glossary (2001), <https://www.iaea.org/sites/default/files/iaea_safeguards_glossary.pdf>, accessed 24 January 2022.

[55] 31 Oct. 1994, OJ C 305/78, pp. 78 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1994:305:FULL&from=EN>, accessed 23 January 2022.

[56] European Commission, 2020–2025 action plan on firearms trafficking, COM (2020) 608 final, p. 3, <https://eur-lex.europa.eu/resource.html?uri=cellar:65f0454e-cfef-11ea-adf7-01aa75ed71a1.0003.02/DOC_1&format=PDF>, accessed 24 January 2022.

[57] See also 'Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community', 10 June 2009, OJ L 146, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0043&from=EN>, accessed 23 January 2022 and 'Regulation (EU) No 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing Art. 10 of the United Nations' Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supple-

2017/853[58] gives a definition of the term 'illicit trafficking'[59] and requires Member States to introduce penalties for failure to comply with the directive.[60] However, these penalties do not have to be criminal sanctions. In their 2020–2025 action plan on firearms trafficking[61] the Commission identified a lack of harmonized definitions[62] and criminalization of illicit arms trafficking, since not all Member States have implemented the Firearms Directive or ratified the UN Firearms Protocol,[63] which obligates the State Parties to establish illicit trafficking in firearms, their parts, components and ammunition as a criminal offence (Art. 5 para. 1 lit. b leg cit).[64] Therefore, one of the Commission's action points in the coming years is to assess whether there is a need to establish 'common criminal law standards on trafficking in firearms'.[65] In Austria any trafficking of weapons of mass destruction is punishable under Sec. 177a Austrian Criminal Code; the trafficking of war material, which includes most firearms, is criminalized under Sec. 7 of the War Material Act[66] if the trafficking is done without an authorization or without providing mandatory information *e. g.* the serial number. The illicit trafficking of other weapons, especially those included

menting the United Nations Convention against Transnational Organised Crime (UN Firearms Protocol), and establishing export authorisation, and import and transit measures for firearms, their parts and components and ammunition', 30 Mar. 2012, OJ L 94/1, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0258&from=EN>, accessed 23 January 2022.

[58] 'Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons', 24 May 2017, OJ L 137, pp. 22 ff. (Firearms Directive), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0853&from=EN>, accessed 23 January 2022.

[59] According to Art. 1(12) Firearms Directive 'illicit trafficking' means the acquisition, sale, delivery, movement or transfer of firearms, their essential components or ammunition from or through the territory of one Member State to that of another Member State. The trafficking is illicit if any one of the Member States concerned does not authorise it in accordance with the Directive or the object in question is not marked with the name of the manufacturer or brand, the country or place of manufacture, the serial number and the year of manufacture before its placed on the market.

[60] Art. 16 Firearms Directive.

[61] European Commission (n. 56).

[62] According to Annex I of the Firearms Directive the term 'weapons' includes firearms and weapons other than firearms as defined in national legislation.

[63] General Assembly resolution 55/255, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (8 June 2001).

[64] European Commission (n. 56), pp. 4–5.

[65] European Commission (n. 56), p. 10.

[66] Bundesgesetz vom 18. Oktober 1977 über die Ein-, Aus- und Durchfuhr von Kriegsmaterial (Kriegsmaterialgesetz – KMG), BGBl I 1997/540.

in the common military list of the EU,[67] can be punished under Sec. 79–80 Foreign Trade and Payments Act.[68] The trafficking of weapons of any kind can be also be punishable under Sec. 280 Austrian Criminal Code if it is done with the intent to equip a larger number of people for an armed conflict. In Slovenia any kind of trafficking (assembly, manufacturing, offering, selling, exchange, delivery, import, export, etc.) of firearms, chemical, biological or nuclear weapons, ammunition or explosives, military weapons and military equipment, without proper sate authorization is punishable with up to 5 years of imprisonment, and if trafficking is done on a larger scale with up to 10 years of imprisonment (Art. 307 Slovenian Criminal Code). Due to the fact that the Firearms Directives leaves the definition of the term 'weapon' up to the discretion of the Member States, we see a potential conflict with the principle of legality.

b) Computer-Related Crime

Probably one of the vaguest definitions on the entire list is the computer-related crime category. As computers and information system have become an essential tool for functioning of modern society, they are also commonly used when committing criminal offences. A unified and comprehensive list of crimes that are performed against or with the help of computer systems was compiled in the Convention on Cybercrime.[69] The overall acknowledged Convention lists the following offences: illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography, and offences related to infringements of copyright and related rights. However, only computer-related forgery and computer-related fraud are defined under the chapter computer-related offences (others are defined under chapters offences against the confidentiality, integrity and availability of computer data and systems, content-related offences, and offences related to infringements of copyright and related rights). The offences list was later expanded with the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.[70] Therefore, it is quite evident that computer related crimes could include a vast list of different offences, which opposes the principle of legality, as it is not clear which offences are really meant with the title computer-related offences. This dilemma was at least partly

[67] 2020/C 85/01 (13 Mar. 2020), OJ C 85/1, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG0313(07)&from=EN>, accessed 24 January 2022.

[68] Außenwirtschaftsgesetz 2011 – AußWG 2011, BGBl I 2001/26.

[69] Convention of Cybercrime, Council of Europe, CETS No. 185, Budapest, 23 Nov. 2001.

[70] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Council of Europe, CETS No. 189, Strasbourg 28 Jan. 2003.

solved with the Directive 2013/40/EU,[71] which includes five different offences: illegal access to information systems, illegal system interference, illegal data interference, illegal interception, and tools used for committing offences. Therefore, only these offences should be covered by the category "computer-related crime" in the Annex D of the EIO Directive.

c) Murder, Grievous Bodily Injury

Murder is one of the oldest and most known criminal offences. On a surface level murder seems to be easily definable as the intentional killing of a person. There is no EU legislation or other international legislation on murder as the definition seems to be so common that it does not need additional explanation. Continental countries often define murder in the most simplistic way as intention killing of another (e. g. Art. 115 Slovenian Criminal Code and Sec.75 Austrian Criminal Code) and then add special circumstances that add to the penalty of the crime (e. g. cruel killing of another, killing for financial gain, etc.). The German Criminal Code differentiates between murder under specific aggravating circumstances (Sec. 211; 'Mord') and murder (Sec. 212; 'Totschlag'). It is not therefore not entirely clear whether both offences fall under the listed offence murder in Annex D; however, the German language version does not speak of 'Mord', but of 'Vorsätzliche Tötung' ('intentional killing'). The concept of body injury can be defined as damaging a person's physical condition. There are numerous types of body injuries in continental criminal law doctrine, ranging from light, severe, grievous or body injury resulting in death. Slovenian Criminal Code defines three types of body injuries – light (Art. 122), severe (Art. 123) and grievous (Art. 124). The Austria Criminal Code also differs between light (Sec. 83) and severe (Sec. 84) bodily injury in the Criminal Code, and also criminalizes injury resulting in death (Sec. 86) and grievous injury (Sec. 85) in separate offences.

The offence grievous bodily injury could also be problematic, as it not clear when an injury becomes grievous, and not only severe. In some countries this distinction is done by court practice, while others demand that for an injury to be grievous, a part of human body must be permanently destroyed.

d) Illicit Trafficking in Cultural Goods, Including Antiques and Works of Art

Although there are several EU regulations[72] regulating the import and export of cultural goods, there is no EU legislation harmonizing the criminalization of the il-

[71] 'Directive 2013/40/EU of the European Parliament and of the Council of 12 august 2013 on attacks against information systems and replacing council framework decision (2005/222/JHA)', 14 Aug. 2013, OJ L 218/8, pp. 8 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0040&from=EN>, accessed 23 January 2022.

[72] 'Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods', 7 June 2019, OJ L 151/1, pp. 1 ff.,

licit trafficking of such goods. The existing regulations concerning the import and export of cultural goods obligate Member States to lay down rules on penalties for infringements of the regulations;[73] however, these penalties do not have to be criminal law sanctions.[74] The Council of Europe Convention on Offences relating to Cultural Property[75] calls for an obligatory criminalisation of illicit trafficking of cultural goods,[76] however only six of the EU Member States have signed it and it is not yet ratified by any of them. The lack of a harmonized criminalization and especially of common definitions – the existing definitions in EU legislation[77] are vague – pose a burden and practical problem in prosecuting this offence.[78] Under Austrian criminal law, trafficking in cultural goods is not an autonomous criminal offence. Depending on the circumstances the perpetrator may be liable to criminal prosecution for handling of stolen goods (Sec. 164 Austrian Criminal Code) or money laundering (Sec. 165 Austrian Criminal Code) or theft (Sec. 127, 128(1) no. 3 Austrian Criminal Code). If the elements of these offences are not met, the illicit import[79] and export[80] of cultural goods constitute only administrative offences. In

available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0880&from=EN>, accessed 23 January 2023; 'Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods', 10 Feb. 2009, OJ L 39/1, pp. 1 ff. available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0116&from=EN>, accressed 23 January 2022; 'Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96', 8 July 2003, OJ L 169/6, pp. 6 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R1210&from=EN>, accessed 23 January 2022; 'Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011', 19 Jan. 2012, OJ L 16/1, pp. 1 ff., available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0036&from=EN>, accessed 23 January 2022.

[73] Art. 11 Regulation (EU) 2019/880 (n. 72); Art. 9 Council Regulation (EC) No 116/2009 (n. 72).

[74] The UNCESO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 Nov. 1970, which was ratified by most Member States, also leaves it to the Member States to impose penal or just administrative penalties (Art. 8 and 10).

[75] Convention on Offences relating to Cultural Property, Council of Europe, CETS No. 221 (Nikosia 19 May 2017).

[76] Art. 3 to 11 Council of Europe Convention on Offences relating to Cultural Property.

[77] For example 'objects of ethnological interest' in the Annex of Regulation (EU) 2019/880.

[78] *Brodie*, N./*Yates*, D., Illicit trade in cultural goods in Europe. Characteristics, criminal justice responses and an analysis of the applicability of technologies in the combat against the trade (Luxembourg: Publications Office of the European Union, 2019), p. 163.

[79] Sec. 23 Cultural Goods Restitution Act = Bundesgesetz über die Rückgabe unrechtmäßig verbrachter Kulturgüter (Kulturgüterrückgabegesetz – KGRG), BGBl I 2016/19.

[80] Sec. 37(2) Monument Protection Act = Bundesgesetz betreffend den Schutz von Denkmalen wegen ihrer geschichtlichen, künstlerischen oder sonstigen kulturellen Bedeutung (Denkmalschutzgesetz – DMSG), BGBl I 1923/533.

Slovenia trafficking in cultural goods is defined in numerous offences against property (theft in Art. 205 Slovenian Criminal Code, concealment in Art. 217 Slovenian Criminal Code), however the main being Art. 218 Slovenian Criminal Code (Illegal export and import of things of special cultural significance or natural values).

e) Swindling

A regularly critiqued point about the list of offences is the lack in difference between the offences fraud and swindling. Some of the language versions, *e. g.* the German, Slovenian and Czech version of Annex D do not differentiate between fraud and swindling but list the same offence twice (the only difference being the inclusion of the protection of the EU's financial interests in the first listing of the offence). During the legislative process regarding the European Arrest Warrant the minutes of the Council stated that some of the constituent elements of swindling might be 'using a false name, claiming a false position or using fraudulent means to abuse people's confidence or credibility in order to appropriate something belonging to another person'.[81] These constituent elements are very similar to those of fraud mentioned in the PIF Directive. The German legislator blamed the double mention of the similar or same offence on the list's history of origins and the compilation of the list being done in French.[82] However, in the French Criminal Code the offence of swindling (Art. 313 – 1 leg cit) also includes the constituent element of fraudulent means so there doesn't seem to be a clear distinction between the listed offences. There is no EU legislation harmonizing the offence of swindling in the Member States. The Austrian Criminal Code does not include a separate offence of swindling and the Austrian legislation implementing the EIO Directive adopted the Annex without changing it, therefore it lists the offence of fraud twice.[83] Slovenian criminal law also does not include the offence swindling. This apparent lack of harmonization and a clear distinction of the two offences in EU and national laws create problems regarding the principle of legality and the practical assessment whether a national offence falls under the list of offences.

[81] Council of the European Union, Corrigendum to the Outcome of Proceedings, 14867/1/01 REV 1 COR 2 COPEN 79 CATS 50, <https://www.parlementairemonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvij5epmj1ey0/vi7jgss2d8zh>, accessed 23 January 2022.

[82] BT-Drs. 15/1718, 18 <https://dserver.bundestag.de/btd/15/017/1501718.pdf>, accessed 23 January 2022. The French version of Annex D of the EIO-Directive distinguishes between 'fraude' and 'escroquerie'.

[83] 'Betrugsdelikte' and 'Betrug'; see Anhang I Teil A Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG), BGBl I 2004/36; ErläutRV 370 BlgNR 22. GP 7.

f) Counterfeiting and Piracy of Products

While there is an efficient multidisciplinary cooperation between national authorities in EU countries, the Commission, and the European Central Bank to fight against counterfeiting of euro, there is no real legislation regarding the counterfeiting and piracy of products. With the Convention on Cybercrime the countries that have signed the TRIPS[84] agreement have agreed to provide criminal prosecution of software piracy, however only when the purpose of it is financial gain. Meaning that the usage for personal purposes is left to the discretion of the countries. There is no EU legislation that defined the meaning of counterfeit goods or of piracy goods. Normally the difference between both is that counterfeited goods present themselves as original goods. While piracy goods are unlawful copies of copyright goods, however it is evident that these are not original goods. Counterfeiting as a legal term is extremely broad and can cover numerous types of offences. Only in Slovenian Criminal Code it covers more than 10 offences ranging from falsification of electoral documents (Art. 154), Counterfeiting of election results (Art. 155), Counterfeiting of business documents (Art. 235), Counterfeiting of money (Art. 243), Counterfeiting of value papers (Art. 244), numerous offences regarding forgery of documents (Art. 251, 252, 253, 255 and 259), and a number of offences related to the usage of counterfeit documents. The Austrian Criminal Code similarly covers counterfeiting in numerous offences. Copyright infringements in Slovenia are criminal only when the perpetrator's abuse of copyright works reaches a threshold of 5.000,00 euros. This is not the case in Austria. Overall, it is evident that this category is quite problematic from the aspect of the principle of legality, since it is not clear which offences are meant whit such a vague and broad definition.

g) Trafficking in Stolen Vehicles

During the legislative process concerning the European Arrest Warrant, the list of offences first included the offence 'motor vehicle crime'.[85] During the reading, this was changed to the narrower term of 'trafficking of stolen vehicles'.[86] The offence of trafficking in stolen vehicles is not harmonized and there is no binding definition of the term vehicle[87] in any EU legislation, so difficulties could arise to determine

[84] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), World Trade Organization, amended on 23 Jan. 2017.

[85] The Europol Convention (n. 13) defines motor vehicle crime in the Annex as 'the theft or misappropriation of motor vehicles, lorries, semi-trailers, the loads of lorries or semi-trailers, buses, motorcycles, caravans and agricultural vehicles, works vehicles, and the spare parts for such vehicles, and the receiving and concealing of such objects, […]'.

[86] Council of the European Union, 'Note of the Permanent Representatives Committee, 14867/01 LIMITE COPEN 79 CATS 50', <https://data.consilium.europa.eu/doc/document/ST-14867-2001-INIT/en/pdf>, accessed 24 January 2022.

[87] The 'Council Decision of 22 December 2004 on tackling vehicle crime with cross-border implications', 30 Dec. 2004, OJ L 389, pp. 29 ff., available at <https://eur-lex.europa.eu/legal-

whether certain vehicles like 'Segways', e-bikes and other controversial examples are within the scope of offence. Under Austrian and Slovenian criminal law, trafficking in stolen vehicles is not an autonomous criminal offence. Depending on the circumstances the perpetrator may be liable under Austrian law to prosecution for handling of stolen goods, provided that they didn't steal the vehicle themselves (Sec. 164 Austrian Criminal Code), for money laundering (Sec. 165 Austrian Criminal Code) or for fraud, if the buyer was deceived. Under Slovenian law, the offender may be liable for fraud or concealment, if the stolen vehicle was bought knowingly (Art. 217 Slovenian Criminal Code). Due to the fact that there is no clear definition of the term vehicle, there is a conflict with the principle of legality.

h) Arson

There is no universal legal definition of arson. It can be defined as a crime of intentionally (or negligently) starting a fire in order to damage or destroy something, especially a building. As there is no EU legislation (except for EU legislation related to forest fires, however the latter is not of criminal nature) that would define arson, the definition is up to each of the states. In Slovenia, arson is covered in the Art. 222 of the Criminal Code and covers intentional or negligent setting of fire to a building, house, cultural goods, and similar objects. Destruction of common things, which can be done with force, explosion, fire, or any kind of act, is covered by Art. 220 of the Criminal Code. Austria differs between intentional arson in Art. 169 and negligent arson in Art. 170 of the Criminal Code. Arson is defined as a conflagration on someone else's property. Although the term arson is easily understood, the lack of EU legislation on the meaning of the term and the fact that there is no universally accepted offence between EU member states, this offence is quite problematic from the view of the principle of legality.

i) Sabotage

There is no universal definition of sabotage. In the dictionaries of English language, it is defined as to deliberately destroy, damage, or obstruct (something), especially for political or military advantage. In criminal law language, sabotage is often related to endangering the constitutionality, order, or security of the state. It is also used when referring in the context of military law, when a person attempts to thwart a war effort, or in employment law, when disgruntled employees destroy employer property. Overall, there is no clear universal definition and no international convention that would define the proper meaning of sabotage. It is therefore left to the states how sabotage will be defined in the national law, meaning that the term is quite undefined in the context on international law. In the Slovenian Criminal Code, sabotage is defined in the Art. 357 as endangering the constitutional order or security of

content/EN/TXT/PDF/?uri=CELEX:32004D0919&from=EN>, accessed 23 January 2022 de fines the term vehicle 'as any motor vehicle, trailer or caravan […]'.

the Republic of Slovenia, covertly, insidiously or in any other similar way causing great damage to a state body or organization where the perpetrator works or performs his work obligations. In Austria, it is disputed which offences could fall under sabotage. There is the offence named Sabotage of defence means in Art. 260 of the Criminal Code. However, all offences of the 14th ('High treason and other attacks against the state'), 16th ('Treason'), 17th ('Offenses against the armed force') section of the Criminal Code could also fall under sabotage. It is evident that there is no clear definition of sabotage, not in the EU, and not in the Member States. Therefore, the offence of sabotage is quite problematic regarding the principle of legality.

III. Conclusion

In our opinion, the principle of legality in relation to the categories of offences listed in the Annex D of the EIO Directive can be fully respected only when a clear legal definition of each categorically listed offence can be found in the EU legislation. If there is no clear normative content provided by the EU, then the differences between the legal definitions of certain offences can vary between member states to such extent, that there is no clear legal definition of the offence at all. As shown in this chapter, there are some offences in the Annex D of the Directive 2014/41/EU that have clear legal definition in EU legislation; however, there are also quite a lot of offences that have absolutely no legal basis in the EU legislation, resulting in major differences in the definitions of these crimes in national legislations.

Furthermore, some of the listed offences are so broad that it is even unclear which national offences should be considered when trying to find a corresponding definition. An additional problem is that due to a lack of harmonization and especially an obligation to criminalize certain offences for the Member States in EU Law, some of the mentioned offences might not be even punishable in the criminal codes of some Member States.

This is all quite problematic from the aspect of principle of legality as the most important principal of continental criminal law. As certain crimes are not defined clearly and precisely, their legal implications are not foreseeable. Furthermore, this could present serious problems between states issuing and execution the European Investigation Order on account of the crimes defined in the Annex D of the Directive 2014/41/EU, which are not clearly defined in the EU legislation and are left completely to the national legislations and could differentiate considerably between member states. If there is no common ground between member states in the substantial criminal law, there can be no successful criminal procedural cooperation.

The Principle of Proportionality in Directive 2014/41/EU – Challenges of the Present and Opportunities for the Future

By *Laura Scomparin* and *Andrea Cabiale*

I. Introduction

Proportionality is undoubtedly one of the most important features that a European Investigation Order ('EIO') must have. As is well known, Art. 6 EIO Directive (2014/41/EU) states that an EIO can be issued only when 'the issuing […] is necessary and proportionate for the purpose of the proceedings […] taking into account the rights of the suspected or accused person' (letter a, par. 1).

However, although proportionality is a cornerstone of the regulation of EIOs, it seems difficult to define precisely; everyone could have a different idea about what is proportionate and this vagueness obviously risks undermining efficient co-operation, respectful of fundamental rights.

The question is, therefore: can the principle of proportionality be a proper compass for cooperating authorities, or is it too vague to assume such a fundamental role? To answer this question, we will firstly examine proportionality more broadly, analysing the general theory; secondly, we will investigate the case law of the European Court of Human Rights ('ECtHR') and, thirdly, that of the Court of Justice ('CJEU'); finally, we will look into some sources of EU law. Thereafter, the resulting characteristics of proportionality will be used to analyse EIO Directive and, in particular, to grasp the dynamics of proportionality between the issuing and executing authorities.

II. The Principle of Proportionality in General Theory and in ECtHR Case Law

Traditionally, proportionality is used to measure the legitimacy of a public power's intrusion in the individual sphere. This means that a limitation of a fundamental right, such as liberty, property, or privacy, must be proportionate to the objective to be achieved and must not overstep this important mark. A proportionality check is often conceived as an assessment procedure, consisting of several steps.[1]

[1] The present paper is the result of a joint discussion. However, paras. I., II. and VII. must be attributed to Laura Scomparin and paras. III., IV., V., and VI. to Andrea Cabiale.

The first step consists of verifying the legitimacy of the pursued aim. This test precedes any other verification and any lack of legitimacy results in the early termination of the control proceedings. At the second step, there is a necessity check: the measure adopted must be ascertained to be essential for achieving the pursued aim. Finally, the third step entails ascertaining whether the end justifies the means in that specific case (proportionality *stricto sensu*). ECtHR case law contains many practical applications of this assessment process, with regard to criminal evidence.[2]

Indeed Art. 8 of the European Convention of Human Rights ('ECHR') explicitly implies a balancing of different rights, interests and values, which is a proportionality test. The first paragraph states that 'everyone has the right to respect for his private and family life, his home and his correspondence'. The second paragraph, on the other side, allows limitations to that right and lists the conditions to be fulfilled. An 'interference' with the exercise of the right concerned has to be 'in accordance with the law', 'necessary in a democratic society' and connected to one of the interests mentioned in para. 2: 'national security', 'public safety', 'economic well-being of the country', 'prevention of disorder or crime', 'protection of health or morals', and 'protection of the rights and freedoms of others'. The requirements established by Art. 8(2) ECHR are very similar to those included in the traditional proportion-

For information on this principle and the three steps check, see, amongst others, *Alexy*, R., 'Constitutional Rights, Balancing, and Rationality', Ratio Juris 16 (2003), p. 131; *Borowski*, M., 'Absolute Rights and Proportionality', in: K. Odendahl et al. (eds.), German Yearbook of International Law 56 (2013), p. 385; *Cohen-Eliya*, M./*Porat*, I., 'Proportionality and the Culture of Justification', American Journal of Comparative Law 59 (2011), p. 463; *Klatt*, M./*Meister*, M., 'Proportionality-a benefit to human rights? Remarks on the I·CON controversy', International Journal of Constitutional Law 10 (2012), p. 687; *Möller*, K., 'Proportionality: Challenging the Critics', International Journal of Constitutional Law 10 (2012), p. 709; *Tsakyrakis*, S., 'Proportionality: An Assault on Human Rights', International Journal of Constitutional Law 7 (2009), p. 468; *Webber*, G., 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship', Canadian Journal of Law and Jurisprudence 23 (2010), p. 179.

[2] See, amongst others, *Ashworth*, A., 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence', in: P. Roberts/J. Hunter (eds.), Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions (Oxford et al.: Hart Publishing, 2012), p. 145; *Cabiale*, A., I limiti alla prova nella procedura penale europea (Milan: Wolters Kluwer, 2019), p. 87; *Choo*, A. L.-T., The Privilege Against Self-Incrimination and Criminal Justice (Oxford et al.: Hart Publishing, 2013), p. 22; *Harris*, D./*O'Boyle*, M./*Warbrick*, C., Law of the European Convention on Human Rights (Oxford: Oxford University Press, 4th edition, 2018), 417; *Jackson*, J. D./*Summers*, S. J., The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions (Cambridge: Cambridge University Press, 2012), p. 151; *Ölcer*, P. F., 'The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights', in: S. C. Thaman (ed.), Exclusionary Rules in Comparative Law (Dordrecht et al.: Springer, 2013), p. 371; *Quattrocolo*, S., Artificial Intelligence, Computational Modelling and Criminal Proceedings. A Framework for A European Legal Discussion (Cham: Springer 2020), p. 74; *Viebig*, P., Illicitly Obtained Evidence at the International Criminal Court (Berlin: Springer, 2016), p. 58.

ality check: legitimacy of the action and of the aim pursued, as well as necessity of the interference.[3]

One of the most recent judgments in this field clearly illustrates the method adopted by the ECtHR.[4] The applicant complained that the gathering of his identification data – photographs, fingerprints, palm prints and a personal description – violated his right to respect for private life. These data, gathered during an investigation which was later discontinued, were subsequently retained, due to some of the applicant's previous convictions and a prognosis of possible recidivism.[5]

The infringement in the applicant's life was deemed by the Court 'in accordance with the law' and pursuing a legitimate aim, *i. e.* the 'prevention of crime as well as the protection of the rights of others, namely by facilitating the investigation of future crimes'.[6] Then the Court 'determined whether the interference in question [was] 'necessary in a democratic society', which means that it must answer a 'pressing social need' and, in particular, be proportionate to the legitimate aim pursued'.[7] Many factors were considered: 'the nature and gravity of the offences in question'; the conclusion of the proceedings in which those data were gathered; the kind of materials collected, considering that 'the retention of cellular samples [is] particularly intrusive compared with other measures such as the retention of fingerprints, given the wealth of genetic information contained therein'; the length of the data retention time-limit; the availability of a remedy; the presence of 'safeguards against abuse (such as unauthorised access to or dissemination) of the data'.[8]

No violation of the Convention was found, from any possible standpoint: the applicant had previously been convicted many times; the police did not collect DNA

[3] See *Bachmaier Winter*, L., 'The Role of the Proportionality Principle in Cross-Border Investigations Involving Fundamental Rights', in: S. Ruggeri (ed.), Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina (Heidelberg et al.: Springer, 2013), 85, p. 91; *Quattrocolo*, S. (n. 2), p. 46; *Spagnolo*, P., 'I presupposti e i limiti dell'ordine di indagine europeo nella procedura passiva', in: M. R. Marchetti/E. Selvaggi, La nuova cooperazione giudiziaria penale. Dalle modifiche al Codice di Procedura Penale all'Ordine europeo di indagine (Milano: Wolters Kluwer, 2019), 263, p. 289.

[4] ECtHR, Judgement of 11 June 2020, No. 74440/17 (*P.N. v. Germany*), ECLI:CE:ECHR:2020:0611JUD007444017.

[5] ECtHR (n. 4), para. 14.

[6] ECtHR (n. 4), paras. 59 – 68.

[7] According to the Court, 'the domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored, and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored'.

[8] ECtHR (n. 4), paras. 69 – 75. See also ECtHR, Judgement of 4 Dec. 2008, Nos. 30562/04 and 30566/04 (*S. and Marper v. The United Kingdom*), ECLI:CE:ECHR:2008:1204JUD 003056204; ECtHR, Judgement of 18 Apr. 2013, No. 19522/09 (*M.K. v. France*), ECLI:CE:ECHR:2013:0418JUD001952209; ECtHR, Decision of 4 June 2013, Nos. 7841/08 and 57900/12 (*Peruzzo and Martens v. Germany*), ECLI:CE:ECHR:2013:0604DEC000784108.

samples; the retention was limited in time and German law provided for a right to review. Therefore, under those conditions 'he collection and storage' ensured 'a fair balance between the competing public and private interests' and constituted 'a proportionate interference with the applicant's right to respect for his private life'.[9]

Beyond Art. 8, the Court often applies similar tests, even though the ECHR does not explicitly require a proportionality assessment. Every time the judges verify respect of fairness, they state that 'what constitutes a fair trial cannot be the subject of a single unvarying rule, but must depend on the circumstances of the particular case', 'having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident'.[10]

In recent years, more and more judgments relating to evidentiary complaints are based on a preset catalogue of criteria. For example, in the well-known Ibrahim case, the Grand Chamber established that, 'when examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account': the eventual applicant's vulnerability; 'the legal framework governing the pre-trial proceedings'; 'the opportunity to challenge the authenticity of the evidence'; the quality of the impugned evidence, its reliability and accuracy; the degree and the nature of the compulsion used to obtain the evidence in question; the unlawfulness of the evidence gathering and its gravity, 'the use to which the evidence was put by the judge' and, finally, 'the weight of the public interest in the investigation and punishment of the particular offence in issue'.[11]

The Strasbourg Court compares various aspects of the concrete case: on the one hand, the seriousness of the infringement of the rights of the defence; on the other hand, the contrasting interest in preventing crimes and punishing their perpetrators. It is only when the balance tilts too far towards the latter that a violation of procedural fairness occurs.

[9] ECtHR (n. 4), paras. 76–91.

[10] ECtHR, Judgement of 25 June 2020, No. 44151/12 (*Tempel v. Czech Republic*), ECLI:CE:ECHR:2020:0625JUD004415112, para. 62. See also ECtHR, Judgement of 23 May 2019, No. 51979/17 (*Doyle v. Ireland*), ECLI:CE:ECHR:2019:0523JUD005197917, para. 71; ECtHR, Judgement of 9 Nov. 2018, No. 71409/10 (*Beuze v. Belgium*), ECLI:CE:ECHR:2018:1109JUD007140910, para. 121.

[11] ECtHR, Judgement of 13 Sept. 2016, nos. 50541/08 et al. (*Ibrahim and Others v. the United Kingdom*), ECLI:CE:ECHR:2016:0913JUD005054108, para. 274. In relation to this judgement see, amongst others, *Caianiello*, M., 'You Can't Always Counterbalance What You Want', European Journal of Crime, Criminal Law and Criminal Justice 25 (2017), p. 283; *Celiksoy*, E., 'Ibrahim and Others v. UK: Watering down the Salduz Principles', New Journal of European Criminal Law 9 (2018), p. 229; *Soo*, A., 'Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13 September 2016)', European Journal of Crime, Criminal Law and Criminal Justice 25 (2017), p. 327.

In short, some compromise is deemed acceptable; what matters is that the breach of the accused's rights is proportionate to the intensity of the competing interests and does not exceed a certain threshold, beyond which it becomes intolerable.

III. The Principle of Proportionality in the EU Context

The principle of proportionality is explicitly regulated in EU law.[12]

The Treaty on the European Union ('TEU') mentions proportionality in Art. 5, stating in paragraph 4 that, 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Proportionality is used here to prevent intrusions by the EU into the domestic affairs of the Member States.[13] That intrusion must be limited to what is necessary to achieve the EU aims.

Art. 52(1) of the Charter of Fundamental Rights ('CFR') is much more detailed. According to this provision, 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms'; moreover, as confirmed by the second part of the same paragraph, 'subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

Therefore, while Art. 5 TEU deals with relationship between the EU and the Member States, Art. 52(1) CFU focuses on interferences with individuals' fundamental rights. The relationship at stake is that between public powers and the individual sphere.

Art. 52(1) CFR is partly similar to Art. 8 ECHR. It requires any limitation of rights and freedoms to be in accordance with the law and to pursue a legitimate aim; in addition, as the same provision states, those limitations, even when necessary and proportionate, shall not affect the 'essence' of the limited rights and freedoms.

[12] For a general overview of the principle of proportionality in EU law, see *Ferraro*, F./*Lazzerini*, N., 'Art. 52. Portata e interpretazione dei diritti e dei principi', in: Mastrioanni, R. et al. (eds.), Carta dei diritti fondamentali dell'Unione europea (Milan: Giuffrè, 2017), p. 1062; *Harbo*, T.-I., 'The Function of the Proportionality Principle in EU Law', European Law Journal 16 (2010), p. 158; *Lenaerts*, K., 'Exploring the Limits of the EU Charter of Fundamental Rights', European Constitutional Law Review 8 (2012), p. 375; *Rosano*, A., 'De Criminali Proportione: On Proportionality Standing between National Criminal Laws and the EU Fundamental Freedoms', University of Bologna Law 2 (2017), 49, p. 51; *Sauter*, W., 'Proportionality in EU Law: A Balancing Act?', in: C. Banard et al. (eds.), Cambridge Yearbook of European Legal Studies 15 (2012), p. 439.

[13] See *Helenius*, D., 'Mutual Recognition in Criminal Matters and the Principle of Proportionality. Effective Proportionality or Proportionate effectiveness?', New Journal of European Criminal Law 5 (2014), 349, p. 350.

Therefore, in EU law, necessity and proportionality *stricto sensu* seem to be literally considered as two different concepts: limitations to rights and freedoms must be both necessary and proportionate.

However, these two requirements are not enough: the essential core of the infringed value must remain intact. This does not mean that a complete deprivation of the right/freedom at stake is always forbidden. For example, nobody would assume that the deprivation of liberty, by enforcing a final conviction, is not allowed. However, sometimes the standards set by the ECtHR refer to the 'quality' rather than the 'intensity' of the limitation to a fundamental right. Therefore, liberty can be deprived due to the enforcement of a sentence but, in order not to affect the essence of the right to liberty, such compression must take place only in a manner respectful of the human dignity and after a proceedings characterized by fairness requirements compliance.[14] This particular condition curbs the effects of a rigid application of the proportionality check: even if public interest appears to be very strong in the concrete case, a specific threshold cannot be overridden.[15]

No other indication stems from Art. 52 CFR: in particular, it explains nothing about the elements to be considered in the proportionality check and the best way to conduct it. What can be balanced? In what way should we balance the various interests and values involved? The Charter does not explain these aspects.

The proportionality test has also been used in some judgments by the CJEU. In the case *WebMind Licensed Kft.*, the Court was asked if, 'in the interests of the proper observance of the obligation of the Member States of the European Union to collect the total amount of VAT effectively […] the tax authority of the Member State, at the evidence-gathering stage of the administrative tax procedure and in order to clarify the facts, is entitled to admit data, information and evidence, and, therefore, records of intercepted communication, obtained without the knowledge of the taxable person

[14] See, among the others, ECtHR, Judgement of 17 July 2014, Nos. 32541/08 and 43441/08 (*Svinarenko and Slyadnev v. Russia*), ECLI:CE:ECHR:2014:0717JUD003254108, para. 116. It can also noted the provisions of Art. 5 ECHR, according to which 'no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'.

[15] See *Tridimas*, T./*Gentile*, G., 'The Essence of Rights: An Unreliable Boundary', German Law Journal 20 (2019), p. 804: 'the trouble is that the core element of the right is difficult to determine. It could be defined subjectively-from the point of view of the right holder – or objectively – from the point of view of the function of rights within the constitutional polity. The problem with a subjective definition is that it leads to an excessively broad understanding of essence: Imprisonment by definition defeats the right to liberty just as deportation defeats the EU right to free movement […]. To determine the core of the right, we need to look at its objectives, its positioning in the constitutional hierarchy, the objectives of the limitations imposed on it, and the circumstances of a specific restriction'; *Lenaerts*, K., 'Limits on Limitations: The Essence of Fundamental Rights in the EU', German Law Journal 20 (2019), p. 792, according to which 'the essence of a fundamental right is not compromised where the measure in question limits the exercise of certain aspects of such a right, leaving others untouched, or applies in a specific set of circumstances with regard to the individual conduct of the person concerned'.

by the investigating body of the tax authority in the context of a criminal procedure and to use them as a basis for its assessment of the tax implications'.[16]

In their answer, the CJEU judges confirmed that 'the measures which the Member States may adopt must not go further than is necessary to attain the objectives of ensuring the correct levying and collection of VAT and the prevention of tax evasion'. They verified, in particular, whether the information in question 'could not have been obtained by means of investigation that interfere less with the right guaranteed by Article 7 of the Charter than interception of telecommunications and seizure of emails, such as a simple inspection at WML's premises and a request for information or for an administrative enquiry sent to the Portuguese authorities'.[17] The proportionality check was therefore focused on the necessity requirement.

More complex reasoning underpins the solution in the case *Digital Rights Ireland Ltd*,[18] regarding data retention for the purpose of the investigation, detection and prosecution of serious crime, as regulated, at the time, in Directive 2006/24/EC.[19] After having stated that the Directive pursued a legitimate aim, the Court verified the compliance with proportionality considering many factors, 'including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference'. It was established that, 'by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter'.[20]

While the aim was legitimate and the data retention itself 'appropriate for attaining the objective pursued', the Directive failed the scrutiny of strict necessity. Indeed, such regulation covered, 'in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception'; in addition, there were no limits to 'persons authorised to access' and the retention period was the same for all data.[21]

[16] CJEU, Judgement of 17 Dec. 2015, No. C-419/14 (*WebMindLicenses Kft. v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*), ECLI:EU:C:2015:832.

[17] CJEU (n. 16), paras. 74–82.

[18] CJEU, Judgement of 8 Apr. 2014, Nos. C-293/12 and C-594/12 (*Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others*), ECLI:EU:C:2014:238.

[19] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[20] CJEU (n. 18), paras. 46–47.

[21] CJEU (n. 18), paras. 49 and 62.

The principle of proportionality also applies to the issuance of a European Arrest Warrant ('EAW');[22] even though Framework Decision 2002/584/JHA does not expressly provide for a proportionality requirement, the CJEU recently confirmed that 'the second level of protection of the rights of the person concerned requires that the issuing judicial authority review observance of the conditions to be met when issuing a European arrest warrant and examine objectively – taking into account all incriminatory and exculpatory evidence, without being exposed to the risk of being subject to external instructions, in particular from the executive – whether it is proportionate to issue that warrant'.[23]

Again with regard to the EAW, the contents of the *Handbook on how to issue and execute a European Arrest Warrant* are even more important: according to the Handbook, 'issuing judicial authorities are advised to consider whether in the particular case issuing an EAW would be proportionate'.[24] In order to conduct this control, the following factors should be taken into account: 'the seriousness of the offence'; 'the likely penalty imposed if the person is found guilty of the alleged offence'; 'the likelihood of detention of the person in the issuing Member State after surrender'; 'the interests of the victims of the offence'; the existence of 'other judicial cooperation measures' equally 'effective but less coercive'.[25]

IV. Necessity and Proportionality in EIO Directive

Thus far, the impression given is that, in general, the proportionality check, is quite a clear concept: any intrusion into the individual's sphere, affecting fundamental rights and freedoms, is subject to verification, including an assessment of necessity and proportionality *stricto sensu.* However, the parameters of this control and the process for carrying it out are less clear. The ECtHR and the CJEU have attempted to lay down some instructions but the choice of criteria, the weight given to them and the balancing in itself may be influenced by personal understanding and beliefs.

We will now analyse proportionality, as regulated in EIO Directive. In the original draft, no proportionality check was mentioned;[26] it has been said that the absence of

[22] See, amongst others, *Xanthopoulou*, E., 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment', New Journal of European Criminal Law 6 (2015), p. 32.

[23] CJEU, Judgement of 12 Dec. 2019, No. C-566/19 PPU and C-626/19 PPU (*JR and YC*), ECLI:EU:C:2019:1077, para. 61.

[24] Commission Notice, *Handbook on how to issue and execute a European arrest warrant*, Doc. No. 2017/C 335/01, p. 15.

[25] Commission Notice (n. 24), p. 19

[26] See Proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters, Doc. No. 9145/10 (29 Ap. 2010). For further information, see *Mangiaracina*, A., 'A New and Controversial Scenario in the Gathering

such a mention was not an important issue, given that the proportionality principle is implied in the EU system of law.[27] Nevertheless, during the initial negotiations, 'some Member States raised concerns about the fact that the issuing or execution of an EIO could not be proportionate. Based on current experience of the application of the European Arrest Warrant, these Member States underlined the importance to ensure proportionality check of any EIO'.[28] Shortly after, the Presidency of the Council – convinced about the opportunity of applying 'a certain threshold of seriousness of the offence to be investigated via the EIO'[29] – suggested adding a new provision in this regard, which was later supported by all delegations.

The final version of Art. 6, 'conditions for issuing and transmitting an EIO', states that 'the issuing authority may only issue an EIO', where two important requirements, among others, 'have been met': 'the issuing of the EIO is necessary and proportionate for the purpose of the proceedings […] taking into account the rights of the suspected or accused person'.

Once again 'necessity' and 'proportionality' appear to be different. An EIO can be necessary but not proportionate and vice versa. Necessity can be seen as the obligation to apply a certain measure or the impossibility of obtaining a piece evidence without a certain measure. Proportionality is something different: even when the chosen measure is the only one existing in order to gather a specific piece of evidence, it is nevertheless essential to assess the importance of such a piece of evidence in the specific case and the overall advantages and disadvantages resulting from its gathering.[30]

By way of example, the Italian investigation authorities are seeking some documents that could be crucial evidence in proofing a fraud. These documents are probably stored at the domicile of the accused, in France, where he or she conducts most of his or her business. The accused has always refused to collaborate with the investigators and no copies of these documents are available; therefore, a search order seems necessary. However, this does not mean that, although necessary, the measure is also

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of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order', Utrecht Law Review 10 (2014), p. 125.

[27] *Bachmaier Winter*, in: (n. 3), p. 99.

[28] Doc. No.15531/10 (29 Oct. 2010), p. 6.

[29] In particular, according to the Presidency, 'it appears as self-evident that a realistic approach towards a rational use of available resources for investigations demands that a certain threshold of seriousness of the offence to be investigated via the EIO be respected by the issuing authorities. In this respect, an assessment of proportionality at some stage of the procedure is an issue which certainly merits further consideration': see Doc. No. 12201/10 (20 July 2010), p. 11.

[30] See *Bachmaier Winter*, in: (n. 3), p. 90; *Daniele*, M., 'I chiaroscuri dell'OEI e la bussola della proporzionalità', in: M. Daniele/R. E. Kostoris (eds.), L'ordine europeo di indagine penale. Il nuovo volto della raccolta transnazionale delle prove nel d.lgs. n. 108 del 2017 (Torino: Giappichelli, 2018), pp. 59–60; *Helenius* (n. 13), pp. 353–354, according to which 'the positive value of the administration of criminal justice must be weighed against the negative aspects of procedural measures'; *Spagnolo*, in: (n. 3), p. 290.

proportionate: the respect for home is a fundamental right. In addition, the EIO is a complex mechanism that involves authorities of different Member States and requires costs and coordinated activities.

If the fraud in question has caused a small amount of damage, consisting of a few hundred Euros, and it was an isolated conduct not part of a wider criminal plan, the EIO may not be proportionate. Considering the individual rights at stake and the complexity of the mechanism to be triggered, the sacrifices required by the document-gathering process may appear to be too high.

The only way to rationalise this evaluation is to establish precisely the values and interests to be balanced. In fact, the Directive does not provide many indications in this respect.[31] Recital 11 states that an EIO 'should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand'; the issuing authority must check 'whether the evidence sought is necessary and proportionate for the purpose of the proceedings, whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence concerned, and whether, by means of issuing the EIO, another Member State should be involved in the gathering of that evidence'. Recital 23 adds that it should be considered 'whether an EIO would be an effective and proportionate means of pursuing criminal proceedings' and Art. 6(1) requires consideration of 'the rights of the suspected or accused person'.

In light of these few indications and the analyses performed in the previous paragraphs, we can list some factors that the issuing authority must consider: the gravity of the investigated crime (for example, the level of punishment laid down by law, or the concrete seriousness and dangerousness of the offence), the economic damages caused by the crime, the number and conditions (social, economic and health) of the victims, the kind of evidence to be collected, the evidence gathering measures to be carried out (coercive or not),[32] the importance of the evidence at issue in the fact-finding activity, the rights and freedoms at stake, the number of persons involved and the intensity of the intrusion into their rights and freedoms, the complexity (time and human resources) of the activities to be carried out by the executing authority, and the total costs of executing the EIO.[33]

[31] See *Bachmaier Winter*, L., 'Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters', Eucrim 11 (2017), p. 51, according to which the Directive 'does not set any guidelines on how to assess' the proportionality principle and 'does not establish a threshold under which the EIO could be considered unproportional'.

[32] For Recital 16, 'non-coercive measures could be, for example, such measures that do not infringe the right to privacy or the right to property, depending on national law'.

[33] For similar catalogues, see *Allegrezza*, S., 'Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality', in: S. Ruggeri (ed.), Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights- Oriented Criminal Investigations in Cross-border Cases (Heidelberg et al.: Springer, 2014), pp. 61–62; *Bachmaier Winter* (n. 31), p. 52.

To sum up, some of those elements encompass the interest in the investigation and punishment of the offence (gravity, harm caused and victim's condition), which, as observed above,[34] is often considered by the ECtHR and is mentioned in the *Handbook* on the EAW. The other factors, in some way competing with the former, concern, on the one hand, the protection of the individual sphere from unreasonable breaches and, on the other hand, the guarantee of loyal and efficient cooperation between Member States.

The conflict between the objectives of the justice system and the respect of individual rights is a classic theme of criminal procedural law. In the context of transnational cooperation, another interest is emerging: a mechanism like the EIO, based on mutual trust, is characterised by a fragile compromise. EU Members agree to cooperate and trust other Members, but the interests of the cooperation cannot override a certain threshold, beyond which it becomes too demanding, risking the breakdown of such a fragile system.

V. The Duties of the Issuing and Executing Authority

The proportionality check, as Art. 6(2) states, is firstly a duty of the issuing authority,[35] which is surely the one that best knows and understands the features of the concrete case.[36]

With regard to the executing authority, the lack of necessity/proportionality *stricto sensu* does not directly constitute a ground for non-recognition or non-execution.[37] In fact, despite the pressures of some Members States,[38] 'a wide majority of delegations [were] of the opinion that a ground for refusal based on proportionality would undermine the EU cooperation based on mutual recognition and mutual trust. They also argued that it is the issuing authority which is the best placed to make that proportionality assessment. Conferring such control to the executing authority would re-

[34] See paras. 2–3.

[35] See *Allegrezza*, in: (n. 33), p. 62.

[36] Moreover, it was generally agreed that 'proportionality should be checked by the issuing authority as it is the best placed to assess the necessity and proportionality of the issuing of an EIO': see Doc. No. 15531/10 (29 October 2010), p. 6.

[37] See *Helenius* (n. 13), p. 358; *Zimmerman*, F./*Glaser*, S./*Motz*, A., 'Mutual Recognition and Its Implications for the Gathering of Evidence in Criminal Proceedings: A Critical Analysis of the Initiative for a European Investigation Order', European Criminal Law Review 1 (2011), p. 79.

[38] Doc. No. 12862/10 (30 Aug. 2010), p. 7: 'two delegations (DE, UK) reiterated that a possibility for the executing authorities to reject the EIO for lack of proportionality should be included in the text. However, a large majority of delegations (CZ, ES, FR, IT, LT, LU, LV, PL, SK) opposed this view, maintaining that no such ground for refusal should be introduced and that, at most, a check by the issuing authorities could suffice'.

quire it to make a substantial analysis of the case, with the additional risk of requiring extensive information from the issuing authority and delaying cooperation'.[39]

Nevertheless, the executing authority has an important role.[40] According to Art. 6(3) 'where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO'; 'after that consultation the issuing authority may decide to withdraw the EIO'. Thus, before the execution, the entity that receives the EIO has the opportunity to highlight that, in its opinion, the 'necessity' or 'proportionality' is not met. At this preliminary stage, the latter authority has no other particular power: the issuing authority may modify or withdraw the EIO, but may also reiterate its own request.[41] This privilege is a fundamental application of the principles of mutual trust and mutual recognition: the authority issuing the EIO is in the best position to assess the conditions of issuance and the executing authority should ultimately trust it.[42]

The most significant power of the executing authority is illustrated in Art. 10(3). It may 'have recourse to an investigative measure other than that indicated in the EIO where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO.[43]

'Less intrusive' means that the alternative measure is characterised by a lesser impact on individual rights and freedoms or appears to be less demanding in terms of complexity of execution.[44] The executing authority is therefore entitled to consider

[39] Doc. No. 15531/10 (29 Oct. 2010), p. 6. See also Doc. No. 12201/10 (20 July 2010), p. 11: 'in the view of the Presidency, it should be left to the responsibility of the issuing authority to apply that test: in this respect, the formulation of a specific ground for refusal would place the option in the hands of the executing authorities, which are perhaps not the best placed to assess all the conditions of a specific case'.

[40] See *Daniele*, M., 'Evidence Gathering in the Realm of the European Investigation Order', New Journal of European Criminal Law 6 (2015), p. 190.

[41] For *Bachmaier Winter* (n. 31), p. 53, 'this provision may function as a warning to the issuing authority'.

[42] See *Bachmaier Winter*, L., 'European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European Directive', Zeitschrift für Internationale Strafrechtsdogmatik 5 (2010), 580, p. 581: 'the system of mutual recognition thus is based on mutual trust. In essence it means that the state of execution can renounce to exert control upon the grounds that motivate the request for evidence of the issuing state, because the execution state can trust that the requesting authorities have already checked the legality, necessity and proportionality of the measure requested'.

[43] See *Armada*, I., 'The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a fundamental Rights-Based Refusal the Solution?', New Journal of European Criminal Law 6 (2015), p. 19, who remarks that the 'recourse to a different measure is […] merely optional when the alternative method leads to the same result by less intrusive means'.

[44] See *Allegrezza*, in: (n. 33), p. 64, according to which this provision 'is a satisfactory compromise, even in the light of fundamental rights of the individuals'; according to *Helenius*

the requested measure 'unnecessary', as another measure allows the same evidence to be obtained with less sacrifice.[45] This evaluation of necessity is clearly not impartial; thus, it is unlikely that, at this stage, the degree of compression of the accused person's procedural rights will be properly taken into account. These issues would certainly be better addressed by the judge in charge of ruling upon the admissibility of the evidence gathered.

The decision of the executing authority is indisputable: there is only a duty to inform the issuing authority, which – in a manner similar to that prescribed in Art. 6(3) – 'may decide to withdraw or supplement the EIO' (Article 10(4)).[46]

The situation is very different when the executing authority estimates that the requested measure does not meet the condition of necessity, but another, less intrusive measure is not envisaged by its domestic law. In such a case, the required measure must be executed without the opportunity to refuse. In fact, the opposite alternative of notifying 'the issuing authority that it has not been possible to provide the assistance' is subject to two precise conditions: the measure requested 'does not exist under the law of the executing State', or 'would not be available in a similar domestic case', and, in the meantime, 'there is no other investigative measure which would have the same result' (Art. 10(4)). In other words, if the requested measure is applicable and the executing authority wishes to replace it, but its domestic law does not envisage a suitable measure, assistance must be granted. Of course, the possibility of invoking a ground for non-recognition or non-execution remains.[47]

Another consideration is crucial. While 'necessity' can be disputed by the executing authority, the previous assessment of 'proportionality' *stricto sensu* cannot be reversed. Art. 10 in fact allows for the measure to be replaced only when the first condition is at stake. In accordance with the principle of mutual trust, the cost-benefit

(n. 13), p. 358, 'the need for effectiveness has to be balanced against the need for proportionality'.

[45] The executing state does, however, have a duty of information similar to the consultation phase envisaged by Art. 6(3): 'when the executing authority decides to avail itself of the possibility referred to in paragraphs 1 and 3, it shall first inform the issuing authority, which may decide to withdraw or supplement the EIO'. See *Bachmaier Winter* (n. 31), p. 54, according to which 'this mechanism is welcome insofar as it does not affect the efficiency of the cooperation, while it provides ad additional safeguards for the fundamental rights'.

[46] *Mangiaracina* (n. 26), pp. 127–128, remarks that this mechanism acts 'as a 'hidden' ground for refusal', that 'does not require a check of the necessity and proportionality of the different measure by the issuing authority'; in this sense, see also *Heard*, C./*Mansell*, D., 'The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases', New Journal of European Criminal Law 2 (2011), p. 359.

[47] In particular, if applicable, the executing authority may invoke the ground set out in Art. 11(1) lit. f: 'the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO'.

analysis is a prerogative of the issuing authority, unless, again, a ground for non-recognition or non-execution can be invoked.[48]

A particular regulation is provided exclusively for the economic costs of the execution (Art. 21). Where the executing authority considers that 'the costs for the execution of the EIO may be deemed exceptionally high, it may consult with the issuing authority on whether and how the costs could be shared or the EIO modified'. Only if 'no agreement can be reached' may the issuing authority decide to 'withdraw the EIO in whole or in part', or to 'keep the EIO, and bear the part of the costs deemed exceptionally high'. Therefore, economic lack of proportionality does not constitute a ground for non-execution;[49] Art. 21 aims at reaching an agreement between the two opponents.

VI. The Lack of Proportionality and its Consequences

One final problem needs to be addressed. What happens when the issuance of the EIO was not 'necessary and proportionate', but the evidence has been gathered and transferred by the executing authority? Must such evidence be considered inadmissible in the criminal proceedings carried out in the issuing State?

Art. 14(1) states that 'Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO'. This paragraph thus contains an equivalence clause: judges are obliged to take the same decision they would adopt if the evidence had been gathered within their national borders.

Thus, in the first place, the inadmissibility of the evidence gathered through an EIO shall be declared where, in a similar domestic case, such a consequence is prescribed by law or is usually accepted by the national Courts. If, under domestic law or case law, a certain lack of necessity or proportionality *stricto sensu* implies the inadmissibility of the evidence, the same must occur in relation to evidence obtained through the EIO.[50] This is surely one of the 'substantive reasons for issuing the EIO' that Art. 14(2) allows to be challenged 'in an action brought in the issuing State'.

Two other provisions of the EIO Directive must be cited. According to Art. 14(7), 'without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the

[48] See *Bachmaier Winter*, in: (n. 42), p. 586: 'the authorities of the executing State are bound to trust the issuing State's assessment […]. The only ground for opposition, in application of the general clause contained in art. 1.3 PD EIO, is that the executing State deems that the measure in question would violate fundamental rights or certain constitutional rules'.

[49] See *Helenius* (n. 13), p. 358.

[50] See Art. 6(1) lit. b ('the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case').

EIO'. In addition, Article 1(4) confirms that the Directive 'shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings'.

The requirement of proportionality is thus directly linked to the protection of fundamental rights and its absence may once again affect the admissibility of evidence in the national proceedings:[51] for example, in light of the aforementioned provisions, it seems possible to suppress evidence gathered by disproportionate means in violation of Art. 8 ECHR.[52]

The judge at this stage is also entitled to verify whether the methods adopted in the evidence-gathering violated the defence rights of the accused person under domestic law. Gathering a piece of evidence abroad is not the same as gathering it within the national borders. Nevertheless, such an obvious fact cannot always imply a renunciation of cooperation. However, as required by Art. 52 CFR, at least the 'essence' of the domestic rights of the defence must be preserved and this control is also a duty of the judge of the issuing State.[53] To carry out this complex assessment, national judges can be guided by the case law of the ECtHR: it is therefore not necessary to respect all domestic procedural guarantees; what really matters is that the overall fairness of the proceedings is preserved.

In summary, it appears from the text of the EIO Directive that the lack of necessity/proportionality *stricto sensu* – not previously noticed by the authorities of the issuing and executing States – does not always affect the admissibility of the evidence. This only happens in the cases identified above, *i. e.* a similar domestic case or the infringement of a fundamental right.

Other possible factors of disproportion, such as the excessive complexity of the execution, do not seem relevant at this stage. In fact, the executing State has performed the required measure and these particular aspects are without prejudice to the position of the accused person. Nothing changes when the executing authorities activated the consultations envisaged by Art. 6(3) and 10(4) but the issuing State confirmed the original request. The principles of mutual recognition and mutual trust prevail once again and the will of the requesting authority must, in principle, be respected.

[51] See *Bachmaier Winter* (n. 31), p. 52.

[52] Indeed, in some of these cases, the executing State should already have invoked the ground for non-recognition or non-execution envisaged by Art. 11(1) lit. f, according to which recognition or execution must be refused where 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

[53] For a practical application of this judicial control, see *Daniele* (n. 40), pp. 190–194.

VII. Concluding Remarks

The adoption of a proportionality check brings with it some advantages. Every legal system knows proportionality and makes use of it more or less explicitly.[54] In summary, proportionality represents a common principle between Member States[55] and its flexibility allows proportionality to be adapted to any concrete situation both in terms of applicable law and factual issues.[56]

However, there are also negative aspects. As already stated, proportionality can be interpreted in many ways;[57] thus, similar cases risk being treated in many different ways.[58] Secondly, not every legal system formally provides for such broad judicial discretion, especially when the admissibility of evidence is at stake.[59] Where admissibility of evidence is strictly regulated by the law, the judge cannot obviously carry out that balancing of values and interests which is an essential part of the proportionality check.[60]

Lastly, some problems may also occur with regard to the parameter of the seriousness of the investigated crime which – as already mentioned – is often adopted for carrying out the control in question. In most cases, evidence located within the national borders is collected regardless of the seriousness of the crime. Thus, taking also into account that parameter, the proportionality test may lead to unequal treatment between purely domestic investigations and those requiring evidence to be gathered abroad.

Now we can outline an answer to our initial question: can the proportionality test be the pillar of EU evidentiary cooperation in criminal matters?

The answer should be positive. Finding a common language is mandatory, in order to keep together so many systems having their own laws, political choices and differ-

[54] See *Daniele*, in: (n. 30), p. 69.

[55] See *Caianiello*, M., 'L'OEI dalla direttiva al decreto n. 108 del 2017', in: M. Daniele/R. E. Kostoris (n. 30), p. 45.

[56] With regard to this issue, see *Armada* (n. 43), p. 8; *Bachmaier Winter*, in: (n. 3), p. 105; *Karas*, *Ž./Pejakovic Đipić*, S., 'Evaluation of the Results of the European Investigation Order', *EU and Comparative Law Issues and Challenges Series* 3 (2019), p. 492.

[57] See *Zimmerman/Glaser/Motz* (n. 37), p. 71: 'Member States will not always agree on what is proportionate – carefully put, some of them are certainly rather 'generous' than others when it comes to investigating a breach of the law'.

[58] See *Mangiaracina* (n. 26), p. 132.

[59] See *Caianiello*, M., 'To Sanction (or not to Sanction) Procedural Flaws at EU Level? A Step Forward in the Creation of an EU Criminal Process', European Journal of Crime, Criminal Law and Criminal Justice 22 (2014), p. 322: 'there are […] insurmountable differences in the way of conceiving the proceedings, which play a crucial role in shaping the procedural sanction's doctrine of each State'.

[60] With regard to this issue in the Italian legal system, see *Daniele*, in: (n. 30), pp. 71–72; *Kostoris*, R. E., 'Ordine di investigazione europeo e tutela dei diritti fondamentali', Cassazione penale (2018), pp. 1146–1448; *Ubertis*, G., 'Equità e proporzionalità versus legalità processuale: eterogenesi dei fini?', Archivio penale 59 (2017), p. 389.

ent traditions. Nevertheless, much can be done to improve this instrument and to mitigate the shortcomings presented above. The EU lawmaker must standardise the proportionality test as much as possible across the Union; this is the only way that mutual trust can grow and evidentiary cooperation can become more and more efficient.

Therefore, the European Union should develop a common definition of proportionality, to be inserted in every legislative act in which the proportionality test is adopted as a cornerstone of cooperation.[61] The contents of the EAW Handbook are a first step in this direction.

The ongoing discussions about the proposal for a Regulation on electronic evidence may be the first opportunity to shape a European notion of proportionality, suitable for every Member States. At present, the Commission proposal mentions proportionality among the conditions for issuing one of these orders but, unfortunately, no precise definition of such a notion has yet been drafted.[62]

[61] See, in this regard, *Belfiore*, R., 'Riflessioni a margine della direttiva sull'ordine europeo di indagine penale', Cassazione penale (2015), p. 3294.

[62] See Art. 5(2) and 6(2) of the proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, Doc. No. COM(2018) 225 final (17 Apr. 2018). On this Proposal, see, amongst others, *Robinson*, G., 'The European Commission's e-Evidence Proposal', European Data Protection Law Review 4 (2018), p. 347; *Smuha*, N. A., 'Towards the EU Harmonization of Access to Cross-Border E-Evidence: Challenges for Fundamental Rights & Consistency', European Criminal Law Review 8 (2018), p. 83; *Tinoco-Pastrana*, Á., 'The Proposal on Electronic Evidence in the European Union', Eucrim 14 (2020), p. 46.

European Investigation Order, E-Evidence and the Future of Cross-Border Cooperation in the EU

By *Anže Erbežnik* and *Marin Bonačić*

I. Introduction

Directive 2014/41/EU on the European Investigation Order ('EIO Directive')[1] was an attempt to introduce a balance to mutual recognition between efficiency and fundamental rights. This was one of the goals of the former five-year JHA Stockholm Programme under which the European Investigation Order (EIO) has been adopted, inter alia, to restore balance between law enforcement and rights of the individual that shifted substantially in favour of efficiency in previous years.[2] Throughout the EIO Directive the focus on fundamental rights is obvious. In that regard the following elements were included, namely a specific provision on proportionality,[3] a definition of (non)coercive measures,[4] a validation procedure in the issuing State by a typical judicial authority,[5] a court authorisation of the requested measure in the executing State if requested by national law,[6] a specific fundamental rights non-recognition ground,[7] clearer provisions on legal remedies,[8] etc. The directive is mainly the product of intense negotiations of the two co-legislators and a more passive role of the Commission during negotiations.[9] However, developments in the field of mutual rec-

[1] Directive 2014/41/EU on the European Investigation Order (OJ L 130, 1 May 2014, p. 1).

[2] European Council, The Stockholm Programme – An open and secure Europe serving and protecting the citizen, 2009. In that regard it stated, inter alia, that '[t]he challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe'. See also the resolution of the European Parliament of 25 November 2009 on the mentioned programme (P7_TA(2009)0090) stating, inter alia, that the programme should 'strike a better balance between the security of citizens (e. g. protection of external borders, prosecution of trans-border crime) and the protection of their individual rights'.

[3] Art. 6 EIO Directive (2014/41/EU).

[4] Rec. 16 in connection with Art. 10(2), lit. d EIO Directive.

[5] Art. 2, lit c, lit. ii EIO Directive.

[6] Art. 2, lit. d EIO Directive.

[7] Art. 11(1), lit. f EIO Directive.

[8] Art. 14 EIO Directive.

[9] The Commission took a passive role during legislative negotiations on the file, although physically present. Consequently, its representatives did not provide specific proposals/solutions during trilogues as witnessed by one of the co-authors of this chapter who took part in all

ognition after the EIO showed once more a significant move towards efficiency as shown, for example, by Regulation (EU) 2018/1805 on mutual recognition on freezing and confiscation orders,[10] by Regulation (EU) 1939/2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'),[11] and even more so by the proposed e-evidence package.[12] Its two proposed instruments are introducing, for example, a more limited fundamental rights non-recognition ground and a much more abbreviated provision on legal remedies. This is in line with the vision of some to make mutual recognition automatic despite a lack of necessary harmonisation and significant legal differences of basic notions of criminal law, non-implementation of certain harmonisation directives on procedural rights in criminal law, as well as despite serious rule of law issues in several Member States.[13] In that regard the proposed e-evidence system annuls the second (executing) judicial authority almost completely and introduces a system of direct orders to service providers in another jurisdiction, without informing the concerned State of it. Such a proposal will supplement (or *de facto* replace) the EIO as regards existing e-evidence as a main source of evidence in criminal proceedings in the future.

However, such steps were taken despite the lack of harmonisation of some basic concepts in EU criminal law, namely admissibility of evidence/exclusionary rules and the issue of retention of telecommunication data. Do such differences allow for such a development? As regards admissibility, two EU Member States' systems will be used to show different approaches to admissibility of evidence, namely Croatia and Slovenia. Both systems started from the same common denominator (from the common former Yugoslav criminal procedural law). The two systems will also be used to show opposite solutions regarding data retention. The topic is connected with the annulment of Directive 2006/24/EC[14] by the CJEU (*Digital Rights Ireland*)[15] as

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the trilogues. Apparently, this was connected with the intention of the Commission to propose possibly its own proposal if the EIO negotiations based on the draft of a group of Member States had not be successful.

[10] OJ L 303, 28 Nov. 2018, p. 1.

[11] OJ L 283, 31 Nov. 2017, p. 1. The Regulation foresees in Article 31 a direct cooperation between the European delegated prosecutors (the 'handling' and the 'assisting' delegated prosecutor) in cross-border cases with very limited barriers, such as where the assignment is incomplete or contains a manifest relevant error, the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons, or the assigned measure does not exist or would not be available in a similar domestic case.

[12] Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (COM/2018/225 final) and Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings (COM/2018/226 final).

[13] This includes, but is not limited to, two Member States with Art. 7(1) TEU proceedings going on.

[14] OJ L 105, 13 Apr. 2006, p. 54.

[15] CJEU, Judgment of 8 Apr. 2014, No. C-293/12 and C-594/12 (*Digital Rights Ireland et al.*), ECLI:EU:C:2014:238.

well as data retention in some national systems (*Tele2/Watson*[16] and *Quadrature du Net*[17]). We are now in a situation where some Member States abolished the system of data retention, while others are still using or even re-introducing it. Understanding those complexities and differences is essential to provide for a diligent use of the EIO as well as any future e-evidence instrument(s). Based on all mentioned above, the following will be presented: 1) the adoption of the EIO and main focal points in the negotiations; 2) the issue of a harmonised approach to admissibility of evidence and data retention; and 3) e-evidence proposal and its pitfalls as well as a reversal of the EIO trend to have one instrument and opting again for a plurality of evidence gathering instruments in EU criminal law.

II. The Adoption of the EIO and the Main Points of Discussion Between the Two Legislators

On 29 April 2010 a group of seven Member States introduced a proposal for a draft Directive on a European Investigation Order.[18] The proposal was based on the principle of mutual recognition and aiming at simplifying and unifying the existing framework for obtaining evidence abroad, in which mutual legal assistance[19] and mutual recognition[20] coexist.

Following difficult negotiations, the Council agreed on a partial general approach on the first 18 Articles and Article Y on costs in June 2011. The resulting draft text was presented at the Justice and Home Affairs council meeting on 7 December 2011. The European Parliament (EP) Civil Liberties, Justice and Home Affairs (LIBE) Committee has examined the proposal (rapporteur Nuno Melo, EPP, Portugal) and on 5 December 2013 the Committee supported the compromise text agreed in the trilogue on 26 November 2013. On 27 February 2014 the agreement[21] was approved in the plenary in Strasbourg. The specificities of the national systems, the need to protect fundamental rights and the proportionality principle were advocated by

[16] CJEU, Judgment of 21 Dec. 2016, No. C-203/15 and C-698/15 (*Tele2 et al.*), ECLI:EU:C:2016:970.

[17] CJEU, Judgment of 6 Oct. 2020, No. C-511/18, C-512/18 and C-520/18 (*La Quadrature du Net et al.*), ECLI:EU:C:2020:791.

[18] Art. 76 lit. b TFEU allows legislation to be proposed by a minimum of a quarter of Member States.

[19] European Convention of 1959 on Mutual Legal Assistance in Criminal Matters (Strasbourg, 20 Apr. 1959, CETS n. 30) and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12 July 2000, p. 1) and their additional protocols.

[20] Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2 Nov. 2003, p. 45) and Framework Decision 2008/978/JHA on the European evidence warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceeding in criminal matters (OJ L 350, 30 Dec. 2008, p. 72).

[21] European Parliament, Doc. No. P7_TA(2014)0165 (27 Feb. 2014).

the European Parliament. It engaged in a strong four-year dialogue with Member States (twelve trilogues and several technical meetings) before reaching an agreement on the text. A comparison between the initial draft and the final result shows a significant change. The initial proposal of Member States mentioned a limited list of rights affected, namely the right to security and the right to good administration, and opted for an automatic recognition with only limited non-recognition grounds.[22] The European Parliament changed this substantially and its view prevailed whereby an important ally was the Irish presidency.[23] The most highlighted issues during discussions were the definition of issuing and executing authority, the introduction of a fundamental rights non-recognition clause, as well as the definition of (non)coercive measure in connection with measures that have to be always available.

1. The Notion of 'Judicial Authority'

As regards the issue of 'judicial authority' both co-legislators showed remarkable foresight. The European Arrest Warrant (EAW) as the first fully functioning mutual recognition system of criminal law at the time of the adoption of the EIO already showed sporadic problems with such a definition whereby atypical authorities were considered as judicial in some Member States.[24] The problem was identified in the mentioned Framework Decision 2008/978/JHA on the European Evidence Warrant (EEW). It provided in Article 11(4) the possibility to refuse a house search if the issuing authority was not a judge or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing State. And according to Article 11(5) a Member State could make a declaration requiring such validation in all cases where the measures would have to be ordered or supervised by such an authority in the executing State in a similar domestic case. The EIO continued this trend. It introduced under the definition of 'issuing authority'[25] a special validation procedure if the domestic order was initially issued by an atypical authority (mostly police). In such a case the order has to be validated by a prosecutor or court (Article 2(c)(ii)). The Court of Justice of the EU (CJEU) clarified that the level of independence of such

[22] Council EU, Doc. No. 9288/10, ADD 2 (23 June 2010). The initial draft has only foreseen the following non-recognition grounds: immunity or privilege, essential national security interests, non-availability of measure and the measure would not be authorised in a similar national case for administrative criminal cases.

[23] The Irish presidency helped the EP to fully understand what is now Art. 10, namely the issue of measures to be always available and the reduced number of non-recognition grounds for such measures (double criminality and catalogue offences are excluded).

[24] It was UK courts that started to deal with the issue, most prominently in the Assange case – see UK Supreme Court, Julian Assange v Swedish Prosecution Authority, Judgment of 30 May 2012, No. UKSC 22.

[25] The EIO Directive does not provide a definition of 'judicial authority', due to the divergence of national systems. See, for example, declarations of State Parties to the 1959 Council of Europe MLA Convention, whereby some of them also include police, ministries of justice and parliamentary investigative bodies.

prosecutors does not need to adhere to the same level of independence as required for EAW proceedings.[26] In addition, the EP also insisted to solve the issue of prosecutors as issuing authorities and their role in national systems. In some Member States they have quasi-judicial prerogatives (for example, the authorisation of house searches) while in others this is not possible. In such asymmetrical cases, as provided under the definition of 'executing authority', the execution of an EIO may require a court authorisation in the executing State where provided by its national law (Article 2(d)). CJEU case-law, some national cases and the proposed e-evidence package confirmed much later such a visionary approach.

2. A Fundamental Rights Non-Recognition Clause

The EP considered it essential to have a substantive fundamental rights clause in mutual recognition in criminal law. Such a clause has been already part of existing mutual recognition instruments in criminal law, like the EAW. However, it was limited only to a general definition of respect of fundamental rights under Art. 6 Treaty of the European Union (TEU) but not defined as a non-recognition ground.[27] The Council did in principle not object to it and the issue reverted more around its definition. In that regard the EP rejected the concept of 'flagrant denial of justice', an European Court of Human Rights (ECtHR) concept dealing with Article 6 European Convention on Human Rights (ECHR) basic requirements as a barrier to extraditions, as too limited. A broad clause based on Art. 6 TEU and the Charter of Fundamental Rights of the EU (CFREU) was agreed. The Council Legal Service insisted on a separate mentioning of the CFREU, although mentioned also under Article 6 TEU, in view to guarantee adherence to a common 'federal' fundamental rights standards.[28] However, the EP did not want a race to the bottom (i.e. to use the lowest common denominator) and wanted also to solve the '*Solange*' issue, a possible conflict between national constitutional fundamental rights standards and EU law. In that regard the reference to Art. 6 TEU was ingenious as it allowed to disperse such tension with certain flexibility as regards basic (essential) national fundamental right standards.[29] As such, the EIO reflects the reality of mutual recognition and mutual trust acknowledging that a substantial part of common EU standards was/is still missing. And even

[26] CJEU, Judgment of 8 Dec. 2020, No. C-584/19 (*Staatsanwaltschaft Wien*), ECLI:EU:C:2020:1002. Compare to CJEU, Judgment of 27 May 2019, No. C-508/18 in C-82/19 PPU (*OG* and *PI*), ECLI:EU:C:2019:456, as regards the EAW independence criteria.

[27] For example, Art. 1(3) Framework Decision 2002/584/JHA on the European Arrest Warrant: 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

[28] See in that regard von *Bogdandy*, A. et al., 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States', *Common Market Law Review* 49 (2012), 489.

[29] The instrument is drafted in such a careful and balanced way that even the UK at that time joined the EIO. Unfortunately, Ireland did not join the instrument, inter alia, due to concerns with their system of house searches.

some existing standards are done at a relatively low level, for example the right to a lawyer as only a relative right in Directive 2013/48/EU.[30] CJEU case-law once again with a certain delay confirmed the correctness of the EP position acknowledging such a ground for non-recognition in the EAW framework as regards certain aspects of fundamental rights such as prohibition of torture, inhuman and degrading treatment[31] and independence of the judiciary.[32] Unfortunately, newer instruments of mutual recognition did not follow the EIO example and introduced a limited fundamental rights non-recognition ground referring only to the CFREU. Even more so, at the moment a whole cacophony of fundamental rights non-recognition grounds exists either in instruments or stemming from case-law. At the moment we have at least five different definitions. For example, Framework Decision 2005/214/JHA on mutual recognition to financial penalties,[33] the EIO[34] and some national laws[35] transposing the EAW refer to a broad Article 6 TEU non-recognition ground. The mentioned Regulation (EU) 2018/1805 on freezing and confiscations refers to 'in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter'.[36] The e-evidence Regulation proposal refers to 'based on the sole information contained in the EPOC, it is apparent that it manifestly violates the Charter or that it

[30] Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6 Nov. 2013, p. 1). It allows for 'derogations' in the police/pre-trial phase (Art. 3(6) Directive 2013/48/EU). In several Member States this is an absolute constitutional right, not a relative one. Also, the narrow implementation and application of such derogations is not satisfactory as shown by the 2019 Commission report (European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (COM(2019) 560 final, 26 Sept. 2019)).

[31] CJEU, Judgment of 5 Apr. 2016, No. C-404/15 and C-659/15 PPU (*Aranyosi* and *Căldăraru*), ECLI:EU:C:2016:198; Judgment of 15 Oct. 2019, No. C-128/18 (*Dorobantu*), ECLI:EU:C:2019:857.

[32] CJEU, Judgment of 27 July 2018, No. C-216/18 PPU (*LM*), ECLI:EU:C:2018:586.

[33] OJ L 76, 22 March 2005, p. 16, Art. 20(3) – 'where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty'.

[34] Art. 11(1) lit. f EIO Directive – 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Art. 6 TEU and the Charter'.

[35] For example, Sec. 40 of the Austrian *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union*, or Article 4 of the Belgian *Loi relative au mandat d'arrêt européen.*

[36] Art. 8(1) lit. f and Article 19(1) lit. h of Regulation (EU) 2018/1805.

is manifestly abusive'.[37] Also, the CJEU introduced a two-pronged test in *Aranyosi*[38] and *LM*[39] referring to a systemic deficiency and then to a particular assessment. Such a situation is unsustainable from a practical point of view and shows the danger that each mutual recognition instrument is considered as its own universe instead of a coherent harmonised approach. There is also an almost irrational fear by some Member States and the Commission that any reference to Article 6 TEU will lead to a breakdown of mutual recognition.[40] This is an *argumentum ad absurdum* as trust cannot be forced upon as a 'religious dogma' but is a consequence of practical experience. Practitioners see a problem of fundamental rights, or they do not see one in a given case. But they cannot be forced to 'look away' by an artificial fundamental rights clause with a set of complicated and undefined criteria. Prosecutors and judges are not administrative workers but are also legally bound to respect and protect fundamental rights of the individuals in the procedure. The EIO brought this again to the forefront.

[37] Art. 9(5) proposed e-evidence Regulation.

[38] It decided: 'where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter'.

[39] It decided: 'where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.'

[40] See, for example, Council conclusions on mutual recognition in criminal matters – 'Promoting mutual recognition by enhancing mutual trust' (OJ C 449, 13 Dec. 2018, p. 6) stating, inter alia, that 'Member States are reminded that in accordance with the case-law of the Court of Justice of the European Union, a refusal to execute a decision or judgment that has been issued on the basis of a mutual recognition instrument can only be justified in exceptional circumstances, and taking into account that by virtue of the principle of primacy of EU law, Member States cannot demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law. As a consequence, any case for non-execution based on an infringement of fundamental rights should be applied restrictively, following the approach developed by the CJEU in its case law'.

3. (Non-)Coercive Measures

The third point of significant debate during negotiations was the issue of availability of investigative measures. In that regard Article 10(2) EIO Directive defines measures that have to be available in all participating Member States, including 'non-coercive' investigative measures under the law of the executing State.[41] According to Art. 11(2) for such measures two non-recognition grounds do not apply, namely dual criminality and catalogue offences (Article 11(1) lit. g and lit. h). A wrong understanding of the issue of coerciveness/non-coerciveness could give the impression that the executing Member State has to introduce upon an EIO request measures not foreseen in its own system. There were cases where issuing Member States were asking the use of Trojan viruses in the framework of criminal proceedings from executing States not familiar with this investigative tool. Such requests had to be refused as there is no obligation to introduce measures not known in the national system. The English term 'coercive' can be wrongly understood in other EU languages meaning only 'physical restraint'. Therefore, in the last trilogue the EP insisted on adding a recital clarifying the matter.[42] Recital 16 was added that states that '[n]on-coercive measures could be, for example, such measures that do not infringe the right to privacy or the right to property, depending on national law'.[43] *A contrario* coercive measures are measures that do affect privacy. Consequently, the EIO demands from a Member State to help the other Member State only as much as possible under its own system, no more no less. The use of special investigative tools not familiar to domestic legal system upon an EIO request would also breach Art. 8 ECHR requiring for such clandestine investigative tools a very detailed legal framework.[44]

Based on all mentioned as well as on input of practitioners,[45] the EIO can be considered a useful and well-balanced instrument that resolved pending legal issues from

[41] The other measures to be always available are obtaining of information or evidence which is already in the possession of the executing authority, information contained in databases held by police or judicial authorities, hearing of a witness, expert, victim, suspected or accused person or third party, and identification of persons holding a subscription of a specified phone number or IP address.

[42] The issue of translation into other languages triggered additional debates at the level of lawyer linguists where the Rapporteur informed the EP lawyer linguists to translate it in line with 'non-invasive' as agreed in the last EIO trilogue with the Lithuanian presidency.

[43] Due to the late stage of negotiations (last trilogue) it was not possible anymore to add a definition in the articles as such but only a recital could be agreed.

[44] For example ECtHR, Judgment of 10 Feb. 2009, No. 25198/02 (*Iordachi and Others v. Moldova*), ECLI:CE:ECHR:2009:0210JUD002519802; Judgment of 4 Dec. 2015, No. 47143/06 (*Roman Zakharov v. Russia*), ECLI:CE:ECHR:2015:1204JUD004714306.

[45] European Investigation Order – legal analysis and practical dilemmas of international cooperation (EIO-LAPD), national reports for Croatia and Slovenia, 2021, <https://lapd.pf.um.si/materials/>, accessed 9 May 2022. See also Commission's EIO Implementation Report (European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/41/EU of the European Parliament and of

previous mutual recognition instruments, and significantly contributed to cross-border cooperation in the EU. This was partially the result of the hybrid nature of the EIO, a hybrid with MLA and MR features, taking the best of both worlds. Any more ambitious goals towards automatic mutual recognition raise significant legal and practical issues as will be shown on the e-evidence example.

III. E-Evidence Proposal and its Pitfalls

The e-evidence proposal[46] consists of two legislative proposals: of a regulation and a directive. The Regulation proposal foresees a mechanism of direct cooperation based on Art. 82(1) Treaty on the Functioning of the European Union (TFEU) (mutual recognition in criminal matters), while the Directive proposal establishes a compulsory legal representative for service providers offering services but not having an establishment in the EU based on Articles 53 and 62 TFEU (coordination of administrative measures in the internal market as regards diplomas, qualifications, and pursuit of self-employed activities). It is supposed to supplement[47] the EIO as regards the gathering of electronic evidence in criminal proceedings and is based on the notion of direct European production order certificates (EPOC)[48] and European preservation order certificates (EPOC-PR)[49] from law enforcement authorities from the issuing State to electronic providers in another (enforcing/executing) Member States. It covers electronic evidence stored in electronic form by or on behalf of a service provider and includes all categories of electronic telecommunication data, namely subscriber, traffic (transactional) and content data.[50] The provider in a different Member State in principle has to comply with the order in strict deadlines (10 days/6 hours in urgent situations), except in some limited case, namely the certificate is incomplete, con-

the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (COM(2021) 409 final, 20 July 2021)) showing a very high rate of EIO executions.

[46] See above n. 12.

[47] Art. 23 proposed e-evidence Regulation.

[48] 'European Production Order' means a binding decision by an issuing authority of a Member State compelling a service provider offering services in the Union and established or represented in another Member State, to produce electronic evidence (Art. 2(1) proposed e-evidence Regulation).

[49] 'European Preservation Order' means a binding decision by an issuing authority of a Member State compelling a service provider offering services in the Union and established or represented in another Member State, to preserve electronic evidence in view of a subsequent request for production (Art. 2(2) proposed e-evidence Regulation).

[50] The Commission added in its proposal a fourth category between subscriber data and transactional (traffic) data called 'access data' necessary for the sole purpose of identifying the user of the service, inter alia, due to dynamic IPs and their hybrid nature (see Art. 2(8) proposed e-evidence Regulation). They are near to subscriber data, but their identification requires the use of traffic data. See also Council of Europe, TC-Y, Conditions for obtaining subscriber information in relation to dynamic versus static IP addresses: overview of relevant court decisions and developments, T-CY (2018)26.

tains manifest errors or does not contain sufficient information, force majeure or *de facto* impossibility not attributable to the provider, or the order manifestly violates the CFREU or is manifestly abusive.[51] In the case of EPOC-PRs the provider has to preserve the data for a renewable 60-day period. The authority of the other (enforcing) Member State becomes involved only if the provider does not comply.[52] In addition, the Commission has foreseen certain harmonisation as regards the notion of issuing authorities and conditions. In that regard EPOC-PRs and EPOCs for subscriber and access data can be ordered or validated by a judge or a prosecutor for all offences, and EPOCs for traffic and content data by a judge for offences above a three year threshold and certain additional offences.[53] A specific procedure has been introduced for conflicts of law with third countries.[54] Such a proposal is justified by the Commission with the need for swift cooperation in the digital age and volatility of electronic evidence, as well as taking into account the international dimension whereby the internal model provides a basis for future agreements with third states, such as the United States.[55] The Council[56] followed the proposal with certain modifications in its general approach.[57] It broadened the scope to cover execution of custodial sentences or detention orders that were not rendered *in absentia* in case the convict absconded from justice,[58] introduced a post-validation possibility in urgent cases,[59] and limited any assessment of providers.[60] In addition, it introduced a consultation procedure for transactional (traffic) data in 'non-domestic' cases,[61] and very

[51] Art. 9 and 10 proposed e-evidence Regulation.

[52] Art. 14 proposed e-evidence Regulation. Even a different terminology was introduced referring to 'enforcing State/authority' (not 'executing State/authority') to illustrate a difference with classical mutual recognition.

[53] Arts. 4 and 5 proposed e-evidence Regulation.

[54] Arts. 15 and 16 proposed e-evidence Regulation.

[55] Art. 218(6), lit. (a)(v) TFEU.

[56] Despite the adoption of the general approach several States expressed reservations, such as Germany, Finland and the Netherlands.

[57] Council EU, Doc. No. 15292/18 (12 Dec. 2018).

[58] Art. 3(2) general approach.

[59] Art. 4(5) general approach.

[60] Art. 9(4) and (5) general approach.

[61] Art. 5(7) general approach. In cases where the Order concerns transactional data and where the issuing authority has reasonable grounds to believe that: (a) the person whose data are sought is not residing on the territory of the issuing State, and (b) the data requested is protected by immunities and privileges granted under the law of the enforcing State or it is subject in that Member State to rules on determination and limitation of criminal liability relating to freedom of press and freedom of expression in other media, or its disclosure may impact fundamental interests of that Member State such as national security and defence, the issuing authority shall seek clarification on that. It shall take these circumstances into account in the same way as if they were provided for under its national law and it shall not issue or shall adapt the European Production Order where necessary to give effect to these grounds.

limited notification obligation of the enforcing State only for content data in 'non-domestic' cases and without suspensive effect.[62]

Such two approaches pose several legal questions. First, the proposal of a new system is based on an atypical notion of mutual recognition. The classical understanding of Art. 82 TFEU refers to two judicial authorities (one in the issuing and one in the executing State) and any re-interpretation of the Treaties in the sensitive area of criminal law could amount to a function creep.[63] In addition, there is a discrepancy in the application of the two instruments of the e-evidence package. The Directive is based on the former first pillar provisions creating obligations for all Member States while the Regulation bounds only some. The proposed directive establishing a legal representative shows the clear intention to use it for other instruments, as well as a general trend of 'private-public' partnership in law enforcement.[64] Further, the proposed package does not take account of the territorial obligations of the executing State as regards providers on its territory from an ECHR and data protection perspective. The Council in its general approach partially remedied the situation by distinguishing between domestic and non-domestic situations. However, it considers situations whereby the suspect is in the issuing State, but the data is in another State as domestic situations.[65] The EP significantly changed the Commission proposal in its internal

[62] Art. 7a general approach. In cases where the European Production Order concerns content data, and the issuing authority has reasonable grounds to believe that the person whose data are sought is not residing on its own territory, the issuing authority shall submit a copy of the EPOC to the competent authority of the enforcing State at the same time the EPOC is submitted to the addressee. The notified authority may as soon as possible inform the issuing authority of any circumstances as mentioned above of traffic data and shall endeavour to do so within 10 days. The issuing authority shall take these circumstances into account in the same way as if they were provided for under its national law and shall withdraw or adapt the Order where necessary to give effect to these grounds if the data were not provided yet.

[63] See European Parliament, 2nd Working document on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (2018/0108 (COD)) – Scope of application and relation with other instruments, Doc. No. DT\1176230EN (6 Feb. 2019): 'The Commission, thus, itself acknowledges that the proposed e-evidence instrument would no longer stipulate automatic cooperation between two judicial authorities, i. e. a direct involvement of the second Member State's judicial authorities. By contrast, according to the Commission, a systematic involvement of the judicial authorities of the executing Member State is not required for the principle of mutual recognition under Article 82(1)(a) to apply. Instead, according to the Commission, it was sufficient to involve the judicial authority of the executing State should problems arise with the execution of a production or preservation order by the service provider. Taking all aforementioned into consideration, the e-evidence instrument, as proposed by the Commission, would go beyond the current application of Article 82(1)(a)) by broadening the concept of mutual recognition as laid down therein.'

[64] See, for example, Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online (OJ L 172, 17 May 2021, p. 79).

[65] The issue has been also raised by ECtHR Judge Prof. Dr. Bošnjak, e-evidence EP hearing, 27 Nov. 2018: 'As far as the law of the enforcing state is concerned it seems to be of no relevance according to the existing proposal. From the point of view of the Convention this can create a problem because the High Contracting Parties to the ECHR, including all 28 MS EU,

report[66] and reintroduced a substantial notification procedure and role for the executing State mimicking the EIO. It introduced the same non-recognition grounds but separated the different transmission procedures based on the invasiveness of the data concerned. A direct transfer would be possible for preservation orders (EPOC-PRs). For production orders a system was proposed whereby the executing State has a certain time limit to react. However, no reaction means a positive decision. The EP also strengthened the provisions on legal remedies and introduced provisions on admissibility. In addition to the internal EU legislative procedure, negotiations were concluded at the Council of Europe level in view of the second additional protocol to the Budapest Cybercrime Convention[67], and are going on for an agreement with the US.[68] Whatever the final result of e-evidence negotiations will be, during the negotiations it became clear that the divergence of approaches to admissibility of evidence and data retention pose serious issues for possible direct transfers as regards uniform legal remedies and the avoidance of negative forum shopping.

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are responsible for protection of human rights on the territory under their jurisdiction. […] They have to put in place a regulatory framework and also guarantee legal, if not judicial, protection in particular cases. […] If the authorities of the enforcing state are faced with a complaint that the protection of a Convention right has been manifestly deficient and this cannot be remedied by EU law, they cannot refrain from examining the complaint on the ground that they are just applying EU law. This has clearly been stated in the judgement of *Avotiņš v. Latvia.* […] The proposal, as it is before you, crates a rather unique situation from the point of ECHR jurisprudence. The interferences with Article 8 are without any involvement of the authorities of the enforcing state. I wonder if this is in line with the ECHR. There might be a legitimate expectation that the law of the enforcing state would apply in each and every particular situation. This would affect the assessment of lawfulness.' See European Parliament, 3rd Working document on the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (2018/0108 (COD)) – Execution of EPOC(-PR)s and the role of service providers, Doc. No. DT\1176298EN (6 Feb. 2019).

[66] European Parliament, Draft Report, Doc. No. PR\1191404EN (24 Oct. 2019), and internal EP Compromise, Doc. No. A9-0256/2020 (11 Dec. 2020). Beforehand it conducted a significant study in seven public working documents.

[67] The proposed draft text provides for direct cooperation only for subscriber data with several limitations possible – see T-CY (2020)7, 28 May 2021.

[68] See *Carrera*, S. et al., Cross-border data access in criminal proceedings and the future of digital justice (Brussels: Centre for European Policy Studies (CEPS), 2020); *Tosza*, S., 'The European Commission's Proposal on Cross-Border Access to E-Evidence', *eucrim* 4 (2018), 212; *Tosza*, S., 'All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European Investigation Order and the European Production Order', *NJECL* 11 (2020), 161; *Christakis*, T., 'E-Evidence in the EU Parliament: Basic Features of Birgit Sippel's Draft Report', European Law Blog (21 Jan 2020), <https://europeanlawblog.eu/2020/01/21/e-evidence-in-the-eu-parliament-basic-features-of-birgit-sippels-draft-report/>, accessed 16 Nov. 2021; *Bonačić*, M., 'Pristup elektroničkim dokazima: na putu prema novom modelu kaznenopravne suradnje u Europskoj Uniji', in: J. Barbić (ed.), *Prilozi raspravi o daljnjem razvoju kaznenog prava Europske unije* (Zagreb: Hrvatska akademija znanosti i umjetnosti 2022), 71 etc.

IV. A Harmonised Approach to Admissibility of Evidence and Data Retention as Cornerstones for a Functioning EU Evidence and E-Evidence System

Do differences in the admissibility of evidence and data retention hinder a more automatic approach to evidence and especially e-evidence? This would depend on the results of such approaches that may lead despite differences to a similar result. In that regard, as mentioned before, the Croatian and Slovenian criminal law systems will be compared.

1. Admissibility of Evidence and the Exclusionary Rule

Both systems were developed from the 1977 common Yugoslav federal procedural law.[69] There were no procedural laws in the individual republics of the former State but only one common procedural law.[70] However, after independence the two systems started to diverge significantly as regards the written rules. The Croatian Constitution[71] has a specific article on admissibility prohibiting the use of unlawfully obtained evidence (Article 29(4)).[72] This is not the case in Slovenia as such notion can be only indirectly inferred from the general provision of Article 15(4) of the Slovenian Constitution[73] dealing with general redress for fundamental rights violations.[74] However, Slovenia kept the old Yugoslav notion of an investigative judge whereby till 2003 only such a judicial body could collect personal evidence (make formal interrogations). This was based on the old Yugoslav system that in 1967 introduced a significant change in comparison with other East-European criminal procedure acts and introduced a system of a strict separation between informal police collection of information and formal (evidentiary) collection of evidence by the investigative judge in the framework of the regular criminal procedure. The Slovenian system is still based on this divide with the alternation from 2003 allowing the police formal collection of personal evidence if a lawyer is present. In addition, already the Slovenian Constitution introduced in Article 19(3) a full-fledged Miranda warning sys-

[69] *Zakon o krivičnom postupku/Zakon o kazenskem postopku*, Službeni list SFRJ, Vol. 33, Beograd, 1977, no. 4.

[70] This was different as regards substantive criminal law whereby the prerogatives between the federation and individual republics were shared. And besides a federal Criminal Code there were also criminal codes of the individual republics.

[71] *Ustav Republike Hrvatske*, Narodne novine no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

[72] 'Dokazi pribavljeni na nezakonit način ne mogu se uporabiti u sudskom postupku.'

[73] *Ustava Republike Slovenije*, Uradni list, no. 33/91-I et al.

[74] 'Zagotovljeni sta sodno varstvo človekovih pravic in temeljnih svoboščin ter pravica do odprave posledic njihove kršitve.'

tem for an arrested person.[75] This system is mimicking the US system demanding that an arrested person is being informed about the basis for the arrest, the right to a lawyer and the right to remain silent. Any violation of such warning amounts to inadmissibility of statements with certain exceptions. The Slovenian system went further and introduced such a warning not only for arrested persons but by law also to every suspect (Art. 148(4) Slovenian Criminal Procedure Act (ZKP-SI)).[76] In addition, the law introduced a system of inadmissibility of evidence coupled with an almost absolute exclusionary rule (Arts. 18 and 83 ZKP-SI). As inadmissible evidence is considered the one that violates fundamental rights, basic rules of the criminal procedure specifically indicated in the law, or evidence based on unlawful evidence (a full-fledged fruit of the poisonous tree doctrine). Such evidence has to be excluded already by the prosecutor or later by the investigative judge. In addition, the Constitutional Court introduced the notion of 'psychological contamination' of the adjudicating judge whereby the trial judge shall in principle not have contact with unlawful evidence reflected now in Art. 39 of the ZKP-SI. If she or he had contact, the trial judge has to be replaced.[77] The adjudicating/trial judge should in principle not get familiar with such evidence except if the evidence was of such nature not to be able to influence the judicial decision. However, the Court introduced several exceptions to such an absolute inadmissibility rule copying exceptions from the US system, for example the inevitable discovery doctrine, the purged taint doctrine, and the good faith doctrine.[78] In that regard it is only the courts that can make such exceptions not foreseen by law as such.

In comparison, the Croatian criminal procedure contained a similar solution, with three categories of unlawful evidence[79] but the model was changed in 2008 with the introduction of the new Criminal Procedure Act (ZKP-HR).[80] The new model allows for a limited judicial weighing of interests. From the beginning there was a question

[75] 'Vsakdo, ki mu je odvzeta prostost, mora biti v materinem jeziku ali v jeziku, ki ga razume, takoj obveščen o razlogih za odvzem prostosti. V čim krajšem času mu mora biti tudi pisno sporočeno, zakaj mu je bila prostost odvzeta. Takoj mora biti poučen o tem, da ni dolžan ničesar izjaviti, da ima pravico do takojšnje pravne pomoči zagovornika, ki si ga svobodno izbere, in o tem, da je pristojni organ na njegovo zahtevo dolžan o odvzemu prostosti obvestiti njegove bližnje.'

[76] *Zakon o kazenskem postopku (ZKP)*, Uradni list no. 63/94 et al.

[77] Slovenian Constitutional Court, Judgment of 21 March 2002, No. U-I-92/96.

[78] For example, Slovenian Supreme Court, Judgment of 22 Dec. 2011, No. I Ips 132/2010, referring to the inevitable discovery doctrine in connection with SMS messages gathered from a phone without a court order; Judgment of 8 May 2014, No. I Ips 5162/2010, regarding the purged taint doctrine whereby outside circumstances annulled the initial illegality; Judgment of 6 Oct. 2011, No. I Ips 46/2011, regarding the good faith exceptions in view of police actions based on law on obtaining telecommunication declared subsequently as unconstitutional.

[79] For an overview of development of the provision on unlawful evidence in Croatia see *Bojanić*, I./*Đurđević*, Z., 'Dopuštenost uporabe dokaza pribavljenih kršenjem temeljnih ljudskih prava', *Hrvatski ljetopis za kazneno pravo i praksu* 15 (2008), 973, 996–97.

[80] *Zakon o kaznenom postupku*, Narodne novine no. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/19.

whether this is in accordance with the absolute and complete constitutional prohibition of the use of unlawfully obtained evidence.[81] The issue was brought before the Croatian Constitutional Court, which decided that the new model is in principle in accordance with the Constitution.[82] After two amendments, in 2012 and 2013[83], the ZKP-HR in Article 10 defines four categories of unlawful evidence: a) evidence obtained in violation of the prohibition of torture, inhumane or degrading treatment provided for in the Constitution, statute or international law, b) evidence obtained in violation of the rights to defence, reputation, honour and inviolability of personal and family life guaranteed by the Constitution, domestic or international law, with exception of the cases falling into the following category, c) evidence obtained in violation of criminal procedure provisions which is expressly provided for in the ZKP-HR, and d) evidence of which knowledge has been gained from unlawful evidence (fruit of the poisonous tree).[84] The peculiarity of the second category (b) is that evidence obtained in violation of the rights and freedoms shall not be deemed unlawful under two conditions: the proceedings are conducted for grave forms of criminal offences falling within the jurisdiction of the county courts and the interest of the perpetrator's criminal prosecution and punishment prevails over the violation of a right (Art. 10(3) ZKP-HR). If these conditions are met, the evidence will be admissible, but under the additional condition that the court's judgement cannot be founded exclusively on such evidence (Art. 10(4) ZKP-HR). However, the possibility of weighing is limited, since many violations of the rights to defence, reputation, honour, and inviolability of personal and family life, as already mentioned, are listed in the third category (unlawful evidence expressly provided for in the CPA) and have to be excluded *ex lege* without any possibility of weighing.

In the case of Croatia and Slovenia two different approaches on admissibility and the exclusionary rule (exceptions based on law in one and court created exceptions in the other) lead as it seems to similar end-results. However, this might not be the case for other Member States. So, as regards the admissibility issue an in-depth analysis of the different national systems is necessary as differences at first sight might not nec-

[81] *Pavišić*, B., 'Novi hrvatski Zakon o kaznenom postupku', *Hrvatski ljetopis za kazneno pravo i praksu*, 15 (2008), 489, 529–530.

[82] Croatian Constitutional Court, Judgment of 19 July 2012, No. U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010, U-I-2871/2011. The Constitutional Court did however establish that the right to dignity should not be in the category of evidence that can be weighted. This subsequently led to the amendment of the provision.

[83] *Zakon o izmjenama i dopunama Zakona o kaznenom postupku*, Narodne novine no. 143/2012 and no. 145/2013.

[84] Evidence in this category should be excluded without any exception. However, it is stated that the evidence will not be a fruit of the poisonous tree if there are several sources of knowledge about the evidence, and only some of them are illegal. *Martinović*, I./*Kos*, D., 'Nezakoniti dokazi: teorijske i praktične dvojbe u svjetlu prakse Europskog suda za ljudska prava', *Hrvatski ljetopis za kaznene znanosti i praksu* 23 (2016), 311, 334. For an overview of illegal evidence in Croatia see *ibid.*, 330–335.

essarily lead to a different result.[85] In addition, the existing differences may hamper acceptance of cross-border evidence, whereby evidence legal and admissible in one Member State will be held as inadmissible in another. For example, the Slovenian Constitutional Court introduced a stringent requirement for foreign evidence being in-line with basic requirement of fundamental rights and the Slovenian Constitution.[86]

2. Data Retention

Data retention at EU level was introduced by Directive 2006/24/EC[87] ordering Member State data retention for a period between six months and up to two years.[88] However the CJEU considered the directive as non-proportionate and annulled it in the *Digital Rights Ireland et al.* case.[89] The Court pointed to the indiscriminate generalised manner of the instrument affecting all individuals, all means of electronic communication and all traffic data without any differentiation, limitation or exception being made, the lack of any objective criterion which would ensure that the competent national authorities have access to the data and can use them only for the purposes of prevention, detection or criminal prosecutions of particular serious offences, and a general data retention period of at least six months, without taking any distinction between the categories of data. In that regard the Court concluded that 'Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Arts. 7 and 8 CFREU. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary'.[90] Further jurisprudence clarified that also national general data retention systems should not be used. In joined cases *Tele2/*

[85] Such an analysis should have been done by the Commission before proposing the e-evidence package. See in that regard the ongoing project – Admissibility of E-Evidence in Criminal Proceedings in the EU, European Law Institute, 2020–2022.

[86] Slovenian Constitutional Court, Judgment of 18 Sep. 2014, No. Up-519/12. However, the Supreme Court stated that rules of the Slovenian criminal procedure are not taken into account when assessing cross-border evidence. Slovenian Supreme Court, Judgment of 30 May 2008, No. Kp 16/2007; Judgment of 15 Oct. 2015, No. I Ips 44415/2010-3763; or Judgment of 9 July 2015, No. I Ips 19969/2010-620.

[87] Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13 Apr. 2006, p. 54).

[88] Art. 6 Directive 2006/24/EC: 'Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication'.

[89] CJEU (n. 15).

[90] CJEU (n. 15), para. 65.

Watson[91] the Court further ruled that EU law precludes national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. It also precludes national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union. In addition, it specifically highlighted the sensitivity of traffic data stating that '[t]hat data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them'.[92] Despite this several Member States kept a fully functioning data retention system[93] and it seems that the latest CJEU case-law opened the door again for certain types of data retention and clarified other issues. In the *Privacy International*[94] and *La Quadrature du Net*[95] judgments, the Court addressed the issue of data retention for national security purposes and indicated the possibility of a more general system of retention of subscriber data and IP address and targeted retention of location and traffic data. In the *H.K.*[96] case it clarified the issue of targeted retention as regards authorising authorities as well as certain principles of (non)admissibility of such evidence. The court, while admitting national prerogatives, stated that as regards evidence gathered in breach of EU law 'the objective of national rules on the admissibility and use of information and evidence is, in accordance with the choices made by national law, to prevent information and evidence obtained unlawfully from unduly prejudicing a person who is suspected of having committed criminal offences. That objective may be achieved under national law not only by prohibiting the use of such information and evidence, but also by means of national rules and practices governing the assessment and weighting of such material, or by factoring in whether that material is unlawful when determining the sentence'.[97] However, it gave particular weight to

[91] CJEU (n. 16).

[92] CJEU (n. 16), para. 99.

[93] See, for example, FRA, Data Retention across the EU (2017), https://fra.europa.eu/en/publication/2017/data-retention-across-eu, accessed 16 Nov. 2021; *Fennelly*, D., 'Data retention: the life, death and afterlife of a directive', *ERA Forum* 19 (2019), 673; *Rojszczak*, M., 'The uncertain future of data retention laws in the EU: Is a legislative reset possible?', *CLSR* 41 (2021), 1 etc.

[94] CJEU, Judgment of 6 Oct. 2020, No. C-623/17 (*Privacy International*), ECLI:EU:C:2020:790.

[95] CJEU (n. 17).

[96] CJEU, Judgment of 2 March 2021, No. C-746/18 (*H. K.*), ECLI:EU:C:2021:152.

[97] *Ibid.*, para. 43.

adversarial procedure stating that 'the principle of effectiveness requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law or by means of access of the competent authority thereto in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.'[98] This could be considered a EU admissibility law in *statu nascendi.*

In Slovenia a general data retention system was introduced by Articles 162 – 169 of the Electronic Communication Act (ZEK-SI)[99] as regards categories of data and periods of retention. It had foreseen obligatory storage for 14 months for telephone data and 8 months for internet data. However, access to such data (authorities and types of offences) has been regulated in the ZKP-SI.[100] The Slovenian Constitutional Court in case U-I-65/13 annulled Slovenia's national data retention system following the CJEU judgment as regards its non-compatibility with the Slovenian Constitution. The decision was based on the assumption that despite the annulment of Directive 2006/24/EC a data retention system is not prohibited by EU law as such. In that regard the Slovenian Constitutional Court found that the existing system was not compatible with Article 38 of the Slovenian Constitution on data protection as it did not fulfil the necessity criteria under the proportionality test. The Court stated, *inter alia*, that a non-selective and preventive retention encroaches rights of a large population without any triggering factor, and no answer has been provided for reasons for the time periods provided in the legislation.[101] However, such an annulment did not necessarily lead to inadmissibility of evidence obtained whereby an additional and separate assessment is carried out.[102] No new data retention has been introduced. In Croatia, data retention for the purposes of criminal proceedings is regulated in the Electronic Communications Act (ZEK-HR)[103] and the ZKP-HR. According to Article 109 ZEK-HR, operators of public communication networks and publicly available electronic communications services are obliged to retain data on electronic communications to enable the investigation, detection, and prosecution of criminal offenses in accordance with a specific law in the field of criminal procedure, and protection of

[98] *Ibid.*, para. 44.

[99] *Zakonom o elektronskih komunikacijah* (ZEKom-A, Uradni list, no. 129/06) replaced by a new law (ZEKom-1, Uradni list, no. 109/12 and 110/13).

[100] Now Articles 149.b – 149.e ZKP-SI.

[101] See *Bardutzky*, S., 'The Timing of Dialogue: Slovenian Constitutional Court and the Data Retention Directive', Verfassungsblog (10 Sep. 2014), <https://verfassungsblog.de/timing-dialogue-slovenian-constitutional-court-data-retention-directive/>, accessed 16 Nov. 2021.

[102] Slovenian Constitutional Court, Judgment of 9 Oct. 2019, No. Up-709/15, Up-710/15.

[103] *Zakon o elektroničkim komunikacijama*, Narodne novine no. 73/2008, 90/2011, 133/2012, 80/2013, 71/2014, 72/2017.

defence and national security in compliance with specific laws in the area of defence and national security. The data must be kept for a period of twelve months from the day of communication. This framework was not changed since the introduction of the Electronic Communications Act in 2008, but the CJEU case-law had an impact on the ZKP-HR. Under the influence of the judgment in joined cases C-293 and C-594/12, annulling the Directive 2006/24/EC, the possibility of 'checking of the establishment of telecommunication contact' under Article 339a(1) ZKP-HR was limited.[104] The aim of the measure is to check the identity, duration and frequency of communication with particular electronic communication addresses, to determine the location of a communications device and the location of persons establishing electronic communication and to identify the device. Before the amendment, it was possible to conduct this evidentiary action for all criminal offences for which criminal proceedings are instituted *ex officio.* Since then, Article 339a(1) ZKP-HR is only applicable to criminal offences listed in Article 334 ZKP-HR for which special evidentiary actions, such as covert surveillance and technical recording, can be ordered, and other criminal offences punishable by imprisonment for a term of more than five years. The measure is ordered by the judge of the investigation upon the request of the state attorney, or by the state attorney in cases of urgency, but it must be validated within 24 hours by a judge (Article 339a(3) to (6) ZKP-HR). The research among Croatian state attorneys has shown that in principle they did not encounter any problems with requests for retained data, when acting both as issuing or executing authority.[105]

The two systems show a contradictory approach to the issue of data retention. However, for a well-functioning EIO or another cross-border system and to avoid forum shopping or issues of (non)admissibility common EU rules are necessary. A 'checkerboard approach' of opposite solutions inside the same legal area is not beneficial. It should be clear if and to what extend a data retention system is admissible, or at what point the Commission would start infringement proceedings against Member States having inadmissible systems in place. Such common rules do not need to force all Member States do adopt data retention in view of different national constitutional sensitivities. But they should apply once a Member State decides to do so, if such a system is permitted under its Constitutional Law. Such clear rules on data retention would clarify that information/evidence coming from another Member State is at least in line with basic EU data protection and privacy rules. Thus, avoiding temptations of forum shopping. In that regard debates are on-going.[106]

[104] Explanation of the amendments of the CPA: Ministarstvo pravosuđa, Prijedlog Zakona o izmjenama i dopunama Zakona o kaznenom postupku, s konačnim prijedlogom zakona, Zagreb, Oct. 2014.

[105] EIO-LAPD National Report: Croatia, p. 34 <https://lapd.pf.um.si/materials/>, accessed 9 May 2022.

[106] See, for example, Portuguese presidency, WK 2732/2021 INIT (26 Feb. 2021); EDRi, Europe's Data Retention Saga and its Risks for Digital Rights Europe's Data Retention (2 Aug. 2021), <https://edri.org/our-work/europes-data-retention-saga-and-its-risks-for-digital-rights/>, accessed 22 Nov. 2021.

V. Conclusions

As shown above the EIO achieved a good balance between efficiency and fundamental rights protection in cross-border cases. Practitioners are confirming this. In addition, it finished the multilayer system of cross border instruments and replaced it with one coherent instrument (excluding only JITs). However, the e-evidence proposal and the EPPO Regulation are reversing this trend with additional cooperation possibilities fragmenting again the area of cross-border evidence gathering. It is deplorable that new solutions such as for a speedier procedure for e-evidence were not included inside the EIO with a new specific regime and article with possible shorter deadlines and specific rules. The new proposed mechanisms and instruments on e-evidence also open significant and serious legal questions regarding the role of private providers as law enforcement partners and fundamental rights obligations on the respective national territory. The current system of rule of law in the EU is in a crisis modus as shown by Art. 7(1) TEU procedures and the Commission's annual rule of law reports. In addition, systems of direct cooperation or automatic mutual recognition are pre-mature without clarification of several significant issues beforehand such as admissibility of evidence and data retention. Without such common rules a more automatic system cannot function without significant frictions and to the detriment to the rights of the defence. The EIO is the only logical tool of cooperation, taking into account the stage of EU integration in the field of EU criminal law.

Part III

Short Comments

Comments re *Gavanozov I* and *Gavanozov II*

By *Jan Stajnko, Mário Simões Barata* and *István Szijártó*

I. A New CJEU Decision Regarding the EIO Form

Jan Stajnko and Mário Simões Barata

Recently, the CJEU got its first chance to interpret a provision of the Directive 2014/41/EU regarding the European Investigation Order in criminal matters.

The ruling (C-324/17, Gavanozov, 24 October 2019)[1] concerns difficulties which the Specialised Criminal Court of Bulgaria encountered difficulties in completing Section J of the EIO form set out in Annex A to Directive 2014/41, which deals with legal remedies. The referring court noticed that Bulgarian law does not provide for any legal remedy against decisions ordering a search, a seizure or the hearing of witnesses.

The referring court in Bulgaria therefore asked, 'in essence, whether Art. 5(1) of Directive 2014/41, read in conjunction with Section J of the form referred to in Annex A to that directive, must be interpreted as meaning that the judicial authority of a Member State must, when issuing an EIO, include in that section a description of the legal remedies, if any, which are provided for in its Member State against the issuing of such an order'.

The CJEU ruled that 'the issuing authority does not, when issuing an EIO, have to include in Section J of the form set out in Annex A to Directive 2014/41 a description of the legal remedies, if any, that are available in its Member State against the issuing of such an order'. The CJEU offered a pragmatic solution to the case which differs quite substantially from the opinion of AG *Bot* of 11 April 2019.[2]

AG noticed that 'inability in Bulgaria of a third party subject to investigative measures such as searches or seizures to challenge the substantive reasons behind those measures is a blatant lack of effective protection of that right'. His conclusion was that if no remedies exist in the issuing State, the form cannot be completed and the EIO therefore not issued.

[1] CJEU, Judgement of 24 Oct. 2019, No. C-324/17 (*Gavanozov*), ECLI:EU:C:2019:892.

[2] CJEU, Opinion of Advocate General Bot of 11 Apr. 2019, No. C-32417 (*Gavanozov*), ECLI:EU:C:2019:312.

Legal scholars are pointing out[3] that this ruling (once again) brought to light the somewhat troubling relationship between mutual trust and fundamental rights. They are warning of 'the risks of shifting from mutual legal assistance to mutual recognition, including that of increasing the difficulties for the defence to challenge evidence collected abroad'.

II. The Fundamental Rights Objections

Mário Simões Barata and Jan Stajnko

In Chapter 1 II. we commented on the CJEU's first ruling on the European Investigation Order (EIO) in Case C-324/17, Gavazonov, 24th October 2019, and pointed out to the fundamental rights objections in the Opinion of the Advocate General Yves Bot of 11 April 2019 and the criticisms expressed by legal scholars.

The CJUE ruled that the national issuing authority does not have to include a description of the legal remedies available in the issuing State to challenge an EIO when it fills out Section J of the form that can be found in the Annex to the EIO Directive. This interpretation of Article 5(1) and points i) and ii) of Section J of the form is based on a textual reading of the legal norms as well as a teleological analysis of the EIO Directive (2014/41/EU).

However, the Advocate General 'took a road less travelled by' and arrived at a very different conclusion. The AG's approach adopts a systematic reading of the EIO Directive and concludes that EIO Directive requires that anyone who has been the subject of a search, seizure, or questioning has the right to a legal remedy to challenge the substantive reasons subjacent to the decision that ordered the investigate measure.

In Case C-324/17, the Bulgarian Code of Penal Procedure does not foresee a legal remedy or a safeguard to challenge a judicial decision that orders a search or seizure. Therefore, it does not comply with fundamental rights laid down in the European Convention on Human Rights nor is in line with the Charter of Fundamental Rights of the European Union (CFREU).

In the Opinion of the AG Bot the Bulgarian legislation is contrary to Article 47 of the CFREU. He considers that Article 14 of the EIO must be interpreted in a sense that the national judicial authority of an issuing State cannot resort to an EIO if its domestic legislation does not consecrate a legal remedy designed to challenge the grounds for requesting an investigate measure.

[3] *Simonato*, M., 'Mutual recognition in criminal matters and legal remedies: The first CJEU judgment on the European Investigation Order', European Law Blog (1 Apr. 2020), <https://europeanlawblog.eu/2020/04/01/mutual-recognition-in-criminal-matters-and-legal-remedies-the-first-cjeu-judgment-on-the-european-investigation-order/>, accessed 27 January 2022.

The AG's Opinion and the comments made by legal scholars raise an important issue that is tied to the necessity of protecting fundamental rights when an investigative measure is ordered which can be considered to be intrusive and susceptible of violating the rights of the persons involved. Furthermore, the CJEU's ruling is criticized for having preferred expediency and the celerity of judicial cooperation in penal matters.

In sum, the necessity to observe fundamental rights at both the domestic and European level may require a legislative alteration to the EIO Directive to rebalance the interests involved.

III. Considerations Regarding the *Gavanozov II* Case Before the CJEU

Szijártó István

Scholars already pointed out in this monograph that the EIO has far-reaching consequences for the protection of fundamental rights (see Part II Chapters 2 and 5). It is a procedural legal instrument based on the principle of mutual recognition, aiming to enhance judicial cooperation between Member States in criminal matters, specifically in the phase of investigation. As such it necessarily has a nature of constricting human rights to a certain extent. This could be observed in the *Gavanozov I* case brought before the Court of Justice of the European Union (CJEU) as well. In the criminal proceedings brought against I. D. Gavanozov the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) first decided to issue an EIO in which it requested Czech authorities to execute searches of home and business premises and seizure of certain items. However, the Bulgarian court also decided to initiate a preliminary ruling procedure since it found that the Bulgarian implementation of the EIO directive does not allow for challenging the substantive reasons of issuing an EIO if it concerned the above-mentioned investigative measures.

Its question referred to preliminary ruling concerned if the Bulgarian implementation of the EIO directive allowing legal remedies regarding the issuing of an EIO is in line with the right to an effective legal remedy and the directive itself if it precludes a challenge with regard to certain investigative measures, for example the search of home and business premises and the seizure of items. The underlying issue is that the Bulgarian implementation regulates legal remedies regarding the EIO much like legal remedies provided in a similar domestic case and its legislation on criminal procedure does not allow to challenge the issuing of all kinds of investigative measures but just a constricted number of them.

It is clear, that the above-mentioned investigative measures necessarily violate – or rather constrict – the right to respect for the private and family life of persons involved in the criminal procedure. However, such limitation of a fundamental right

must be necessary and proportionate to the aim of the criminal procedure. Fulfilling these requirements is safeguarded by the right to effective legal remedy in cases when the intrusion of State actions into the private life of concerned persons is of a considerable nature capable of having adverse effects as well. This safeguard is lacking in the case in question. This is not a Bulgarian speciality. Hungarian legislation also operates with a similar rule on legal remedies regarding the issuance of an EIO. It only allows to challenge the lawfulness of issuing an EIO if the investigative measure requested in it could be challenged in a similar domestic case. Thus, it also provides a somewhat limited scope of legal remedies in comparison with the scope of the EIO (however wider than its Bulgarian counterpart). This brings us to the rather problematic conclusion that the right to legal remedies against the issuing of an EIO is of varying nature according to which Member State issued it.

Thus, the assignment for the CJEU was clear. It needed to decide whether such legislation violated either the right to respect for private life or the right to effective legal remedies or not. The Luxembourg court avoided doing so in the *Gavanozov I* case by reformulating the question referred to it. Nevertheless, it should be noted that AG Bot considered such national legislation transposing the EIO directive to be in violation of Art. 47. Of the CFR, the right to an effective legal remedy.

However, after a closer look at the case-law of the CJEU it does not come as a surprise that it avoided answering the question. Since the principle of mutual recognition has only been applicable during the phase of criminal investigations for a couple of years by the time it needed to deliver the preliminary ruling in the Gavanozov I case it did not have case-law on the underlying issue. Of course there is the case-law of the European Court of Human Rights (ECtHR) which dealt with the issue in a series of cases of which there is a landmark decision delivered in the *Posevini v. Bulgaria*[4] with a quite similar underlying criminal procedure. The defendants turned to the Strasbourg court since searches of their homes and business premises as investigative measures could not be challenged according to Bulgarian criminal procedure. The ECtHR found that such legislation violates the right to an effective remedy (so this specific fundamental right's violation may be found in the context of violating another fundamental right, *e. g.* the right to respect for private life). This is an obvious indication if the right to legal remedies was violated in the *Gavanozov* case.

Since the CJEU avoided answering the question referred to it in the *Gavanozov I* case the Bulgarian court initiated another preliminary ruling procedure with a slightly different question in the beginning of 2020:

'Is national legislation which does not provide for any legal remedy against the issuing of a European Investigation Order for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41/EU 1 and

[4] ECtHR, Judgement of 19 Jan. 2017, No. 63638/14 (*Posevini v. Bulgaria*), ECLI:CE:ECHR:2017:0119JUD006363814.

with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 of the ECHR?

Can a European Investigation Order be issued under those circumstances?'

The CJEU delivered its judgement in the Gavanozov II case in November, 2021. The judgement dealt with the Bulgarian Criminal Code, more specifically its rules on the legal remedies against those investigative measures ordered in the EIO in question. It referred to the case of of the ECtHR, namely the Posevini v. Bulgaria to establish that indeed such legislation violates the right to an effective legal remedy. However, in answering the second question, the Court did not find the fundamental rights-based refusal ground applicable since it found that it cannot be applied in cases when the EIO is a fortiori in violation of fundamental rights. Instead, the Court ruled that Bulgaria is excluded from issuing EIOs ordering such investigative measures which cannot be legally challanged until it modifies its legislation on the issue.

In conclusion authors mainly emphasise that most legal issues which could be encountered in the framework of criminal justice cooperation points in the direction of a badly needed minimum harmonisation regarding the core concepts and instruments of criminal procedure. The *Gavanozov* cases show us that minimum harmonisation is needed regarding the right to legal remedies against the EIO as well since the varying nature of legal remedies provided by Member States could only be effectively solved with such an approach.

Comments re *Parquet de Lübeck*

By *Peter Rackow, Elizabeta Ivičević Karas, Zoran Burić, Marin Bonačić* and *Aleksandar Maršavelski*

I. General Advocate's Opinion on the Eligibility of Prosecutors to Issue European Investigation Orders (C-584/19)

Peter Rackow

In Case C-584/19, the Advocate General delivered his opinion.[1] At the heart of the case lies an EIO issued by the Public Prosecutor's Office in Hamburg, which requested the transfer of certain data from an account held in Austria. As the obtaining of such information under Austrian law requires a court authorization, the Vienna Public Prosecutor's Office filed an application with the Landesgericht für Strafsachen Vienna (Austria).

In view of the ECJ decision on the status of the German Public Prosecutor's Offices in the context of the European Arrest Warrant, the Landesgericht had reservations as to whether the Hamburg public prosecutor's office issuing the warrant was at all eligible as an 'issuing authority' within the meaning of Article 2(c)(i) of the Directive on the European Investigation Order. Famously, the ECJ has decided that Public Prosecutor's Offices, being subject to an external (ministerial) right of instruction, must cease to be issuing judicial authorities within the meaning of Art. 6 of the Council Framework Decision on the European Arrest Warrant. For under these circumstances there is no guarantee of sufficient independence.[2] The Federation of German Judges had prognosticated already (with understandably worried undertone) that the ECJ will not decide differently regarding the European Investigation Order.[3]

However, the opinion of Advocate General Campos Sánchez-Bordona of 16 July 2020 now clearly opposes a parallelisation of the European Arrest Warrant and the European Investigation Order: Both in national proceedings and in the context of the European Investigation Order, it is not so much 'the origin of the request' that is de-

[1] CJEU, Opinion of Advocate General Campos-Sánchez-Bordana of 16 July 2020, C-584/19 (*Staatsanwaltschaft Wien*), ECLI:EU:C:2020:587.

[2] ECJ, Judgement of 27 May 2019, C-508/18 (*OG*) and C-82/19 (*PI*), ECLI:EU:C:2019:456, para. 73 ff.

[3] <https://www.drb.de/fileadmin/DRB/pdf/Stellungnahmen/2020/DRB_200504_Stn_Nr_5_Unabhaengigkeit_StA.pdf>, accessed 13 Jan. 2023.

cisive as the fact that it is reviewed independently by the Landesgericht (paras. 21 ff., 26). Yet, this could also be explained with regard to the procedure for European Arrest Warrants issued by public prosecutors. Be that as it may, the further considerations of the Advocate General, which can be summarized to the effect that the Directive on the European Investigation Order and the Framework Decision on the European Arrest Warrant are sufficiently different in terms of content, subject matter and structure for a uniform understanding of the term 'issuing (judicial) authority' to be hermeneutically enticing, but ultimately inappropriate (para. 36–37), carry a lot of weight:

First of all, the European Arrest Warrant compared with the European Investigation Order provides for much more serious infringements of subjective rights (para. 42). In addition, the law of evidence of the Member States is particularly heterogeneous, which is clearly reflected in the directive (para. 47 ff.). Thus the formula 'in accordance with national law, or similar' is repeatedly found (para. 52). Furthermore the EU legislation had been aware 'of the great diversity of public prosecutor's offices in existence in the different Member States' (para. 55) 'and there is nothing to suggest – on the contrary – that the EU legislature would opt to lay down that (new) requirement' of a prosecutor's office independence from the executive (para. 57). It should also be borne in mind that, compared with the European Arrest Warrant, the executing authorities have greater leeway, for example they can use measures other than those requested (para. 59). And where the executing State considers it appropriate, the requested measures must be subject to judicial review in the executing State (63). Finally, the obligation of the issuing authorities to guarantee the protection of the rights of the person concerned must also be taken into account (para. 73).

After all this, concluded the Advocate General, the fact that a public prosecutor's office can be subject to individual instructions from the executive is not sufficient to exclude it from the group of authorities issuing European Investigation Orders (para. 91).

Whatever the decision of the ECJ will be. In any case, the Advocate General has provided important impulses for a decidedly differentiated understanding of the different legal instruments based on the principle of mutual recognition. The deeper reason why it seems indeed to be inappropriate to assume a uniform concept of judicial authority appears to be that there is likewise no uniform principle of mutual recognition.

II. ECJ Grand Chamber Judgment on the Eligibility of Prosecutors to Issue European Investigation Orders (C-584/19)

Peter Rackow

On 8th of December 2020, the European Court of Justice ruled that public prosecutors' offices can still be judicial or issuing authorities within the meaning of Articles 1(1) and 2(c) of the Directive regarding the European Investigation Order in criminal matters (EIO), 'regardless of any relationship of legal subordination that might exist between the public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order'[4].

As is well known, the ECJ ruled to the contrary in the context of the European Arrest Warrant the year before (ECJ, Judgment of 27th May 2019 – C-508/19 and C-82/19). Yet, the EIO of course does not concern measures involving deprivation of liberty. In this respect, it was obvious to focus on the circumstance that the infringement associated with EIO-based investigative measures is characteristically less far-reaching than deprivations of liberty in the context of the European Arrest Warrant. This point of view is indeed addressed by the ECJ, although it remarkably appears to be of only secondary importance. (para. 73). Instead, the ECJ first argues with the wording of the Directive (paras. 50–55). Indeed, especially Article 2(c)(i) EIO-Directive explicitly speaks of the possibility for public prosecutors to be issuing authorities, without it being made clear from the wording that only those public prosecutors' offices are meant which are not subject to any external right of instruction (para. 54). The focus of the ECJ's argumentation then lies on the issuing State's obligations to examine (paras. 56–63) and on the powers of the executing State (paras. 64–68).

It is noteworthy that the ECJ, in the context of its main considerations, only deals with the underlying principles of the EIO in a rather parenthetical manner (para. 64): 'although the EIO is indeed an instrument based on the principles of mutual trust and mutual recognition', the Directive nevertheless 'allow the executing authority and, more broadly, the executing State to ensure that the principle of proportionality and the procedural and fundamental rights of the person concerned are respected'. There is nothing to suggest that this merely refers to the proportionality and procedural or constitutional legality of the *execution* of the requested measure. On the contrary, the idea that the public prosecutor's office in the issuing State may be bound by instructions is ultimately harmless precisely because there are extensive possibilities for scrutiny in the executing state only makes sense if these include the *decision on the issuing* of the EIO. In the end, in the passage in question, the ECJ is bowing to an insight that had previously been expressed quite clearly in the explanatory memoran-

[4] CJEU, Grand Chamber Judgement of 8 Dec. 2020, No. C-584/19 (*Staatsanwaltschaft Wien*), ECLI:EU:C:2020:1002, para 76.

dum of the German transposition law: The EIO-Directive ultimately is not a legal instrument based in any *substantial* way on the principle of recognition or mutual trust. In the words of the German explanatory memorandum 'the actual details of the EIO Directive mean that the cross-border collection of evidence between the Member States of the European Union will continue to follow the rules of classical mutual assistance to a large extent'[5].

If this was not true and the EIO-Directive was in fact substantially based on the principle of mutual recognition and on that of mutual trust instead, what would then justify the surprisingly far-reaching possibilities of examination (or refusal) by the executing state? Why are these possibilities suddenly important if mutual trust can be assumed?

In any case, an answer to these questions is quite a difficult one if one hopes for an answer that is free of the typical dose of European-Criminal-Law-verbiage. In the real world, however, this side of 'phantasmagoria'[6], the principle of mutual recognition with its business basis of mutual trust appears to have disintegrated at the proving ground of the law of evidence.

Of course, all this does not mean the end of the – absolutely imperative – cooperation of the EU states in the field of mutual legal assistance in criminal matters. However, in view of the experience that has been gained in the meantime, it should be kept in mind that the problem-solving or legitimising potential of the principle of mutual recognition is quite limited: The fact that, from the ECJ's point of view, public prosecution offices subject to instructions can be judicial authorities within the framework of the EIO has little to do with the fact that the EIO is based on the principle of mutual recognition, but rather with the concrete design of the legal instrument, has now made this abundantly clear. All this should not be lost sight of, especially in connection with legal assistance with regard to e-evidence.

III. The Effects of the ECJ *Parquet de Lübeck* Judgement on Croatian Criminal Justice System

Elizabeta Ivičević Karas, Zoran Burić, Marin Bonačić
and Aleksandar Maršavelski

In its judgement in joined cases *C-508/18 (Parquet de Lübeck) and C-82/19 PPU (Parquet de Zwickau)* which was delivered on 27 May 2019, the European Court of

[5] BT-Drs. 18/9757, p. 17: <https://dserver.bundestag.de/btd/18/097/1809757.pdf>, accessed 13 Jan. 2023, original: 'führt allerdings die tatsächliche Ausgestaltung der EIO-Directive dazu, dass die grenzüberschreitende Beweiserhebung zwischen den Mitgliedstaaten der Europäischen Union auch künftig in weiten Teilen den bisherigen Regeln der klassischen Rechtshilfe folgt'.

[6] *Ambos*, K., European Criminal Law (Cambridge et al.: Cambridge University Press, 2018), p. 436.

Justice found that the German Public Prosecutor does not qualify as an 'issuing judicial authority' within the meaning of Art. 6(1) of the Framework Decision on the European Arrest Warrant. Art. 6(1) of the Framework Decision defines the meaning of the term 'issuing judicial authority' thereby determining which national authority may be considered competent to issue a EAW. Therefore, the Court concluded that the German Public Prosecutor may not be considered such an authority and that there is no obligation for the executing judicial authority to act upon a EAW issued by the German Public Prosecutor. The Court came to this conclusion due to close links of the German Public Prosecutor to the authorities of the executive branch of the government.

Due to those close links, the German Public Prosecutor may be in a risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant. What the German Public Prosecutor is missing in order to be considered an issuing judicial authority are guarantees of independence from the executive. This judgement of the European Court of Justice drew a lot of attention and questions were raised how far-reaching are its consequences in the context of judicial cooperation in criminal matters in the European Union. Especially, does the conclusion of the European Court of Justice mean that any public prosecutor, in any Member State of the EU, may not fall within the concept of issuing judicial authority in the context of Art. 6(1) FD EAW. Here, we take a look at the consequences of this judgment for the Croatian Public Prosecutor.

In Croatia, the functions of the public prosecutor are performed by the State Attorney's Office which acts on the level of its central office (Office of the State Attorney of the Republic of Croatia) and on the regional (Office of the County State Attorney) and local (Office of the Municipal State Attorney) level. In Croatia, State Attorneys do have the competence to issue EAWs, which is defined in Art. 6(1) of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union. They share this competence with the courts. However, having in mind the constitutional position of the State Attorney's Office in Croatia, the conclusion must be reached that their position is not comparable with the position of the public prosecutors in Germany.

In Croatia, state attorneys (and their deputies) are not exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister of Justice, in connection with the adoption of a decision to issue a European arrest warrant. Under Croatian Constitution (Art 121.a), State Attorney's Office is an autonomous and independent judicial body empowered and duty-bound to instigate prosecution of perpetrators of criminal and other offences, to initiate legal measures to protect the property of the Republic of Croatia and to apply legal remedies to protect the Constitution and law. The State Attorney General is appointed by the Parliament (at the proposal of the Government of the Republic of Croatia and following a prior opinion of the relevant committee of the Croatian Par-

liament). Deputy state attorneys are appointed, dismissed, and their disciplinary accountability is determined by the State Attorney's Council. Constitutional and statutory provisions in Croatia safeguard the autonomy and independence of the State Attorney's Office and exclude the possibility that the state attorneys are exposed, directly or indirectly, to directions or instructions in a specific case from the executive. Therefore, the ECJ-Judgement of 27 May 2019 in joined case C-508/18 and C-82/19 PPU does not affect the Croatian system and there is no need to exclude Croatian state attorneys from the concept of issuing judicial authority in the context of judicial cooperation based on the EAW.

Another question should be considered – what are the effects of the judgement of the European Court of Justice in the context of judicial cooperation which is based on the European Investigation Order. Should the same standards, which apply in the context of judicial authority pursuant to FD EAW also apply in the context of issuing authority pursuant to Directive EIO? Pursuant to Art. 2(c) of the latter, issuing authority is a judge, a court, an investigating judge or a public prosecutor competent in the case concerned, or any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. From the above, it can be concluded that the concept of the issuing authority in the context of the EIO is a very broad one and may include all the investigating authorities, including the police authorities. However, the same standards which apply in the context of judicial cooperation based on the EAW should not, in general, apply in the context of the EIO. The basic difference is at what is at stake in these two instruments of judicial cooperation and to what level it is at stake. With the EAW it is the deprivation of the right to liberty, and with the EIO, there is a variety of rights (such as privacy and property) and a variety of levels of intrusions into those rights which are at stake. Therefore, in the context of the EIO a much more differentiated approach is needed. And very well, in the context of the most intrusive evidence gathering actions in the context of the EIO, such as those which are undertaken secretly and over a long period of time, it would be reasonable to expect that the above mentioned standards established in the context of the issuing judicial authority in the framework of the cooperation based on EAW, also apply in the context of issuing authority in the framework of cooperation which is based on the EIO. From the perspective of the Croatian criminal justice system, this is not a problem, since the most intrusive evidence-gathering actions may be undertaken only based on a warrant issued exclusively by the court.

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