



# **“D3.2 Methodology guideline to compile judicial practices related to evidence transfer in Spain, Italy and Poland”**

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## **WORKSTREAM 2 – PHASE 2**



**Best practices for EUROpean COORDination on investigative measures and evidence gathering**



**EUROCOORD**

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## Table of Contents

Section 1: Research objectives.....	4
1.1 Introduction .....	4
1.2 Target subjects .....	4
Section 2: Current situation (general terms) .....	4
2.1 Legal issues.....	4
2.1.1. Current legal instruments .....	5
2.1.2. Strengths and weaknesses of the system .....	6
2.1.3. Differences regarding the application of the legal instruments .....	6
2.2: Practical issues .....	6
Section 3: Steps towards a model shift in evidence gathering and transmission .....	7
3.1 In the meantime: the applicable legal regime in case of delayed transposition of the EIO Directive .....	7
3.2 Glimpsing the future: what is expected on the EIO? .....	7
Conclusions .....	8
Common methodology for country reports .....	8
Case Law.....	8
European Court of Justice .....	8
European Court of Human Rights .....	8
National jurisprudence .....	8
References .....	8
Journal articles .....	8
Electronic journals.....	9
Book Chapters .....	9
Books.....	9
Abbreviations and Acronyms .....	<b>¡Error! Marcador no definido.</b>

## Section 1: Research objectives

### 1.1 Introduction

The correct application 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, can only be successful if we assume as a starting point previous experiences in judicial cooperation, both in terms of mutual assistance and the application of legal instruments of mutual recognition.

The objective of this Workstream 2 is to approach the actual state of cooperation at the present time distinguishing two levels, the normative and the functional one. That could be a useful way to glimpse practical problems that will appear with the implementation of the Directive in all Member States.

For this purpose, present research work should detect gaps and be useful to rebuild a common roadmap in order to promote best practices in judicial cooperation from a “due process of law” point of view in order to elaborate a further Code of Practice (WS3).

In addition, it should be considered that, despite it is focused in Italy, Spain and Poland, its outputs must be transferable to the rest of EU Member States.

### 1.2 Target subjects

In order to achieve evidence-based research results our work must be based on the qualitative assessment of restructured data, collected through interviews with members of several focus groups. It should develop a comprehensive qualitative analysis involving professionals of the legal system and judicial institutions, including judges, public prosecutors, defence lawyers and other stakeholders.

Research and interviews will take place under a systematic approach to ensure the scientific validity of the outputs. To this end, two types of questionnaires have been elaborated and handled: a) addressed to judges and prosecutors; b) addressed to defence lawyers.

It should be useful to obtain three types of information:

- 1) Training and practical experience of the interviewed person in European (and international) judicial cooperation. This content is particularly relevant in the case of judges and prosecutors.
- 2) Personal opinions on various aspects related to the cross-border evidence: most commonly used legal instruments, management of some investigation techniques (in particular aspects of the lawful interception of communications), opinions on the costs derived from cooperation, etc.
- 3) Expectations placed on the new system that will be generalized with the European Investigation Order.

## Section 2: Current situation (general terms)

### 2.1 Legal issues

The European Investigation Order will probably become the most relevant initiative in the field of mutual recognition mechanisms between EU Member States. Since it establishes common procedures



for evidence gathering, transmission and admissibility by recognizing foreign judicial decisions, it contains a more efficient way than the previous provisions employed till the moment, mainly Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000 (henceforth MLA 2000).

Member States were requested to adopt by 22 May 2017 the necessary transposition measures to comply with Directive 2014/41/EU regarding the European Investigation Order in criminal matters. From this date it will replace the corresponding provisions of three Conventions applicable between the 26 Member States that are bound by the EIO Directive -Article 34(1)-:

- a) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959;
- b) Convention Implementing the Schengen Agreement of 14 June 1985;
- c) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000 (henceforth MLA 2000).

It also replaces the provisions of Framework Decision 2003/577/JHA of as regards freezing of evidence -Article 34(2)-.

It is called to be in the future the usual way to conduct cross-borders criminal investigations, without the limitations of the above mentioned current mutual legal assistance instruments, which will be replaced.

In this context it must be taken into account:

### **2.1.1. Current legal instruments**

Our First step will be to check the most used normative instruments in gathering and transmitting evidence in criminal matters, which should be replaced (or complemented) by the Directive 2014/41/EU.

It is assumed as a hypothesis to be verified, that those instruments are the same as stated in Article 34 of the EIO Directive, regarding the differences between both ways of judicial cooperation:

a) Mutual legal assistance: Article 34(1) :

- (a) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959;
- (b) Convention implementing the Schengen Agreement of 14 June 1985;
- (c) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000 (henceforth MLA 2000).

b) Mutual recognition: Article 34(2) :

- (a) Framework Decision 2008/978/JHA (European Evidence Warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters - Repealed by Regulation (EU) 2016/95 of the European Parliament and of the Council of 20

January 2016 repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters)

(b) Framework Decision 2003/577/JHA (of as regards freezing of evidence)

### **2.1.2. Strengths and weaknesses of the system**

Final assessment must be able to detect and show strengths as well as and weaknesses of the system from the normative point of view: regulatory gaps and lacks, contradictions, etc. In particular it must be verified if it is to appreciate a loss in the level of procedural guarantees in relation with the national criminal proceedings. e.g. in legal assistance, privilege against self-incrimination, presumption of innocence ,etc.

It would be useful to verify eventual intersections between the use of this legal instruments and those related to the European Arrest Warrant. About the latter there is already a *corpus* of case law which must be kept in mind.

### **2.1.3. Differences regarding the application of the legal instruments**

There must be considered questions regarding the applicability (or not) of the respective normative instruments in the Member States.

For instance, the 2000 Convention was not in force in Italy until a very recent date and it is not yet in force in Croatia, Greece and Ireland. By contrast, Spain ratified the 2000 Convention immediately, but has not yet ratified the second protocol to the 1959 Coe Convention, which has a very similar content.

## **2.2: Practical issues**

It is necessary to be in a position to know how the application of those normative instruments has functioned in the judicial praxis (in which countries). Among other aspects, the following should be considered:

- Where have they worked and where they have to be improved?
- Are directly applicable or require protocols and agreements between the different actors?
- Are they used in administrative procedures with judicial review (considered criminal matters)
- Which role does it play the principle of proportionality?
- etc.

Also in particular it must be considered following issues:

- Lack of coordination due to the absence of common procedures and protocols, which depend on the national law, going place to no homogeneous procedural rules for evidence gathering and transmission. A good example could be the trans-border statement by suspects, witnesses and experts (admissibility or not, videoconference, presence or not of lawyer in the requiring or in the requested State, etc.)

- Problems related to the trans-border evidence-gathering and the admissibility of investigative measures as they are differently adopted in each Member State,
- Time and delays in the different proceedings

## Section 3: Steps towards a model shift in evidence gathering and transmission

### 3.1 In the meantime: the applicable legal regime in case of delayed transposition of the EIO Directive

Almost one year after the deadline (22 May 2017) the implementation of Directive 2014/41/EU is still not completed (Status at Almost one year after the deadline (22 May 2017) the implementation of Directive 2014/41/EU is still not completed ( Status at <https://webcache.googleusercontent.com/search?q=cache:6rKK33Mp2usJ:https://db.eurocrim.org/db/en/doc/2869.pdf+&cd=3&hl=it&ct=clnk&gl=es> ). In preparation for the late transposition of the EIO Directive by some Member States, must be taken into account if the legislation in every Member State has foreseen provisions which would allow for the application of the MLA Conventions with Member States that have not transposed the Directive.

On the other side, it must be known if Member States that have not yet transposed the EIO Directive are applying the EIO regime to the maximum possible extent, e.g. regarding time limits, when executing a request from a Member State that has yet transposed the Directive.

Practitioners have started apparently applying a pragmatic and teleological approach in order to ease eventual problems in the transitional period of time. It should be verified.

Please use as reference Council doc 9936/17 LIMITE, Annex II (Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive. Available at <http://data.consilium.europa.eu/doc/document/ST-9936-2017-INIT/en/pdf>)

### 3.2 Glimpsing the future: what is expected on the EIO?

National reports a judicial practice as foreseen in present WS2 must also reflect the expectations and forecasts of the subjects interviewed. With this premise, several aspects should be taken into consideration. By way of example, there must be mention of issues such as the following:

- Changes in the willingness of the judicial cooperation actors
- Needs to be considered (improvements in material and human resources)
- Consequences (advantages and disadvantages) of the unification of several legal instruments
- Management of aspects not addressed by the EIO Directive: a) those that are already in the current legal instruments; b) those that are not.
- etc.

## Conclusions

Some conclusions should be drawn up (around 10) in separate and numbered paragraphs, allowing a quick approach to the content of the report.

## Common methodology for country reports

### Case Law

#### European Court of Justice

ECJ, 26 February 2013, Melloni, C-399/11

ECJ, 5 April 2016, Aranyosi and Căldăraru Joined Cases, C-404/15 and C-659/15 PPU

Consider the use of the useful information supplied by the EJN: <https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=8&QL=0>

#### European Court of Human Rights

ECtHR, GC, 20 October 2015, Dvorski v. Croatia, appl. no. 25703/11

Consider the use of the document 'Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matters (updated to 30 January 2017)', available at <https://rm.coe.int/16806ee1c9>

#### National jurisprudence

Concerning national jurisprudence the analysis should be limited to case law of Constitutional Courts and Supreme Courts. E.g.:

Spain: STC 123/2018, de 22 de enero / STS (2ª) 145/2018, de 2 de febrero

Italy: C. cost., 7 May 2008, n. 143 / Cass., Sez. un., 30 January 2007, Ramoci, n. 4614, Rv. 235351 / Cass., 13 September 2005, Hussain, n. 33642, Rv. 232118

### References

#### Journal articles

Author name (s), title of publication, year, source, page number;

M. CAIANIELLO, 'La nuova Direttiva UE sull'ordine europeo di indagine penale tra mutuo riconoscimento e ammissione reciproca delle prove', 2014 *Proc. pen. giust.*, p. 1 ff.;

L. BACHMAIER, 'Towards the transposition of Directive 2014/41 regarding the European Investigation Order', 2015 (2) *Eucrim*, p. 47 ff.

M. JIMENO-BULNES,

A.L.

## Electronic journals

Author name (s), title of publication, source, year;

G. DE AMICIS, 'Limiti e prospettive del mandato europeo di ricerca della prova', [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 5 April 2011

## Book Chapters

Author name (s), title of publication, source, publisher, year, page number;

G. DARAIO, 'La circolazione della prova nello spazio giudiziario europeo', in L.Kalb (ed.), *Spazio europeo di giustizia e procedimento penale italiano*, Giappichelli, 2012, p. 580 ff.;

## Books

Author name (s), title of publication, publisher, year;

M.R.MARCHETTI, *L'assistenza giudiziaria internazionale*, Giuffrè, 2005.

## Abbreviations and Acronyms

AFSJ	Area of Freedom, Security and Justice
AN	<i>Audiencia Nacional</i> (National Court )
AAN	Order by National Court
AFSJ	Area of Freedom, Security and Justice
AP	<i>Audiencia Provincial</i> (Provincial Court)
appl./appls.	application/applications
Art.	Article
BOE	<i>Boletín Oficial del Estado</i> (Spanish Official Journal)
BOCG	<i>Boletín Oficial de las Cortes Generales</i> (Official Journal of the Spanish Parliament)
CE	<i>Constitución Española</i> (Spanish Constitution)
CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of the European Union
DEIO	Directive on European Investigation Order
EAW	European Arrest Warrant



## EUROCOORD

EAW FWD	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
eg	<i>exempli gratia</i>
ex	according to
EEW	European Evidence Warrant
EIO	European Investigation Order
EU	European Union
ff/et seq	and the following
FGE	<i>Fiscalía General del Estado</i> (General Public Prosecutor's Office)
ie	<i>id est</i>
ICCPR	International Covenant on Civil and Political Rights of 16 December 1966
LECRim	<i>Ley de Enjuiciamiento Criminal</i> (Spanish Act on Criminal Procedure)
LO	<i>Ley Orgánica</i> (Organic Law)
LOEDE	Law 3/2003, on March 14 <sup>th</sup> , on European Arrest Warrant and Surrender
LOPJ	<i>Ley Orgánica del Poder Judicial</i> (Act on the Judiciary)
LRM	Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters criminal in the European Union ( <i>Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea</i> )
MLA 2000	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by Council Act of 29 May 2000
MS	Member State/s
n./No	Number
OJ	Official Journal of the European Union
op. cit.	<i>opus citatum</i>
p.	Page
para.	paragraph ( <i>fundamento jurídico</i> )
SAN	Judgement by National Court
SAP	Judgement by Provincial Court
STC	Judgement by Constitutional Court



## EUROCOORD

STS	Judgement by Supreme Court
TC	<i>Tribunal Constitucional</i> (Constitutional Court )
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TS	<i>Tribunal Supremo</i> (Supreme Court)
vol.	Volume