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ABBREVIATIONS AND ACRONYMS

AFSJ	Area of Freedom, Security and Justice
Art.	Article
CBP	Code of Best Practices
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
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ex	according to
EEW	European Evidence Warrant
EIO	European Investigation Order
EJN	European Judicial Network
EPPO	European Public Prosecutor's Office
EU	European Union
ff/*et seq*	and the following
FGE	*Fiscalía General del Estado* (General Public Prosecutor's Office)
FD	Framework Decision
JITS	Joint Investigation Teams
LECrim	*Ley de Enjuiciamiento Criminal* (Spanish Act on Criminal Procedure)
LD	Italian Legislative Decree
LO	*Ley Orgánica* (Organic Law)
LOPJ	*Ley Orgánica del Poder Judicial* (Act on the Judiciary)
LORPM	*Ley Orgánica de Responsabilidad Penal del Menor* (Act on regulating the criminal liability of minors)
LRM	Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters criminal in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea*)
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
OJ	Official Journal of the European Union
p.	Page
para.	paragraph (*fundamento jurídico*)

PCPC	Polish Criminal Procedure Code
PP.	Public Prosecutor
PPU	Urgent Preliminary Ruling Procedure
TFEU	Treaty on the Functioning of the European Union
UCM	Universidad Complutense de Madrid
UIMP	Universidad Internacional Menéndez Pelayo

EXECUTIVE SUMMARY

The Report defines the Draft of the Code of Best Practices.

The implementation of the EIO represents a major step forward in the building up of a single Area of Freedom Security and Justice by simplifying the transnational gathering of evidence in criminal matters.

As of August 2018, the EuroCoord team of UCM had already been able to prepare a draft of the Code of Best Practices (CBP- D4.1). In the meantime present deliverable represents the discussion by all partners of such CBP first draft.

In the drafting of this proposal for a Code of Best Practices (CBP), which aims at providing useful guidance in applying the EIO, the issue of striving the right balance between the efficiency in the cooperation and the protection of the fundamental rights and the fairness of the proceedings, has been a continuous challenge and it cannot be stated that the right balance has always been achieved.

Its objective is to identify promote the principle “pro cooperation” in all cases where this would not harm or affect the level of protection of human rights.

1. INTRODUCTION

The final aim of the EuroCoord Project is to present a Code of Best Practices (CBP) on the use of the European Investigation Order (EIO) in the EU.

The Report is based in gathering information through direct encounters with professionals of the judiciary and judicial institutions, including judges, prosecutors, defence lawyers and other interested parties.

Its objective is should highlight the most efficient way to apply the EIO in cross-border criminal investigations, and give guidance to those who will use it, mainly judges, public prosecutors, and defence lawyers on behalf of the defendants.

Due to the late transposition of the Directive in the three countries chosen for this project, the initial methodology was not the most adequate to provide the results sought. The UCM team decided to broaden the scope of information and had to adapt the methodology to the timing imposed by the legislator and by mid August 2018 a preliminary draft was prepared.

At the view of their input, the UCM team not only included amendments to the draft CBP (included below), but we were also able to address problematic questions that had been identified in other countries.

2. SCOPE OF APPLICATION OF THE EIO

1. Starting from the definition of an EIO the scope can be better identified: an EIO is judicial decision which has been issued or validated by a judicial authority within criminal proceedings to carry out an investigative measure for gathering evidence within the EU, except those Member States which are not bound by it (Article 1 DEIO in connection with Article 4 DEIO).

2. Any cross-border request for judicial cooperation for the gathering of evidence in criminal proceedings shall be done by way of an EIO, except when its application is expressly excluded (as for the Joint Investigation Teams) or there is a specific provision that applies as *lex specialis*.[1]

Article 34 DEIO: the replacement of the "corresponding provisions"[2]

3. Article 34.1 DEIO reads:

> "Without prejudice to their application between Member States and third States and their temporary application by virtue of Article 35, this Directive replaces, as from 22 May 2017 the corresponding provisions of the following conventions applicable between the Member States bound by this Directive:
>
> (a) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols,
>
> (b) agreements concluded pursuant to Article 26 thereof; Convention implementing the Schengen Agreement;

[1] Requests for criminal records (Framework Decision 2009/316/JHA on the establishment of the European Criminal Record Information System (ECRIS); or some requests on e-evidence under the Proposal for a Regulation on the European Preservation and Production Order (Proposal from the Commission for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (COM/2018/225 final). The relationship between these two instruments will be discussed later.

[2] See the thorough analysis of Article 34 DEIO by J. Espina, "The EIO and its relationship with other cooperation instruments: basic replacement and compatibility rules", *EUCRIM* 2019 (forthcoming).

(c) Convention on Mutual Assistance in Criminal Matters between the Member States the European Union and its protocol."

6. As the DEIO is not binding for Denmark and Ireland, the said MLA Conventions and other existing bilateral or multilateral agreements will continue to be applicable to the gathering of evidence in criminal matters to those Member States (MS). While the territorial scope is clear, the material scope of the "replacement" is not so evident as it affects only to the "corresponding provisions" included in such conventional instruments. This term refers to the rules on cross-border gathering of evidence and only those are "replaced", albeit the specific repealing of the EEW by way of Regulation 2016/95, of 20 January 2016.

7. The DEIO only replaces "corresponding rules" of the Conventions listed under Article 34.1 DEIO, but not other agreements or arrangements if those bilateral or multilateral instruments further strengthen the aims of the EIO, simplify the procedures and respect the level of safeguards set out in the DEIO. This means that DEIO is compatible with other bilateral agreements that provide an even more favourable legal framework for facilitating the cross-border evidence gathering, while respecting the same safeguards. In any event, the replacement rule is not affected by Article 34.3 DEIO: even if the provisions of the Conventions listed under Article 34.1 DEIO would be more favourable to the aims of the EIO, resorting to them would not be possible, as the replacement of these rules is mandatory, regardless any other factors[3].

[3] In favour of this interpretation, there is the CJEU judgment C-296/08, although related to the EAW, but which can be applied here in analogous way. Similarly to Article 34 DEIO Article 31 FD EAW provided for a replacement rule, and in that regard the CJEU said: "Article 31(2) of the Framework Decision allows the Member States to continue to apply bilateral or multilateral agreements or arrangements in force at the time of adoption of the decision, or to conclude such bilateral or multilateral agreements or arrangements after the entry into force of the decision in so far as they allow the prescriptions of the decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants. However, that provision cannot refer to the conventions mentioned in Article 31(1) of the Framework Decision, since the objective of the decision is precisely to replace them by a simpler and more effective system (...)" (paras. 54 and 55).

8. **Does the EIO cover cross-border surveillance?**

9. One of those rules not replaced is article 40 CISA. Recital 9 of the DEIO states precisely that: "This Directive does not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement." The rules on this measure together with the hot pursuit (Article 41 CISA) have not been replaced[4], but only as long as they are police surveillance measures. If the cross-border surveillance is ordered by a judicial authority within a criminal procedure, then such measure could be considered as an investigative measure aiming at gathering evidence, and thus would be covered by the DEIO, and the relevant authority would need to issue an EIO. The cross-border surveillance will be addressed again later. So far, we have mentioned this measure here for clarifying the meaning of "replaced corresponding rules": if it consists of police surveillance the CISA regulation it is not "replaced" by the EIO.

10. **What are examples of rules not replaced by the EIO because not being aimed at evidence gathering?**

11. The MLA Conventions will also still be applicable to those acts of judicial cooperation that are not aimed at gathering evidence (not "corresponding provisions" pursuant Article 34.1 DEIO), such as service of documents and summons (Article 5 EU MLA Convention 2000), spontaneous exchange of information (Article 7 EU MLA Convention 2000), returning of objects to the injured party (Article 8 of EU MLA Convention 2000) or information with a view to opening proceedings by another country (Article 21 EU MLA Convention 1959). Letters rogatory shall be used for requesting such judicial cooperation.

[4] See Joint Note of Eurojust and the EJN of 2.5.2017 "Note on the meaning of corresponding provisions and the applicable legal regime in case of delayed transposition of the EIO Directive" (Council doc. 9936/17).

3. TYPES OF MEASURES: IDENTIFYING THE COERCIVE MEASURES

12. The DEIO covers all the investigative measures, except those that are specifically excluded. When regulating the requirements, the DEIO differentiates mainly between "coercive" and "non-coercive" measures. As it is known, there is not a uniform definition of what shall be considered a coercive measure, and the Explanatory Note of the DEIO does only give some hint: those measures affecting that do not infringe the right to privacy or the right to property are, for example, non-coercive measures (Recital 16).

13. While the DEIO does not define the concept of "coercive measures", it requires different conditions and provides for different grounds for refusal for the EIOs related to coercive measures. This is why it is important to identify what is a coercive measure or not. The distinguishing feature of a coercive measure is whether it affects fundamental rights –of the suspect, the accused or a third party–, and whether the domestic legislation requires for such measure a judicial warrant.[5] Following these criteria, some measures may be considered coercive even though they do not imply coercion (e.g. interception of telephone and interception of telecommunications). On the other hand, there may be measures affecting fundamental rights –and all investigation measures affect in some way or another the fundamental rights of the individuals, precisely the privacy, albeit to a different extent–, that are not subject to judicial warrant and therefore the domestic law does not classify them within this category.

14. As has been mentioned, although the coercive nature of a measure is defined according to the domestic legislation of the Member States, the DEIO foresees a differentiated treatment depending on whether it is requested a coercive measure or

[5] Recitals 16 and 30 DEIO.

a non-coercive measure. This different regime encompasses: (1) the duty/possibility of replacing the requested measure with another one; and (2) the grounds for refusal.

15. Thus, regarding the measures that are considered coercive under the national legal framework of a Member State, the DEIO imposes their replacement when the investigative measure indicated in the EIO does not exist under the law of the State or it exists, but it would not be available in a similar domestic case (article 10 (1) DEIO). Furthermore, the executing authority may also have recourse to an investigative measure other than that indicated in the EIO when the same result could be achieved through less intrusive means (article 10 (3) DEIO)[6]. Moreover, all the grounds for refusal are applicable to these measures, without any restriction.[7]

16. The rules are different for non-coercive measures under the national law of the executing state. On the one hand, **non-coercive measures may not be replaced by the executing authority**[8]. On the other hand, these measures are "immune" from certain grounds for refusal. In particular, they may not be refused upon lack of double incrimination, **nor due to the fact that the measure is restricted to a list or category of offences or is punishable only by a certain threshold**[9].

3.1. Coercive Measures in Spain, Italy and Poland

17. Domestic legislation does not provide with a definition of "coercive measure" for the aims of application of the EIO. However, in the light of the implementation of article 10 (2) DEIO in Spain and Italy[10], it is confirmed that these measures are

[6] This possibility turns into an obligation in Spain (art. 206. 2 LRM), Italy (art. 9 § 5 LD).

[7] Art. 11 DEIO.

[8] Art.10(2) d DEIO.

[9] Art.11(2) DEIO.

[10] Poland is a special case. In this Country, art. 10(2) DEIO has been implemented in art. 589zi § CPC; this provision does not make any reference to fundamental rights.

considered at the national level as "investigative measures which restrict fundamental rights[11]", as opposed to non-coercive measures.

18. Regarding the recourse to a different type of measures that the one indicated in the EIO, Spain has a complete correlation between coercive measures and measures restrictive of fundamental rights. Therefore, the Spanish executing authorities may (shall) switch investigative measure if they fulfil certain requirements; and the measures requested restrict the fundamental rights enshrined in the Spanish Constitution.

19. In Italy, on the contrary, only those measures which affect the right to freedom and property are considered coercive measures[12].

20. Italy: Why the art. 9§5 LD does not allude to the right to secrecy of communications provided in art. 15 of the Italian Constitution? The Italian report includes the seizures (art. 253 and ff CPC) between coercive measures. What is the fundamental right affected by this measure? Does not this measure include "*il sequestro di correspondenza*"?

21. Nevertheless, the following schemes present a non-exhaustive list of measures which fall within the scope of EIO application, divided between coercive or non-coercive measures in each of the three Member States studied.

3.2. Is It Possible to Consider as Coercive Measures Some of The Investigative Measures That Can Be Ordered by The Public Prosecutor in Spain?

22. In Spain, the distinction between restrictive and non-restrictive measures of fundamental rights is relevant not only with regard to the application of Articles 10

[11] In Poland, these measures are considered as coercive measures in a broad sense or *measures for evidential purposes*.

[12] Art. 9 § 5 LD in relation with arts. 13 y 14 CI.

and 11 DEIO, replacement and refusal of the requested measure**)**[13], but also with regard to the authorities competent to issue, recognise and execute an EIO[14].

23. The problem remains how to identify those investigative measures that could be ordered by the public prosecutor despite affecting fundamental rights (e.g. controlled delivery of drugs, undercover police operations or investigation of assets)[15]. Can these measures be considered as coercive? The answer is not easy. For the aims of issuing an EIO, these measures may be considered as non-coercive, and thus they can be included in an EIO issued by the public prosecutor.

24. Viewed from the perspective of the execution, it would me more adequate to treat these measures as coercive measures, as this would allow replacing them for a less intrusive measure and also applying to them the so-called test of proportionality. This solution seems to be the most respectful with the protection of fundamental rights.

25. ***Recommendation:*** When the measure requested by the EIO is the controlled delivery of drugs or undercover police operations, the Spanish executing authorities shall treat these measures as measures restricting fundamental rights, with results in the ability to replace the measure or deny its recognition and implementation for any of the grounds for refusal foreseen by the LRM.

3.3. Shall Non-Coercive Measures Be Automatically Recognised In The Executing State?

26. As has been seen, non-coercive measures are not subject to be substituted by other less restrictive measures: the presumption that they are available in every state

[13] See also Arts. 206 y 207 LRM.

[14] Art. 187 (1 y 2) LRM.

[15] See *Circular* 4/2013, *Fiscalía General del Estado, sobre diligencias de investigación* (Instructions of the Prosecutor's General Office on investigative measures), pp. 19 a 25.

applies, following art. 10 (1) DEIO. But they are still subject to the grounds for refusal, although some of them will not apply to those measures.

Despite this limitation, it is however possible that the competent authority of the executing Member State does not recognise the measure based on other grounds. So, for example, if the executing Member State is Spain and the requested measure is the interrogation of a **suspect** who is under the age of 16, the execution of this measure may be considered contrary to fundamental rights[16] and, thus, its recognition may be refused.

4. TYPES OF PROCEEDINGS

27. The types of proceedings for which the EIO can be issued are defined under Article 4 of the DEIO and these are criminal proceedings "brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State" (para. (a)); or other administrative or judicial sanctioning proceedings, "where the decision can give rise to proceedings before a court having jurisdiction, in particular, in criminal matters" (paras. (b) and (c)). In other words, any procedure "criminal in nature" regardless how do the national laws label it, and regardless the type of authority that imposes the sanction, in so far, the proceedings may end up being revised before "in particular" a court with criminal jurisdiction.

28. This provision allows issuing EIOs within these types of proceedings. Neither in Italy, Spain or Poland exist these types of proceedings. It would cover the penal orders regulated, for example, in Germany. The problematic question on EIOs issued within these proceedings is not their special features –as long as the EIO complies with the conditions and requirements, it should not pose special problems–,

[16] Art. 207(1) d LRM.

but rather when the proportionality is at stake. Should there be a kind of proportionality check in terms of cost-public interest before resorting to the judicial international cooperation by way of an EIO? This question will be addressed later, when dealing with the conditions for issuing an EIO, as the proportionality check is an element to be discussed with regard to any EIO, regardless the type of proceedings.

4.1. How to deal with EIOs when it is not clear that it has been issued within a criminal proceeding (or proceedings under Article 4 (b) and (c) DEIO)? Is the EIO limited to gathering evidence "for investigating a crime"?

29. The question arises in cases where the aim of "gathering evidence" would point to the EIO, but it is unclear if such a request is issued within a criminal procedure or within the aims of the criminal procedure. Recital 25 DEIO provides application of the DEIO for carrying out an investigative measure "at all stages of criminal proceedings, including the trial phase". "Including trial phase" is to be interpreted that beyond the sentence, an EIO could not be issued?

30. Several examples will show the difficulties identified in this regard.

31. Example 1) Could an EIO be issued to gather evidence to find out the whereabouts of a person subject to a EAW, thus for the means of the enforcement of a detention order? The case took place in Spain, where another MS (Italy), after having issued an EAW, issued an EIO for intercepting communications of the person to be detained. The Spanish authorities refused the execution of such an EIO, on the grounds that the aim of such interception of the communications was not to gather evidence on an criminal offence, but to detain a person; and that the measure in Spain could only be executed within a criminal investigation, and a procedure on the execution of an EAW does not lead to the opening of a criminal investigation in Spain.

32. Example 2) A person convicted is released on parole and in order to check if he/she is complying with the conditional sentence (including e.g. ban to leave the country), could an EIO be issued to gather evidence on this infringement of the probation or conditional release? Could it be interpreted as an analogy to an "investigative measure within criminal proceedings", those issued for ensuring the enforcement of the sentence?

33. Cases where control on the enforcement of a sentence is needed, but that would not fall within the Framework Decision 2008/947/JHA[17] in so far the judgment and the probation decision had not been transferred to another MS (on reasons of the legal of residence of the sentenced person), could the EIO be used for gathering evidence in this context.

34. It could be argued that such a stage is part of the criminal proceedings, as in some MS the enforcement is within the jurisdiction of the criminal court or another judicial authority and may be considered as part of the criminal procedure (e.g. Spain).

35. Member States, the final judgment puts an end to the criminal procedure and other non-judicial authorities are entrusted with the enforcement. The general term "criminal proceedings", does not give the precise answer on the scope of the EIO, as there is no uniform understanding on what the "criminal proceeding" entails (when it starts and when it ends).

36. Example 3) Could an EIO aimed at gathering bank information for the enforcement of a criminal conviction sentence that orders the confiscation of assets, be issued?

37. At the sight of these examples, it has to be recognised that there are arguments in

[17] 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.

favour and against extending the application of the EIO to the enforcement stage of a criminal sentence. In some cases, such stage would amount to another ordinary criminal investigation. For example, in those systems where the breach of a protection order (or a ban to approach a certain person o place) would constitute another criminal offence: breach of sentence. Investigating if there has been such a breach would definitely fall within the concept of a criminal investigation.

38. Shall the solution to this question revolve around the definition of what is "criminal proceeding"? It seems that such an approach is not very useful, as it would lead us to confirm once again that there is no common uniform understanding of the scope of "criminal proceedings".

39. On the other side, if the measure is not covered under the EIO, such evidence should be able to be requested via MLA Convention. Therefore, refusing to apply/execute the EIO would mean, that the issuing authority should resort to the MLA rules. In practice this would mean, changing the forms, and issuing a letter rogatory for obtaining such evidence. This approach does not seem to be an efficient solution.

40. This is the reason why it is advocated to interpret the concept "criminal proceedings" also covering those stages that, according to the national law of the issuing State, are within the criminal jurisdiction, such as the enforcement stage or the breach of the conditions of parole.

4.2. Specific reference to the tracking devices or geo-location buggers on cars or vessels (with no interception of conversations)

41. Several questions have arisen already in practice, due to the diverse use of such tracking devices and also its different aim. When a car/vessel is being tracked with a geo-location device by the authorities in country A, and the car crosses the border and enters into another MS, or even crosses the territory of several Member States, how to proceed? Is the EIO applicable? Shall the measure be authorised? Under

which circumstances?

42. First it has to be distinguished between the tracking that falls within police surveillance for cross-border pursuit; and a surveillance measure adopted within a criminal investigation. As noted above the rules on CISA will be applicable if it is a police surveillance measure.

43. If the tracking-up device has been installed for evidence purposes within a criminal procedure, such measure would fall within the scope of application of the DEIO. Next step is to identify, which rules of the DEIO are applicable.

44. Some countries have entered bilateral agreements to regulate these cross-border technical surveillance measures (Czech Republic), while others simply refuse such measures in their territory, for not being allowed under their domestic rules (Germany).

45. If the installing of a geo-location device in an object (car/vessel, or others) were to be considered an investigative measure implying the gathering of evidence in real time", Article 28 DEIO would be applicable. If it were considered an interception of communication", then rules under 31 DEIO would be applicable. Technically if the device only records the movement of the object, it is not an "interception of communication" at least not a "human communication interception". The device may use however the same channels as those used for intercepting communications, in so far it resembles an "interception of communication". The measure affects fundamental rights in a less intrusive way than the interception of communications, as it does not necessarily provide information of a person (differently from mobile phones which are generally more personalised items).

46. As this investigative measure as a rule does not need technical assistance from the territory where the object is located, it would be sensible to apply Article 31 DEIO: notify the relevant State where the object is located and from where it sends signals.

47. Practice seems to be diverse. Italy reports on the practice they have been experiencing with Germany, in the use of such devices: Italian authorities have acted following Article 31.1 DEIO, and notified the relevant authority of such MS on the crossing of a tracked car; and Germany has ordered the measure to be stopped for not being provided in their territory (Article 31.3 (a) DEIO in connection with 10.1 (a) DEIO). NE practitioner reported that if they foresee that the car/vessel is likely to cross the border, then they would issue an EIO and later ask for permission to use the information gathered as evidence.

48. The proposed guideline for implementation would be the following: the issuing State should notify the "affected" State (once they have knowledge of it), to make them aware of the "interception"; the notified State should not oppose to the measure on the sole ground that it is not provided in their territory. The treatment of this measure should not be equalled to a coercive measure[18] as it does not encroach seriously upon the privacy or the property or other fundamental rights. This is why the flexible approach of the "affected" territory is advisable. As to the admissibility of evidence, this should lie exclusively within the forum court.

4.3. Covert investigations, in particular on-line undercover investigations

49. Identifying best practices on the EIO regarding covert investigations (officers acting under covert or false identity) has not been possible, due to the secrecy and confidentiality rules that apply to them. Establishing guidelines on its use might not be appropriate within this project, not having such background information. Nevertheless, some comments are worth to be made here.

50. This measure is not subject to the principle of mutual recognition, as it requires in any event an agreement between issuing and executing State. Article 29 DEIO mainly sets out this principle and which rules shall apply to the covert investigation

[18] See Recital 16.

(*lex loci*). So far, this investigative measure is relevant within the EIO as it may be requested through this channel, but it is governed by the rules both parties agree. However, it is important to clarify here whether Article 29 also applies to on-line covert investigations, where the covert investigative measure can be carried out without the technical assistance of the affected territory.

51. Such on-line covert investigations have a mixed nature as they entail at the same time the use of a covert or false identity, but it acts within the communication process, and it does record communications. In that vein, it affects to the right to the informational self-determination and also the right to privacy. The issue here is to determine which rules of the DEIO are applicable to this measure.

52. Three scenarios are to be distinguished: 1) the issuing State requests the executing State to carry out the measure by employing their own covert agent; 2) the requesting State seeks to employ its own covert agent, but needs technical assistance from the "affected" State; 3) the issuing State seeks to employ its won covert agent and does not need technical assistance from the other State.

53. The first situation is the one covered by Article 29: an agreement is needed to carry out such an investigative measure. The second one is a covert investigation, but the assistance of the State is not strictly needed for the officers to act under covert or false identity: the false identity is given by the issuing authority and the support to keep such identity and introduce him into the environment to be investigated is not technically needed. If the assistance is for the interception, then it appears reasonable that the rules for the EIO on interception of communications should be applied. We are inclined to support this interpretation, and not subject every on-line covert investigation to the signature of a previous agreement. It would not be consistent with the logic of cyberspace and cybercrime investigations. Thus, the same requirements, conditions and grounds for refusal applicable to interception of telecommunications provided under Article 30 DEIO, should apply.

54. The third situation, where not even the technical assistance is needed to carry out the covert on-line investigative measure, should respect the provisions under Article 31 DEIO. The guideline in this case is to notify the other MS where the measure is going to have effects (if known), and the executing State at the view of the intrusiveness of such measure, should decide on it in accordance with Article 31.3 DEIO. Same principles established for the measure on interception of telecommunications without technical assistance, is to be applied here. REFERENCE NOTE)

5. RELATIONSHIP WITH OTHER INSTRUMENTS

55. Freezing orders, EAW, JITS, MLA Convention, securing evidence, EPPO and EIO

56. Temporary scope of application

6. COMPETENT AUTHORITIES

6.1. Preliminary considerations

57. The designation of the authorities competent to issue an EIO, to recognise and to execute it is a Member State's task/duty. In this endeavour the wide margins provided for in article 2 DEIO shall be respected.

58. Using the possibility established in article 7 (3) DEIO, the Member States may also designate a central authority in order to assist the competent authorities in the framework of the EIO and to channel its administrative transmission and receipt.

From the information sent by the Member States bound by the DEIO [19] to the Commission with regard to those authorities, it can be deduced what follows:

«Issuing authorities»

59. Most of the States have designated as issuing authorities the judge/judicial authority and/or the public prosecutor, as those are the authorities competent to order the gathering of evidence in domestic criminal investigations. Among the States which adopt a dual competence model to issue the EIO there are Spain and Italy [20], therefore in these two countries the validation procedure does not apply [art. 2 (c) ii) DEIO].

60. In addition to the judge/judicial authority and/or the public prosecutor, some other MS have designated as issuing authorities certain administrative and law enforcement institutions or bodies competent to carry out investigations under their national law. This is the case of Poland, where the EIO may be issued by a court or by the public prosecutor within their respective spheres of competence[21], but also by the police after validation by the public prosecutor[22].

«Receiving, recognising and executing authorities»

61. The States studied have opted for granting the same authorities the task of receiving the EIO and deciding over its recognition and execution, save certain exceptions.

[19] Denmark and Ireland have not acceded to the DEIO. The United Kingdom, however, adapted its national law to the Directive, which probably will become operational in this Country on the basis of the agreements adopted in the framework of Brexit.

[20] Art. 187(1) LRM and art. 27(1) LD.

[21] Art. 589w § 1 PCPC

[22] Art. 589w § 2 PCPC in relation with arts. 307, 311§2 y 312 PCPC.

62. In Poland the authority competent to receive the EIO and to proceed with its recognition and execution changes depending on the moment when the order has been issued. If the EIO is issued during the pre-trial stage, the competent authority to execute it as a rule will be the PP. However, if the EIO has been issued at the later stage of the proceedings, the authority competent to receive and execute it is the District Court.

63. In Italy the authority competent to receive the EIO and to proceed with its recognition and execution is the PP at the court in the capital of the district where the requested measures shall be carried out[23]. However, in the case that the requested measures are to be carried out in several places, the PP where the largest number of measures are to be executed; if the number of measures is equal, the competence will be of the PP's Office of the district where the more important investigative measure is be executed[24].

64. A tipping point in this context is represented by the cases where the issuing authority requests that a judge executes the EIO or cases where, according to the Italian law, the measure requested shall be executed by the judge (e.g. interception of communications, or any other measure which affects the fundamental rights guaranteed under the Constitution). In such cases, the PP will still be competent to receive and recognize the EIO, while the execution will lie with the **Judge for the preliminary investigation** (*giudice per le indagine preliminare*).[25] The judge, once the EIO has been transferred to him/her, can revise *ex officio* or upon request of the parties, the decision adopted by the PP recognising the EIO[26].

[23] Art. 4(1) LD.

[24] Art. 4(5) LD.

[25] Art. 5(1) LD.

[26] Art. 13 (5) LD.

65. However, this option poses problems in practice and, as it will be explained, not only because at present, the authority in charge of the pre-trial criminal investigations is, as a rule, the Investigating Judge (*juez de instrucción*)[27].

66. Spanish law has designated the PP as receiving authority for any EIO. The PP is also the authority charged with holding the record of every received EIO, acknowledge its receipt and recognise the EIO. It will also directly proceed to its execution when: (1) the EIO does not refer to measures restricting fundamental rights or, even if it includes it, this measure can be substituted, according to the assessment of the PP, by another measure which does not restrict fundamental rights; and (2) when the issuing authority has not explicitly stated that the measure shall be executed by a judicial authority.

67. In all other cases, once the EIO has been received and registered, the judge will be competent to recognise and execute the EIO (measures restrictive of fundamental rights which the PP considers cannot be substituted by a non-coercive measure; or the issuing authority has explicitly stated that the measure shall be executed by a judge). The PP will hand over the EIO to the judge with material and territorial jurisdiction[28], together with an assessment on the possible grounds for refusal of the EIO, and the position of the PP regarding the lawfulness of the measures requested in the EIO according to the domestic law.

68. **Best practice:**

69. **Receiving authority**

70. It is appropriate that the receiving authority is the one who has to execute the EIO. It is adequate that the receiving authority is in all three countries the PP, as they will also have competence to execute many of the EIOs. If the execution of the EIO

[27] Cfr. Report of the General Council of the Judiciary to the draft law modifying Law 23/2014, 20 November, On mutual recognition.

[28] The criteria for setting the subject-matter and territorial jurisdiction are included in art. 187(3) LRM.

requires to leave the execution in the hands of a judge –because this is required by domestic law of the executing state or because the issuing authority specifically requests so–, the PP shall transfer the EIO to the competent court.

71. Poland has opted for a diverse mechanism, depending at what the stage of the proceedings the EIO has been issued. Such division may be necessary to comply with the domestic rules on jurisdiction, nevertheless it does not seem to be justified in abstract nor to simplify the quick identification of the receiving authority. Keeping the reception of the EIOs in the hands of one single institution (the PP), will also facilitate the registering, the elaboration of statistics and the dissemination of best practices, for the action of the PPs is better coordinated, due to their hierarchical structure. It will also ensure uniformity in the handling and transfer of the EIOs. Moreover, in those cases where the PP is directly competent also for the execution, this solution is to be viewed as the most efficient.

72. Best practice for determining the receiving authority: the PP office of the relevant territory where the measure/s are to be executed.

6.2. Recognition when receiving authority is not competent for the execution

73. When the receiving authority is not competent for the execution of the measure, the question is: 1) should the receiving authority also decide on the recognition, before transferring the EIO to the judge competent for the execution?; and 2) should the execution of the EIO be divided so that those measures that can be directly carried out by the PP remain in its competence, so that the judge should only execute part of the EIO, the one precisely which requires his/her intervention?

74. Best practice in this sense could be expressed as follows:
75. Once the EIO has been received by the PP (not in Poland), and the PP considers that the EIO is to be carried out by a judge, the way to proceed for optimising the

efficiency, is that the same PP decides on the recognition before transferring the EIO to the judge, although the judge can later revise such decision. This is the solution adopted by Italy. In Spain, however, in such cases, the receiving authority will not recognise the EIO, but transfer it directly to the judicial authority, albeit with a not-binding report on the grounds for recognition/not recognition. The judge will, before executing the EIO render a decision on the recognition.

76. Both systems are very similar, and either practice is acceptable, although the first one seems to be more efficient and promotes more the uniformity of the interpretation of the grounds for refusal. Important at this point is to underline that when receiving and executing authority are not the same, the recognition done by the first (the PP) should be subject to be revised by the second (the judge).

77. Regarding the second issue, when an EIO requests several measures, and some can be executed by the PP and others require the intervention of the judge. Should the receiving authority be allowed to fragment the EIO so that the requests that can be executed by the PP are not transferred to the judge? Or rather, should all the measures requested in the EIO be handed over to the judge? This second option is the one chosen by the Spanish law. Italian practice is unclear in this respect. Poland does not face this dilemma, because the competence of the receiving/executing authority is determined by the procedural stage and not by the type of measure.

78. Which would be the best way to proceed? To fragment or to not fragment the EIO? Both options present advantages and disadvantages. The fragmentation may allow the judges not be overloaded with requests which can be executed directly by the PP, so promote a more balanced division of work. However, this solution, may not be optimal for the communications with the issuing authority, that would be forced to follow the execution of the measures before different authorities. A third practice could be: the same receiving authority (the PP) keeps the coordination of the execution of those “mixed-EIOs”. This would allow the issuing authority to

communicate only with one interlocutor, and at the same time, relieve judges from executing non-coercive measures.

79. The best solution will depend on the contextual elements: depending which authorities are best prepared, more experienced and less overloaded. As for the moment, Spanish law has opted for concentrating the execution of “mixed EIOs” in the hands of the judges. It will need time to see how efficient this is dealt with in practice.

6.3. The EIO received requires execution of several measures in different districts

80. This situation adds more difficulty as the EIO can fall not only within the competence of different type of authorities (PP and judges), but also authorities located in different territories. The fragmentation of the execution of the measures seems unavoidable in most cases, because the territorial limits of jurisdiction of the national authorities will not be altered just within the EIO enforcement proceedings. But the competence for dealing with the EIO can be still kept under one single authority. In other words, while the competence for executing each of the measures requested in an EIO will need to be divided, the competence (and coordination) for the recognition, coordination of execution of measures and transfer of evidence, can still be kept under one single judge/authority.

81. This is the best practice to be adopted, in order not to scatter all measures requested in one EIO. The issue now, is which authority shall retain the competence. The Italian solution is to establish the territorial competence in the PP where the majority of the measures requested are to be executed, and if this criterion does not apply, then where the most important investigative measures are to carry out.

82. This seems to be an adequate practice. In Spain the same rule could be applicable, to identify the territorial competence of the PP or the one of the judges, in case of several measures.

83. Best practice:
84. Avoid questions of competence among the executing authorities that would delay the whole procedure of the execution of the EIO; and apply certain flexibility so that the issues of territorial and material competence are solved in a swift manner: in gathering of evidence the principle of the legally pre-established judge is not to be interpreted in a strict way; therefore, issues of competence and jurisdiction should be addressed with flexibility, taking always into account the principle of efficiency in providing the requested judicial cooperation. In complex EIOs, where different authorities and districts are involved, it could also be considered if a coordination authority might not be appointed. In Spain such coordination could lie with the PP, as they are based on the province, which covers different judicial circuits.

«Central authority»

85. Not all Member States bound by the EIO have opted for appointing a central authority as provided under article 7(3) DEIO, but Italy, Poland, and also Spain have done so. In Spain the Central Authority, according to the Law On mutual Recognition is the Ministry of Justice. However, it is unclear what shall be its role with regard to the EIO, as the direct contact between issuing and receiving/executing authority is already provided within this mutual recognition instrument.

86. It does not seem that the Central Authority is to be involved in any form in the procedure of issuing or executing an EIO. However, in case of non-compliance or a systematic infringement of the obligations set out in the EIO Directive, the Central Authority can play a crucial role in collecting complaints regarding the EIO implementation.

6.4. Issuing Of the EIO

a) Who may request the issuing of the EIO?

87. Article 1(3) DEIO provides that the issuing of the EIO may be requested by the suspect or accused person (or by a lawyer on his behalf) within the framework of applicable defence rights in conformity with national criminal procedure.

88. Poland and Spain extend the possibility of article 1(3) DEIO also to any person who is party to the proceedings:

89. In Poland both the suspect and the victim may request the judicial authority to issue an EIO, although the judicial authority does not need to provide a formal response to this request (article 9.1 PCPC).

90. Spain provides that the EIO may be issued *ex officio* or at the request of a party (art. 189 (1) LRM). The party entitled to request the EIO will depend on the proceedings where the issuing of an EIO is requested:

91. When the body conducting the investigations is the PP (those pre-judicial investigative measures that can be ordered and carried out by the PP without intervening the Investigating Judge[29]), the suspect (or the lawyer on his behalf) may request the PP to issue an EIO with a view to conducting preliminary inquiries (not restrictive of fundamental rights) for gathering exculpatory evidence[30]. This request is not binding for the PP and its refusal does not need to be motivated and there is no appeal against it. No other parties are entitled to intervene in these preliminary investigative stages, thus only the defence could file the request to issue an EIO to

[29] Art. 773(2) LECrim and art. 5 EOMF.

[30] *Circular* 4/2013, of 30 December, of the FGE, on the preliminary investigative measures, para. III.1.

the PP[31]. The same applies to juvenile proceedings –where the Public Prosecutor directs the pre-trial investigation[32] -, but in this case, both defence and victim can request an EIO to be issued. In this case, if the PP refuses to issue the EIO, the parties may file again the request before the Juvenile court[33].

92. In the pre-trial investigation led by the Investigating judge, in addition to the defendant, and the victim, all other parties intervening in the proceedings may request the issuing of an EIO (private and popular accuser). The judge must decide by way of an order (auto), explaining the reasons for its decision. This order is subject to appeal, as any other request for evidence filed by the parties[34].

93. In Italy the victim is not included among the persons entitled to request the issuing of an EIO. This does not mean that the victim may not ask for it, but that the PP can reject it without motivating the decision.

94. On the other hand, the EIO requested by the defence will only be admitted if it explains the reasons that justify such investigative measure (art. 31 LD), which obliges to disclose the defence strategy. In the same vein, it is important to stress that, although the law provides that the decision to reject the request shall be motivated (if **it comes from** the public prosecutor) or shall be adopted after hearing the parties (if **it comes from** the judge), this decision may not be challenged by way of appeal.

95. **Proposed Best Practice:**

[31] *Circular* 4/2013, of 30 December, of the FGE, on the preliminary investigative measures, para. XI.

[32] Art. 16(1) LORPM.

[33] Art. 26(2) LORPM and Circular 1/2000, of 18 December, of the FGE, concerning the criteria for applying the LO 5/2000, of 12 January, regulating the criminal liability of minors para. VI.3.C.

[34] See *infra* when addressing the national legal remedies.

96. The decision rejecting the issuing of an EIO requested by the defence should be motivated.

97. Victims and other parties should be entitled to request the issuing of an EIO, as long as this is not incompatible with the principles of the national criminal procedure.

98. It should also be possible, to hear the parties to the process/proceeding before taking a decision on the issuing of the EIO, if such hearing does not endanger the outcome of the proceedings.

99. The need to channel the collection of evidence abroad via the PP or the IJ, poses the problem of disclosing the defence strategy to the PP. However, this is not so problematic in systems where the PP is not strictly and adversary to the defendant but defends the legality. The problem is the same as in MLA instruments, but is not seen as a grave problem by the lawyers interviewed.

100. Centralising the receiving of the EIOs in the PP Office is positive for speeding up the process, for ensuring common standards in the whole territory of a State as to the recognition of an EIO, and for collecting statistical data. It facilitates the process, as the issuing authority will identify more easily whom the EIO should be sent.

101. In cases of several measures requested within the same EIO, the decision on the competence of the executing authority might be quicker if the whole procedure is coordinated by one single authority.

102. CBP: Direct contact between requesting and executing judicial authority is crucial. The communication channels should work equally regardless who is the receiving/executing authority. Where according to national laws, receiving authority in certain cases cannot execute the measure, coordination between both authorities is to be ensured.

103. The splitting of the reception and execution of the EIO between the PPs and the judges does not appear to present practical problems, although it could be

considered to appoint a coordinating authority in case of EIOs that imply diverse judges of different territorial jurisdictions.

b) Is the form of the EIO enough to be sent to the executing authority or must the issuing authority attaching to the form also the judicial resolution?

104. The EIO is set out in a form (Annex A)[35]. As with other instruments based on the principle of mutual recognition this form, as a rule, does not need to be accompanied by a certified copy of the decision taken in the national proceedings with regard to the measures requested in the EIO[36]. The form shall be signed by the issuing authority (or validating authority) and shall be filled in an official language of the executing State or in any other official language accepted by it[37].

105. **Best practice identified:** as a general rule, the form is enough and there is no need to attach the judicial decision. However, as an exception, if the executing State needs more information which are not possible to obtain from the form, it may request the issuing authority to send the judicial decision. It is however recommended that the issuing authority include in the EIO certain additional data with a view to seek the admissibility of evidence and/or facilitate the role of the executing authority. Thus, it is desirable that in Section I, besides recording the formalities and procedures required for the execution of the EIO, there are set out the measures or actions which can not be carried out in a "in a similar domestic case".

106.

[35] For the interception of communications for which no technical assistance from the executing State is needed (Art. 31 DEIO), the form to be employed is Annex C.

[36] Art.7 (I) LRM.

[37] The information on the languages accepted in the different States is available on the website of the EJN *Status of implementation of the Directive on the European Investigation Order*.

c) What other information shall be included in the form of the EIO?

107. The form shall explain all the elements that justify the necessity and proportionality of the measure requested, in order to enable the executing authority

to analyse if such a measure would be allowed in a similar domestic case in the executing state.

108. If such information is missing, before refusing, the receiving/executing authority shall communicate with the issuing authority asking to complement the data required. In certain cases where a coercive measure that entails a serious encroachment of the fundamental rights is requested via EIO, the executing authority may ask the judicial decision upon which the EIO is based to be sent.

d) What other information should be included in the EIO?

109. To contribute to ensuring the admissibility of evidence, the issuing authorities should include in the EIO those requirements that will facilitate the admissibility of the evidence and which should be followed by the executing authority. The issuing authority shall specify which requested measures are to be adopted by a judge and also whether the issuing authority could carry out the requested investigative measure in a similar domestic case.

110. Within Section J (Legal remedies), it should be specified not only whether an appeal against the issuing of the EIO has been lodged, but also whether such an appeal is admissible according to the *lex fori*.

111. In order to avoid unnecessary translation costs, it is recommended to fill out the form of Annex A in *Word*, eliminating from the document the Sections and/or paragraphs not applicable to the specific EIO which is issued. In any event, the Italian and Spanish issuing authorities must not to fill Section L of Annex A DEIO[38].

[38] Section L of the Annex XIII LRM, as regards Spain; and the Section L of the Annex A LD, as regards Italy.

e) How to identify the authority to whom the EIO shall be sent?

112. Once it has been checked that the relevant State has implemented the EIO[39], it is possible to identify the authority competent to receive the EIO through the EU ATLAS, which is also accessible from the website of the EJN. In any event, it is possible to request the help of the contact point of the EJN, Eurojust or the central authority, if this has been appointed.

113. Establishing a centralised receiving authority would facilitate the work of the requesting authority and its transmission. However, this would run against the main principle that contact should be directly between issuing and executing authority in order to avoid delays and unnecessary intermediate steps. It is not recommended to establish a centralised receiving authority, although concentrating all the receiving in the PPs office, as a much structured and hierarchically organised institution might ensure a better coordination in the identification of the competent executing authority.

114. ***Recommendation:***

115. The issuing authorities need to check whether the EIO has to be sent/notified to other authorities of the executing State. In particular, in Italy the EIO shall be transmitted to the *Direzione Nazionale Antimafia e Antiterrorismo* when the investigations refer to some of the crimes mentioned in art. 51 (3 and 3bis) ICPP[40]. Furthermore, copy of the issued EIO should be sent also to the *Ministero della Giustizia*[41].

116. In Spain, the issuing of the EIO (and its execution) shall be included in the corresponding statistics, which then shall be sent to the Ministry of Justice[42].

[39] Information available on the website of the EJN *Status of implementation of the Directive on the European Investigation Order*.

[40] Art. 27(2) DL

[41] See *L'ordine di indagine europea. Cosa è utile sapere? Domande e risposte a cura del Desk italiano di* Eurojust, pp. 10 and 12.

[42] Art. 6 (1 y 2) LRM.

117. All Member States shall inform Eurojust (through its national member) of the transmission of an EIO, when the necessary conditions for the action of this body are met[43]. When such conditions exist, it is also possible to request the assistance of Eurojust in identifying the authorities competent to receive the EIO[44].

7. EXECUTION OF THE EIO

7.1. Shall the EIO issued or validated by the PP be refused when it includes measures restricting fundamental rights whose adoption in the executing State is reserved to the judge/judicial authority?

118. An EIO should not be refused on this ground. It would be contrary to the principle of mutual recognition, as well as to the principle of mutual trust which "requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[45]

119. In addition, the executing authority has no legitimacy to question the competence of the issuing or validating authority, as long as such authorities according to their own domestic legal system, qualify as "judicial authority" in

[43] In Spain this obligation is explicitly set out in art. 9(3) LRM, as well as in article 24 of the Law 16/2015, of the 7 of July. In Italy, in art. 7 of the Law 4/2005, núm. 41.

[44] Art. 3 of the consolidated version of the Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

[45] ECJ of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, paragraph 78 and case law cited there. ECLI: EU:C:2016:198.

accordance with the criteria set forth by the DEIO [art. 2 (c) i)] and by the ECJ itself[46].

120. Furthermore, it should be noted that neither articles 9.3 and 11 DEIO, nor the corresponding implementing law envisage expressly this **circumstance** as a ground for refusal of the EIO.

7.2. How to proceed if the EIO has not been issued by a judge or a PP, but by an authority which according to the domestic legal framework is labelled as a judicial authority.

121. If the domestic law of the issuing state defines an authority as "judicial" to the effects of the criminal investigation, even if it is not a judge or a PP. This has been the case in some EIOs issued by custom authorities in Germany, which according to the German law qualify –within the scope of their activities– as judicial authority. The requested authorities in the executing state (Netherlands), however, refused to execute the EIO, on the grounds that such an authority, to their view, did not fit into the definition of Article 2 (c) 1 DEIO. Unless it was validated by a judge or a PP, it would not be accepted for execution in the Netherlands.

122. This case leads us to the following question. Shall the requested authority before granting the execution check if the authority identified in the EIO form as "judicial authority" can be considered in fact a judge or PP to the end of Article 2 (c) (i) DEIO? In other words, if the issuing authority states that it is a "judicial authority", how shall the requested authority act? Check if it really is such an authority or

[46] The case law of the ECJ on the concept "judicial authority", although adopted in the context of the EAW, may be applied to the EIO: "the words 'judicial authority' (…) are 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 administering justice in the legal system concerned". Judgment ECJ of 10 November 2016, *Kovalkovas*, C-477/PPU, paragraph 34. ECLI: EU:C:2016: 861; and *Poltorak*, C-452/16 PPU, paragraphs 33 and 38. ECLI: EU: C:2016: 858.

according to the mutual recognition principle, take for valid the statement made in the form?

123. **Best practice identified:** In general, the executing authority can NOT check whether the issuing authority has judicial nature under its national law. Only exceptionally when the executing authority has really grounds to believe/fear that the issuing authority might not be a judicial authority in the meaning of Article 2 (c) (i) DEIO, may the executing State check it on the condition that coercive measures are concerned, and under its national law, according to fundamental constitutional principles, this authority can not be considered a judicial one. In this case, it can ask the issuing State to have the EIO validated by a judicial authority and if the latter does not validate it, it may refuse it or refer a preliminary question to the ECJ.

7.3. Can the defence lawyer and other parties to the proceedings take part in the execution of the EIO?

124. Article 9(4) DEIO acknowledges that the issuing authority has the option of requesting that one or more authorities of the issuing State assist in the execution of the measure, participating in the taking of evidence together with the competent authorities of the executing State. According to this provision, the executing authority is obliged to accept such assistance, unless it considers it contrary to the fundamental principles of law of the executing State or it is perceived as harming its essential national security interests.

125. Obviously, having recourse to this option will be very positive in order to ensure the admission of the evidence in the issuing State. In practice however there are budgetary constraints that hinder the issuing authority to travel to the executing state to be present during the gathering of the evidence by way of the EIO.

126. It would have been positive to extend the participation in the execution of the EIO to the defence attorneys and the parties to the proceedings[47]: in the first place, because **(in)** this way the lawyers may first-hand ascertain whether the measure is being carried out lawfully and in accordance with the procedural safeguards; in the second place, because their presence during the execution of the measure would allow them to file complaints "*in situ*" and also to object to a supplementary EIO; and, lastly, according to the national law of the issuing State, respecting the adversarial principle at that investigatory stage may also have a decisive impact on the admissibility of the evidence obtained abroad[48].

127. However, neither the DEIO nor the national implementing laws mention the possible intervention of the defence lawyers in the execution of the EIO, but only for the «authority» or the «officer». [49] Nevertheless, although not specifically foreseen, it should not be interpreted as a prohibition of the defence lawyers to intervene. Moreover, the protection of the right of defence and the principle of equality of arms[50] would support such participation, as long as the investigations are not to be kept secret[51].

128. ***Recommendation:*** The participation of the lawyers in the execution of an EIO should be facilitated in order to protect the defence rights.

129. Thus, as long as it is compatible with the investigations and those are not secret, intervention of the lawyers in the execution of the measures carried out in another Member State should be promoted. To that end, the issuing authority

[47] This was foreseen under art. 4 of the European Convention on Mutual Assistance in Criminal Matters of 1959. In the same sense, see the Recommendation No. R (80) 8 of the Committee of Ministers to Member States concerning the practical application of the European Convention on Mutual Assistance in Criminal Matters, of 27 June 1980.

[48] This is the case in Spain, for instance, with regard to the investigative measures which are impossible or very difficult to be practiced later at trial. Cfr. Arts. 730, 777(2) y 797(2) LECrim.

[49] Arts. 191 and 210 LRM; art. 29 (1 y 2) LD; and art. 589zi (§ 1 y 2) PCPC.

[50] It should be noted that, as consistently stated by the ECHR, this principle is integrated in the right to a fair trial enshrined by art. 6 CEDH. See, for all, judgment *Dombo Beheer v. The Netherlands*, App. 14448/88, of 27 October 1993.

[51] This is requested also by the group of lawyers interviewed in the framework of this project. In this regard, see D.2.3, question 11

should require that the defence lawyers are informed of the date scheduled for its practice.

Issuing an EIO

130. Ex officio upon request of the defence

131. Issuing authority, validating authority

132. Support: EJN and Eurojust, direct contact

8. REQUIREMENTS OF PROPORTIONALITY/NECESSITY OF THE EIO

133. Formal requirements of the EIO form, transmission, confidentiality

8.1. How to proceed in cases where the collecting of evidence is requested via EIO, but the form of the EIO is not a) complete or is incorrect; or b) it is not used?

134. The forms included in the Annex of the EIO are aimed at facilitating the whole procedure of issuing and executing the requests for cooperation. At the same time, in order to make the whole procedure easier and swifter the use of those forms is mandatory.

135. In case a): the issuing authority fills in the form, but this is not complete or is incorrect. The way to proceed is established under Article 16.2 (a) DEIO: only if it is impossible to the executing authority to take a decision, the executing authority shall “immediately” inform the issuing authority.

136. *Senso contrario,* this means that, even if the form is not complete or mistaken, if it is clear for the executing authority what is requested and how to proceed to gather the evidence identified in the EIO, it shall proceed without the need for prior information.

137. In other words: defects in the forms, incomplete forms do not lead to a refusal, nor to a suspension of the execution, unless the lack of such information makes it impossible to proceed. In such, cases, the executing authority shall contact the issuing authority and clarify the content of the EIO (correct mistakes, fill in gaps). The best practice is: Forms are aimed at facilitating, not at hindering the cooperation. In this sense, formalities are never to be invoked as a ground for refusal, as long as the issuing authority is one of the authorities listed under Article (c) DEIO.

138. In case b) the executing authority has received the request for collecting evidence by way of a letter rogatory instead of using the forms of the EIO. This situation can occur during the first months after entering into force the EIO legislation in the Member States but should disappear once the "transition" phase is over, and every practitioner masters the EIO procedure. At present (as of September 2018), several countries reported that they continued receiving requests in the form of letters rogatory instead of the form of the EIO.

139. The appropriate way to proceed in such cases –where all the conditions and requirements for an EIO are met, but the form is not used– would be: initiate the execution of such measures under the EIO rules, and at the same time contact the issuing authority, pointing out to the mistake in not using the prescribed form and: 1) state that they will proceed to execute despite the error, but this practice should not continue in the next future; 2) state that they will proceed to execute despite the error, but ask the issuing authority to re-send the request in the correct form.

8.2. How shall the executing authority proceed in case the issuing authority requests a measure that is not covered by the EIO, but using the forms of the EIO?

140. The practice of the MS authorities varies greatly. Some practitioners deal with those requests not covered within the EIO, as MLA requests directly (Czech Republic), others however refuse the EIO for falling out of its scope. It has to be recalled that the issuing authority shall use the appropriate channels to gather cross-border evidence. Nevertheless, flexibility –at least at the initial months– should be the rule.

141. Therefore, if the request for an EIO is sent as a letter rogatory, or the other way round, an MLA request is transferred via an EIO form, in both cases, the executing authority shall promote the execution: proceed to execute under the applicable rules, and at the same time inform the issuing authority on the mistake detected.

142. **Requirement of *lex fori* in execution**

143. **Time Requirements**

144. **Way to proceed**

145. **State security**

146. **Immunities/privileges**

147. **Notifications/remedies**

Executing an EIO

148. **Validating**

149. **Domestic order or direct execution upon EIO certificate?**

150. **Elements to check, how to check**

151. **Substitution of a requested measure: proportionality or non-existence?**

152. **Consultations**

153. **Confidentiality**

154. **Costs**

9. GROUNDS FOR REFUSAL

155. **Mandatory/optional**

156. **Privilege/immunity**

157. **Territoriality**

158. **Double criminality**

9.1. Ne bis in idem

159. *Ne bis in idem* Article is one of the optional grounds for refusal set out under 11(1) DEIO. This provision shall be interpreted in the light of recital 17 of the DEIO, so that, in order to know whether in the framework of a specific case the *ne bis in idem* could be invoked. Consideration should be given to the European dimension of this principle as recognised by the Charter[52] and interpreted by the case-law of the Court of Justice of the European Union.

160. According to the ECJ case law the principle of *ne bis in idem* protest against a second criminal proceeding against the same person and for the same acts for which he/she has already been finally acquitted or convicted by a final judgment as well as from being punished twice for the same facts. Furthermore, according to the ECJ, the principle of *ne bis in idem* applies both with regards to sanctions, preventing a duplication of sanctions (administrative/criminals) or with regard to

[52] Art. 50 Charter (2016/C 202/02) DO C202/389 (7.6.2016), as well as the Explanation to this provision, (2007/C 303/02) DO C303/17 (14.12.2007), p. 31.

proceedings (administrative/criminals), even though only in those cases where the administrative sanctions are "criminal in nature".

161. Conversely, the ECJ has outlined the elements upon which the principle of *ne bis in idem* is based. Basically, there are two conditions:

162. (a) The subjective and factual identity. That is, that the «same person»[53] is subject to a procedure or is sanctioned with a criminal penalty for the «same acts» (the *idem*)[54] for which he/she has already been convicted (or acquitted) in a previous procedure;

163. (b) The existence of a final criminal decision, which includes any decision – acquittal or conviction – that, according to the law of the State in which it was rendered, implies the definitive closing of the case and has been adopted after an examination of the merits[55]. With reference to this second condition, it is also important to take into account that the ECJ finds to be compatible with article 50 Charter the so-called «execution condition». This condition – which applies in respect of the final judgments imposing a criminal conviction – implies that, in order for the *non bis in idem* to apply in respect of this kind of judgment, it is necessary that «…if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing (State)» (Art. 54 CISA).

164. In the Italian, Spanish and Polish legislation implementing the EIO Directive

[53] ECJ, 28 September 2006, *Van Straaten*, C-150/05, EU:C:2006:614; and ECJ, 5 April 2017, *Orsi y Baldetti*, C-217/15 and C-350/15, EU:C:2017:264.

[54] In the opinion of the ECJ, the expression «the same acts» is an autonomous concept of European Union law. ECJ, 16 November 2010, *Mantello*, case C-261/09, EU:C:2010:683. On this concept, see also ECJ 9 March 2006, *Van Esbroek*, C-436/04, EU:C:2006:165; ECJ, 18 July 2007, *Kraaijenbrink*, C-367/05, EU:C:2007:444; ECJ, 28 September 2006, *Van Straaten*, C-150/05, EU:C:2006:614; and of the same Chamber and same date *Gasparini and others*, C-467/04, EU:C:2006:610; and ECJ, 18 July 2007, *Kretzinger*, C-288/05: EU:C:2007:441.

[55] ECJ 10 March 2005, *Miraglia*, C-496/03, EU:C:2005:156; ECJ), 28 September 2006, *Gasparini and others*, C-467/04, EU:C:2006:610; ECJ, 5 June 2014, *M*, C-398/12, EU:C:2014:1057; and ECJ (Grand Chamber), 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483.

the *ne bis in idem* has been regulated as a mandatory ground for refusal of the EIO. However, to give this ground for refusal a practical meaning, it will need for the executing authority to know whether it applies or not. Unless this is notorious or the defendant invokes such ground for refusal, it will be difficult for the executing authority to take it into account.

a) Cases where the ne bis in idem does not necessarily lead to the refusal of recognition and execution of the EIO?

165. There are two circumstances where the EIO may not be refused on this ground, despite being regulated as a mandatory ground for refusal under domestic law[56]:

166. When the EIO is aimed at establishing if there is possible conflict with the *ne bis in idem* principle. In other words, when the EIO has been issued in order to clarify whether in respect of the same acts and against the same person a final irrevocable decision has been rendered.

167. The second circumstance or exception is that the issuing authority «has provided assurances that the evidence transferred as a result of the execution of the EIO would not be used to prosecute or impose a sanction on a person whose case has been finally disposed of in another Member State for the same acts».

168. ***Recommendation:*** When the EIO aims to determine whether the acts and persons suspected by the issuing authority have already been judged, this should be explicitly indicated in Annex A DEIO (preferably in Section G).

169. Similarly, when the issuing authority fears that the EIO may be refused in the executing State for this reason, it should specify in Annex A (and preferably in its Section G) that the evidence obtained would not be used to prosecute or impose a sanction on a person whose can already been finally disposed in another

[56] V. Recital 17 DEIO.

Member States for the same acts.

b) How should the executing authority proceed when it has doubts that the acts which motivate the issuing of the EIO might have been subject to a final judgment in a third State?

170. It is highly unusual that the executing authority is aware of the possible infringement of the principle of *ne bis in idem* when requested to execute an EIO.

171. In order to facilitate to check whether this ground for refusal may exist, it would be perhaps adequate to notify all the parties to the proceedings in the forum state of the issuing of the EIO. And at the same time, the executing authority should notify the parties affected by the execution of the investigative measure, [57] so that they could put forward the possible ne bis in idem infringement.

172. In any case, the executing authority may not reject out of hand the execution of the EIO for this reason: before adopting a decision in this respect, it shall consult the issuing authority [art. 11(4) DEIO], and involve also the authorities of the state where the decision that triggers the *ne bis in idem* was rendered (if it is different from the executing state).

173. ***Recommendation:*** In order to effectively enforce the *ne bis in idem* principle, issuing and executing authorities should ensure that, as far as possible, the parties to the process are aware of the issuing and/or receipt of the EIO and can oppose to it.

[57] It should be recalled that art. 22.1 LRM considers as compulsory such a notification in cases where the person concerned by the measure is resident or domiciled in Spain. However, an exception to this principle is made for the cases where the activities of the proceeding in whose framework the EIO has been issued are secret or in the cases where the notification may undermine the objectives pursued with the EIO.

174. If the executing authority considers that an EIO might be against the principle of the *ne bis in idem*, before taking a decision in this regard, it will initiate a consultation process with issuing authority and, where necessary, with the judicial authority which rendered the final decision on the same acts (if it is a third state).

c) Is it possible to refuse an EIO on the basis of the principle non bis in idem because of litis pendens?

175. Contrary to what happens in the domestic legal framework of some States, the European concept of *ne bis in idem* does not protect against the international *litis pendens*. Nor does the DEIO consider the pending of another criminal proceeding on the same facts against the same individual in another country as a ground for refusal – mandatory or optional – of the EIO[58].

176. ***Recommendation:*** If, on the occasion of an EIO, the executing authority acknowledges the existence of two or more parallel criminal proceedings on the same acts, it will proceed in the manner contemplated by the corresponding national law implementing the FD 2009/948/JAI, of the Council, of the 30 November, on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings[59].

9.2. Similar domestic case (proportionality, list of offences, suspicions requested, gravity of the offence, statute of limitations.

9.3. Fundamental rights protection

[58] In this respect the DEIO is different from other instruments of mutual recognition. See art. 4(2) FD EAW.

[59] DOUE L 328/42 (15.12.2009).

177. Etc….

178. **Accidental findings**

10. LEGAL REMEDIES AT NATIONAL LEVEL

10.1. General Considerations

179. Article 14 DEIO deals with the legal remedies against the EIO, which can be challenged both in the issuing and in the executing State. More specifically:

180. States shall ensure that the decisions on the recognition and the execution of the investigative measures of the EIO, can be challenged in the executing State by way of "legal remedies equivalent to those available in a similar domestic case" (article 14.1 DEIO).

181. However, as a rule substantive grounds for issuing the EIO can be challenged *only* in the issuing State[60]. Despite the precise wording of Article 14 (2) DEIO, interested parties should also be allowed to put forward challenges regarding the issuing of the EIO before the courts of the executing state, if this is provided within the domestic legislation: the DEIO itself recognises this possibility.[61] Moreover, it will be the only way to challenge the EIO when there is no other legal remedy in the issuing State.

182. The specific type of remedy and all the conditions to file it will be determined by the national legislation. What the DEIO requires as that such remedies are at least equivalent to those provided for similar national investigative measures [arts. 14(2) and 6 DEIO]. Such challenge as a rule shall not suspend the execution of the investigative measure, *unless it is provided in similar domestic cases*» [art. 14 (6)].

[60] Art. 14 (2), in relation to art. 6.1 DEIO.

[61] Art. 14 (2) DEIO, and recital 22 *in fine.*

183. The DEIO does not ultimately oblige the Member States to establish legal remedies against the EIO[62], nor can from this provision be inferred that they shall have a right to challenge the EIO.[63]

184. Another important aspect concerning legal remedies refers to the information that must be provided on them; or, rather, to the obligations that are imposed on the issuing and executing authorities in this regard. On the one hand the issuing and executing authorities have the duty to ensure that the parties promptly know the legal remedies applicable in each case (i.e., in due time «to ensure that they can be exercised effectively»). This obligation does not apply in the cases where the information may compromise the confidentiality of the investigation [art. 14 (3) DEIO]. On the other hand, issuing and executing authorities shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO [art. 14 (5) DEIO].

185. The success of the action brought in the executing state against the decision to recognise or execute the EIO, will be also of great importance, due to the fact that evidence obtained in violation of the *lex loci* will not automatically be excluded in the proceedings. Exclusion or admissibility of such evidence will depend on the laws of the forum state [Art. 14 (7) DEIO].

10.2. Legal remedies at the national level

a) Spain

186. Article 14 DEIO has not been specifically implemented in the Spanish legislation.

[62] It should be recalled that the FD 2003/577/JAI [arts. 11 (1) y 5] obliged the Member States to establish such remedies for cases where the EEW contained coercive measures.

[63] It does not seem, thus, that art. 14 DEIO provides directly a right to challenge a decision on the EIO. Nor it seems that the impossibility to challenge the EIO at the national level is contrary to the mentioned art. 14 DEIO. It is nevertheless necessary to wait for the ECJ decision on the preliminary ruling, 31.05.2017, *Gavanozov*, C-324/17. OJEU C 256/16.

187. LRM[64] provides that against the EIO the same legal remedies as provided in a similar domestic case will be applicable. Following this rule, the identification of legal remedies against the EIO –taking into account the diverse factors that apply– results in the following:

* The same system of appeals applies in cases where the authority competent to the recognition and execution is a **Juez Central de Instrucción** or a **Juez Central de lo Penal**.

** The same system of appeals applies in cases where the authority competent to the recognition and execution is the **Central Juvenile Judge (Juez Central de Menores**).

1. In accordance with art. 14 (6) DEIO, the lodging of an appeal against the EIO does not suspend the execution of the measures there included. However, and as an exception, it is possible to suspend the execution of the order when, in carrying it out, may be created «irreversible situations or may cause injury that will be impossible or difficult to redress». In those cases, the suspension may be accompanied by the provisional measures necessary to ensure the effectiveness of the measure (art. 24.1.II LRM).

b) Italy

2. The Italian legislation does not foresee the possibility of **appealing against** investigative measures agreed at the national level. On this premise, and given that the LD also omit any reference to the possibility of challenging the EIO when it is issued in Italy it shall be concluded that it is not possible to challenge the decisions taken in this regard by the Public prosecutor (*decreto*) or the judge (*ordinanza*). Are exempted from this rule the cases when the EIO **is to be regarded as** a *seizure aimed at evidence*[65].

3. The LD, on the contrary, provides for a system of "opposition" against the decree of recognition of the **EIO by the** Public prosecutor (art. 13 § 1 a 6 LD).

[64] Art. 13 LRM, with regard to appeals against decisions concerning the issuing of the EIO; and art. 24 LRM, with regard to the appeals against the decisions concerning the recognition and execution of the EIO.

[65] Cfr. art. 28 LD and arts. 368 and art. 324 ICPC.

This "remedy" – which should be brought within five days before the judge for preliminary investigations – shows some shortcomings[66]:

4. The first is that only the suspected person and his/her lawyer may use it. It is, thus, not possible the "opposition" by third parties.

5. Another relates to certain measures to which the EIO (i.e. the interception of telecommunications). In these cases, the decree of recognition is communicated to the defence, which prevents *de facto* its "opposition".

6. Furthermore, it should be noted that if the "opposition" is successful, the decree of recognition of the EIO is annulled. Such an outcome may cause problems in the issuing State in respect of the evaluation of the evidence obtained.

7. The filing of the "opposition" in no case suspends the execution of the investigative measure. The only decision that may be taken by the Public prosecutor is to suspend the transmission of the evidence to the issuing State when such a transmission may cause a serious and irreparable harm to the suspected person (art. 13§4 LD).

c) Poland

As in Spain, in Poland the system of appeals applicable to the issuing and execution of the EIO is the one foreseen at the national level to challenge those decisions concerning the adoption of certain investigative measures or decisions to secure evidence which do not have a cross-border nature.

[66] Particularly in comparison with the other "*remedy*" envisaged against the decree concerning the execution of a *seizure aimed at evidence* (art. 13 § 7 LD). On this point, at length, A. Mangiaracina, "L'acquisizione "europea" della prova cambia volto: l'Italia attua la Direttiva relativa all'ordine europeo di indagine penale", *Diritto penale e processo*, 2/2018 pp. 169 ff.

So, it is possible to lodge an interlocutory appeal against the decision to issue the EIO, but only when the order includes certain measures as, i.e., domicile enquiries or tracking of the location of a person holding and opening of correspondence the seizure of property or the monitoring and interception of telephone and electronic telecommunications (art. 589w § 4, in connection with arts. 236, 240 y 241 PCPC). With regard to the latter sort of measures (i.e., the surveillance and wiretapping and the interception of e-communications including the e-mails), it is important to take into account that Polish law provides that the parties will not be informed of the decision granting this measure when it is necessary to protect the successful outcome of the investigations. This notification should in any event be done prior to the ending of the pre-trial stage (art. 589ze § 4, in relation with art. 239 PCPC).

According to Polish law, not only the defence, but any person affected by the investigative measures mentioned above is entitled to challenge is lawfulness.

10.3. Who may challenge the issuing/execution/deferral of the EIO? The term "parties concerned"

The term "concerned parties" used in art. 14(4) DEIO casts doubt on who can appeal the decisions adopted in relation to the EIO[67]. However, a systematic interpretation of this expression,[68] allows concluding that it encompasses also the third parties affected

[67] The already mentioned reference for a preliminary ruling 31.05.2017, *Gavanozov*, case C-324/17, can be taken as an example of these doubts. In this case, the questions referred to the ECJ concern the search on residential and business premises, the seizure of specific items and the examination of a witness; all measures included in an EIO issued by Bulgaria. The first question is whether the holder of the domicile or a person who is to be examined as a witness are considered as «person concerned» for the purpose of art. 14(4) DEIO. The second question asked is whether in the case that the investigative measure is directed to a third person, the suspected or accused person may be considered as «person concerned» with a view to challenge the EIO.

[68] It should be noted that art. 13.2 DEIO establishes the compulsory suspension of the transfer of the evidence to the issuing State if such a transfer «would cause serious and irreversible damage to the person concerned». This provision clearly shows the balancing of the interests of the criminal investigation and the rights and legitimate interests of the person concerned by the measure, regardless whether the latter is a party or a third party.

It should also be reminded that both the FD 2003/577/JHA (art. 11) as well as the FD 2008/978/JHA (art. 18) use the term "party concerned", although both instruments specified explicitly that the term comprised also the "bona fide third parties".

by the investigative measure or the provisional measure provided in the order. Concerned party is anyone affected by the order or the measure.[69]

> ***Recommendation:*** The effective legal remedies against the EIO must be available for the parties to the criminal proceeding and for the third parties affected by the EIO. Consequently, when the respective national laws provide for an appeal in a similar domestic case, will be considered part of the process those third parties, **although** (**siquiera**) solely for the purposes of challenging the decision or measure which affects them. This, of course, this is possible if the information about the possibility to use these legal remedies is given to the third persons as soon as this information does not undermine the successful outcome of the investigations[70].

11. TRANSFER OF THE EVIDENCE

11.1. Methods for transferring the evidence gathered

188. Transfer of data and speciality principle

189. **Problem at issue:**

190. An issue which in practice may rise relates to the data protection of the information obtained by a Member State ("A") from the executing State ("B") in execution of an EIO. In this case, a problem concerns how the information obtained by the State A in execution of the EIO may be used. May they only be used for the specific purpose and in the framework of the specific criminal proceeding in relation to which the EIO has been issued (principle of speciality in data protection law), or may this information be used in other proceedings, for other reasons than those indicated in the EIO? Even more, may this information be forwarded from Member

[69] This is the interpretation in compliance with ECtHR, of 7 July 2015, case *MN and Others v. San Marino*, and of 1 December 2015, case *Brito Ferrinho Bexiga Villa-Nova v. Portugal*.

[70] In Spain this notification represents a legal obligation in the cases where the person concerned by the measure is resident or domiciled in this State. See art. 22 (1) LRM.

State A to another Member State ("C"), without the consent of the executing Member State B that transmitted this information for the specific purpose indicated in the EIO?

191. These questions arise, in particular, because of the principle of speciality, or principle of "purpose limitation", according to which personal data shall be collected for specified, explicit and legitimate purposes and not further transmitted to others nor be used for purposes other than those for which they were transmitted to the recipient. According to this principle, thus, apparently State A could not transmit to a third State C the data obtained from a State B for the specific purpose indicated in the EIO; in fact, every time that State A would like to transmit the information obtained via the EIO to another Member State C or every time that it would like to use them for another purpose or in another proceeding, it should ask State B for consent or authorisation to use or forward this information for a purpose other than this indicated in the EIO.

192. However, at the same time, allowing State A to forward the information obtained in execution of the EIO to another Member State C requesting them for the purposes of another investigation without asking for the consent of the executing Member State B would ensure to the maximum extent possible the free circulation of evidence and information between national competent authorities within the area of freedom, security and justice and the effective investigation and prosecution of the perpetrators of crimes having a cross-border dimension.

193. It is, thus, fundamental to find a balance between these two different needs: the need to ensure the protection of the data transmitted from State B to State A and the need to ensure the free circulation of evidence between the Member States in order to ensure the effective prosecution of the perpetrators of the crimes committed on, or otherwise connected to, the territory of more than one Member State. The solution proposed as a guideline is, thus, the one that in our opinion allows to the largest extent possible to reconcile these two different needs.

11.2. Possible interpretations:

194. In the first instance, it should be highlighted that the DEIO, differently from the 2000 MLA Convention, does not expressly regulate this rule. Thus, in this respect, three different interpretations are possible.

195. **1)** According to a first interpretation, the Member State A which received the information in execution of an EIO can not use these information in another proceeding, at least if it is not strictly and directly connected to the one in relation to which the EIO has been issued, nor can it forward these information to another Member State C requesting them through an EIO without the consent of the executing State B which gave it the information. This interpretation has been adopted by some national implementing laws, such as article 193 of the Spanish implementing law, which says that the Spanish authority can not use the information obtained in execution of an EIO for other purposes than those explicitly indicated in the EIO without the consent of the executing authority or the data subject. According to this interpretation, therefore, the issuing authority which received the information in execution of an EIO must ask for the consent/authorisation of the executing authority every time that it wants to use the data for other purposes than those indicated in the EIO. Such a strict interpretation of the data protection principle of speciality was also adopted by article 23 of the 2000 MLA Convention. According to that article, the personal data communicated under the directive could be used by the Member State to which they have been transferred only “for the purpose of proceedings to which this Convention applies, for other judicial and administrative proceedings directly related to proceedings referred to under point (a), for preventing immediate and serious threat to public security” or “for any other purpose, only with the prior consent of the communicating Member State, unless the Member State concerned has obtained the consent of the data subject”. However, the 2000 MLA Convention has been replaced by the DEIO. According to article 34 DEIO, the DEIO “replaces, as from 22 May 2017, the corresponding provisions of

the […] (c) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol". In this respect, the corresponding provision[71] of article 23 MLA is article 20 DEIO, which concerns the protection of personal data. Thus, according to a literal interpretation, article 20 DEIO replaces article 23 of the 2000 MLA Convention. In this regard, it has nevertheless been argued that the verb used in the DEIO is "replace" and not "derogate". The provision on data protection of the 2000 MLA Convention, i.e. article 23, would therefore be still applicable, as far as it is not explicitly derogated by the DEIO. If such an interpretation is retained, the use of the data for other purposes than those indicated in the EIO would thus be possible only with the consent of the data subject or of the executing State according to article 23 of the 2000 MLA Convention.

196. **2)** According to a different interpretation, on the contrary, article 20 DEIO fully applies and, thus, the data communicated in execution of an EIO is to be processed in accordance with Directive (EU) 2016/680 "on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA", which repeals the Council Framework Decision 2008/977/JHA mentioned in article 20 DEIO. In this regard, Directive 2016/680 provides that "Member States shall provide for personal data to be: processed lawfully and fairly; collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes; adequate, relevant and not excessive in relation to the purposes for which they are processed; […] kept in a form which permits identification of data subjects

[71] On the controversial concept of "corresponding provisions", see 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. Council Document 15210/17, "Extracts from Conclusions of Plenary meetings of the EJN concerning the practical application of the EIO", Brussels, 8 December 2017, p. 3, let. b), p. 8, point 1.

for no longer than is necessary for the purposes for which they are processed."[72] Furthermore, article 4(2) provides that "processing by the same or another controller for any of the purposes [of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security] other than that for which the personal data are collected shall be permitted in so far as: (a) the controller is authorised to process such personal data for such a purpose in accordance with Union or Member State law; (b) processing is necessary and proportionate to that other purpose in accordance with Union or Member State law".

197. Thus, according to the 2016/680 Directive, the data obtained in execution of an EIO may be processed for any other purposes concerning the prevention, investigation detection or prosecution of criminal offences other than that for which the personal data were collected, if such a use is allowed in accordance with Union or Member State law and if the processing of data is necessary and proportionate to that other purpose in accordance with Union or Member State law. It seems therefore that **the processing of data for a purpose other than that for which the information were collected is allowed if it results from a case by case assessment that the use of the information is "proportionate and necessary to that other purpose" in accordance with national or European law**; an evaluation of the proportionality and necessity of the use of the data concerned for the other purpose for which they are to be used is thus necessary. From a combined reading of article 20 DEIO and article 4(2) of the 2016/680 Directive, it seems, thus, that Member State A does not have to ask for the consent/authorisation of the executing State every time that the data received in execution of an EIO should be used in another proceeding for purposes other than those for which they were requested or when they are requested through an EIO by another Member State C. Member State A may, in fact, use this data for another purpose or forward them to another Member State C, as far as it is allowed to do so according to its national law and as far as this processing is necessary and proportionate for that other purpose in accordance with

[72] See article 4, par. 1 of the 2016/680 Directive.

Union or Member State law. In this regard, it should therefore be mentioned that article 193 of the Spanish implementing law could be an obstacle for the Spanish authority in forwarding this information without the prior consent of the executing State, which is expressly required under the Spanish national law[73]. The same result, i.e. the necessity to ask for the consent of the executing authority, may also be derived from a systematic interpretation of a given national legal system, such as the Italian one, where there is no specific rule in this regard. In this case, in the absence of a specific provision, the general rules apply and thus, by a coherent interpretation of article 729 of the Italian code of criminal procedure, the use of a forwarded investigatory act could be limited to a specific proceeding.

198. **3)** According to another interpretation, on the contrary, the "speciality rule" does not apply in relation to the transfer of evidence, as there is no specific legal basis in the DEIO on the applicability of the speciality rule. If such an interpretation is accepted, in those national legal system, as the Polish one, where there is no provision ensuring the respect of the principle of speciality with regard to the transfer of evidence, there is no warranty that the evidence obtained by Member State A in execution of an EIO will not be forwarded to Member State C, provided that is possible according to the Polish national legal system. This interpretation is in line with the wording of another provision of the DEIO, namely article 10(2)(a), according to which there are some investigative measures which must always be available under the law of the executing State, such as "the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO". Thus, according to this provision, Member State A has to forward to the

[73] However, see in this regard the report on the evaluation of the practice in relation to the Spanish system, where we read that "some of the Magistrates have answered they transfer data obtained in a criminal investigation to other proceedings, even if those data have not been obtained in the specific case for which the judicial cooperation was requested. In their opinion, the prosecution of crime prevails over the principle of specialty in evidence matters, prevailing the principle of availability. Any information that has been obtained can be provided on the basis of the lack of prohibition of the spontaneous exchange of information. Limitations on an exchange of date are considered an inadequate barrier to international judicial cooperation" (p. 27 of the Report).

requesting Member State C the information received in execution of an EIO from Member State B that are now in its possession. According to this provision, Member State A would not only be allowed, but even obliged to forward this information to the requesting Member State C. Thus, if one considers that once they have been received by Member State A, this information is in its possession, article 10(2) DEIO would apply. The consequence would be that, as in this case, the European legislator decided to make sure that the need to ensure the free circulation of evidence prevails over the need to ask every time for the consent/authorisation of the executing State, and Member State A could forward the information to Member State C without the need to ask for the previous consent of Member State B.

199. **4)** According to another interpretation of the silence of the Directive on the applicability of the speciality rule, in the "Conclusions of the 49th Plenary meeting of EJN", which took place in Tallinn, November 2017, and particularly in the Workshop III on the "practical implementation of the European Investigation Order in criminal matters", some argued in favour of an interpretation according to which the evidence obtained in execution of an EIO are subject to the speciality principle and may, thus, be transferred to another Member State, only if the requirement of double criminality is fulfilled.

200. **5)** Finally, according to another interpretation, article 19 of the Directive, which concerns the duty of confidentiality, can be considered as an argument for the rule of speciality to be applied. As stated by article 19 DEIO, the executing authority "shall, in accordance with its national law, guarantee the confidentiality of the facts and the substance of the EIO, except to the extent necessary to execute the investigative measure" and "the issuing authority shall, in accordance with its national law and unless otherwise indicated by the executing authority, not disclose any evidence or information provided by the executing authority, except to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO." Finally, article 19(4) DEIO, which concerns the disclosure of bank

information, obliges the Member States to take the necessary measures to ensure that the bank does not disclose to the bank customer concerned or to other third persons that information has been transmitted to the issuing State or that investigation is being carried out in execution of an EIO.

201. At first sight, it seems, thus, that pursuant to article 19 DEIO, Member State A can not forward the information to Member State C without the consent of Member State B. According to this provision, the issuing authority, i.e. in the example Member State A, must, “unless otherwise indicated by the executing authority”, not disclose any evidence or information provided by the executing authority, “except to the extent that its disclosure is necessary for the investigations or proceedings described in the EIO”. Thus, Member State A, according to this provision, must not disclose the information obtained in execution of an EIO, except in two cases: in the first place, in case there is an express consent or indication to that effect from Member State B, and, in the second place, if that disclosure is necessary for the investigations or proceedings described in the EIO. Consequently, it seems that if the disclosure of the information is not necessary for the investigations or proceedings described in the EIO, but it is necessary for another investigation, the consent of the executing State is needed.

202. However, on closer examination, from the analysis of the rationale behind article 19 DEIO, one infers that the aim pursued by the legislator with article 19 DEIO is different from the objective sought by the legislator when requiring the respect of the speciality principle in the transferring of evidence, as it was the case, for example under the 2000 MLA Convention. In fact, unlike the principle of “purpose limitation” or speciality principle, which aims at protecting the personal and confidential data of the data subject, the duty of confidentiality referred to in article 19 DEIO aims at ensuring that the competent authorities can carry out effective investigations. This is patently clear from paragraph 4 of article 19 DEIO but can also be inferred from a closer examination of paragraphs 1-3 of article 19 DEIO. According to article 19 DEIO, the person to whom information must not be

disclosed is in fact the suspect or the data subject and not other judicial authorities; the aim of the provision is not to damage the investigation. The consent of State B is thus required in this case in order to ensure the confidentiality of the investigation, so that the competent authorities may effectively carry out their investigation. On the contrary, the principle of speciality aims at ensuring that the confidential data concerning the data subject are not forwarded to another authority to ensure an adequate data protection of the data of the data subject. That is completely different from the case of article 19 DEIO, according to which the judicial authority may decide not to disclose the information known to it to the data subject in order to ensure that investigations are carried out effectively. It follows *a contrario* that **the information may be disclosed to carry out investigation having a different purpose than the one for which they were obtained through the EIO if this does not damage the investigation in relation to which the EIO was issued.** The different objectives pursued, thus, change the way of interpreting the need of confidentiality and secrecy of the information and the consequent possibility to use this information in other criminal proceedings. In this respect, it should be noted that, even if it is true that in some cases are the same information which are not disclosed to judicial authorities of another Member State in order to ensure the respect of both the principle of speciality and the duty of confidentiality, this is not always the case; thus, one can not derive the need to ensure the respect for the principle of speciality from article 19 DEIO, which protects a different interest, i.e. the confidentiality of the investigations.

203. **6)** In conclusion, however, from an overall interpretation of the European legal framework, i.e. of the whole DEIO and the Directive 2016/680, it seems that the interpretation under point 3) is possible only in relation to the so-called non-coercive investigative measures, namely those measures which do not restrict the fundamental rights of the individuals concerned. In fact, in case of coercive measures affecting the fundamental rights of the persons concerned, an interpretation according to which Member State A must obtain the consent of Member State B or of the data subject or, if the interpretation under point 2) is

retained, must evaluate whether the processing of the information in its possession is necessary and proportionate to that other purpose in accordance with national and European law, seems the more suitable solution in order for the right to data protection of the subjects concerned to be fully respected.

204. **Best practice:**

205. In case that Member State A is requested to forward to Member State C via an EIO the information obtained from Member State B in execution of an EIO, it is recommended that, in case of non-coercive measures Member State A forwards the information without needing to ask for the consent/authorisation of Member State B from which it obtained the information. On the contrary, in case of coercive measures, it is recommended that Member State A, either ask for the consent of Member State B or of the data subject, or assess itself whether the processing of the information for this other purpose is necessary and proportionate for this other purpose in accordance with national and European law.

12. SPECIFIC INVESTIGATIVE MEASURES

206. Interception communications

207. What are communications?

208. Whatsapps, telephone conversations, emails, whatsapps, stored communications,

209. With technical assistance

210. Without technical assistance

211. Notification

212. Role of notified authority

213. Consequences of not notifying

214. Prohibition of use after notification

215. Systems for transferring data of interception of communications

216. Relationship/interaction EIO and e-evidence production/retention order

13. EXCHANGE OF INFORMATION ON BANK ACCOUNTS AND BANKING AND OTHER FINANCIAL OPERATIONS

13.1. Brief overview of the DEIO's legal framework concerning the exchange of information on bank accounts, banking and other financial operations

217. The issuing of an EIO in order to obtain information concerning bank accounts or other financial accounts, banking or other financial operations or for the monitoring of banking or other financial operations is regulated in Chapter IV, entitled “Specific provisions for certain investigative measures”, and specifically in articles 26, 27 and 28(1)(a) of the DEIO.

218. The regulation of the exchange of information on bank accounts and bank operations in a separate chapter dedicated to specific provisions for certain investigative measures raises, first of all, an important question, which has significant consequences, including from a practical point of view. Does the fact that the legal framework concerning the exchange of information on bank accounts and banking operations is regulated in specific provisions imply that a specific legal

regime applies in respect of the exchange of bank information, or does the general regime concerning the EIO apply? More specifically, do the rules referred to in articles 10 and 11 of the DEIO, which regulate the recourse to a different type of investigative measure and set forth the grounds for non-recognition or non-execution of an EIO, apply?

219. The answer to this question is rather important because the adoption of an interpretation instead of another one entails different consequences in terms of applicable regime and possibility for the executing authority to have recourse to an investigative measure other than that provided for in the EIO or to refuse to execute the EIO. Furthermore, the issue is particularly important considering that among the most requested activities in the field of judicial cooperation in criminal matters in the country object of this study there is the request of information on accounts[74]. In this regard, two suitable interpretations exist. However, before examining them, it is necessary to briefly describe the content of articles 26, 27 and 28 DEIO.

a) Brief description of article 26 DEIO

220. The explanatory memorandum[75] says that the basis of the provisions included in Chapter IV concerning the exchange of information on bank accounts and banking operations are articles 1 to 3 of the 2001 EU MLA Protocol. In particular, article 26 DEIO, which regulates the case when an EIO is issued in order to determine "whether any natural or legal person subject to the criminal proceedings concerned holds or controls one or more accounts, of whatever nature, in any bank located in the territory of the executing State, and if so, to obtain all the details of the identified

[74] See p. 12 of the report on the evaluation of the practice in Italy and p. 20 of the Spain's report on the evaluation of the practice in this Country.

[75] Document of the Council 9288/10 ADD 1, 3 June 2010, 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 regarding the European Investigation Order in criminal matters - Explanatory Memorandum, p. 17.

accounts"[76] is based on article 1 of the 2001 MLA Protocol.

221. The meanings of the two verbs "held or controlled" are not better explained either in the recitals or anywhere else in the directive. Only the explanatory memorandum briefly mentions that "accounts that are controlled *by* the person under investigation include accounts of which that person is the beneficial owner and this applies irrespective of whether those accounts are held by a natural person, a legal person or a body acting in the form of, or on behalf of, trust funds or other instruments for administering special purpose funds, the identity of the settlers or beneficiaries of which is unknown".[77]

222. As regards the person in whose respect the EIO may be issued, article 26(1) DEIO refers explicitly to "any natural or legal person subject to the criminal proceedings concerned". In this respect, recital 27 establishes that this expression is to be interpreted broadly as including "not only suspected or accused persons but also any other person in respect of whom such information is found necessary by the competent authorities in the course of criminal proceedings". Furthermore, paragraph 3 of the same article specifies that the information requested should also include accounts for which the person subject to the criminal proceedings concerned has power of attorney.[78] The fact that this clarification is made means that the issuing authority must specifically mention in the EIO whether the executing authority needs to also look for accounts for which the person subject to the criminal proceedings has power of attorney; the executing authority is in fact not automatically bound to verify these accounts if not explicitly requested.[79]

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[76] Article 26(1) DEIO.

[77] See explanatory memorandum, p. 24 where we read also that "the concept of beneficial owner is defined in Article 3(6) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25 November 2005, p. 15)".

[78] Article 26(3) of the DEIO.

[79] The analysis of the conditions under which an EIO may be issued is carried out in the next section (1.2).

223. As far as the execution of the EIO is concerned, article 26 does not require the Member States to set up a centralised register of bank account holders, leaving to each Member State the decision on how to comply in an effective way with article 26. Besides, the latter specifies only that the executing authority is obliged to give to the issuing authority all the details of the identified accounts only as far as the information is in the possession of the bank keeping the account.[80] "The result is that in many countries access to information on bank account holders is limited to judicial authorities, which need to officially request the information from every bank in their territory, without the possibility of consulting a single database including all the available information collected from all the banks in that territory".[81]

224. In this regard, a directive recently proposed by the Commission is set to play an important role in providing the competent authorities, including tax authorities, Asset Recovery Offices and anti-corruption authorities when they carry out criminal investigations under national law with direct access to the national centralised bank account registries or data retrieval systems. The proposed Directive, based on Article 87(2) TFEU, is in fact aimed at facilitating the use of financial information to prevent, detect, investigate or prosecute serious crime and to improve access to information by Financial Intelligence Units and public authorities responsible for the prevention, detection, investigation or prosecution of serious forms of crime, to enhance their ability to conduct financial investigations and to improve cooperation between them. Thus, the proposed directive, in order to reduce the recourse by competent authorities to blanket requests sent to all financial institutions in a certain Member State, gives to the competent authorities direct access to the information of bank account holders held in centralised bank account registries or data retrieval

[80] Article 26(4) of the DEIO.

[81] M. Simonato, M. Lassalle, A fragmented approach to asset recovery and financial investigations: a threat to effective international cooperation?, (2016) Durdevic, Zlata, Ivicevic Karas, Elizabeta (eds.), European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges, p. 148.

systems. The latter, currently operational in 15 Member States, are in fact accessible by specific competent authorities in only 6 of them. As regards the relationship with the DEIO, recital 11 of the proposed Directive provides, in particular, that "[t]he information acquired by competent authorities from the national centralised bank account registries can be exchanged with competent authorities located in a different Member State, in accordance with Council Framework Decision 2006/960/JHA and Directive 2014/41/EU of the European Parliament and the Council".

225. The scope of the proposed directive is therefore to give the competent authorities access to the information included in the national centralised account registries, but not to regulate the exchange of this information between the Member States. To that end, the DEIO remains essential. However, the two directives are interconnected as the possibility granted to the competent authorities to have direct access to the national centralised bank account registries or data retrieval system will undoubtedly facilitate the gathering of information and particularly enable the executing authority to provide the issuing authority with the information referred to in articles 26 and 27 DEIO. The proposed directive is, thus, complementary to articles 26, 27 and 28 DEIO.

226. Another problem connected to the previous one concerns the lack of company registers "allowing for the identification of hidden beneficiaries of opaque structures, benefiting from anonymity". The difficulty in identifying the beneficial owner of complex legal persons is mainly due to the lack of transparency of information relating to legal ownership. In this respect the adoption of the fourth and fifth EU Anti-money laundering directives which provide for the establishment of European public registries of legal structures such as trust and companies[82] has been of great importance.

227. Finally, the last paragraph of article 26 provides that an EIO could be issued also to determine whether any natural or legal person subject to the criminal proceedings

[82] See article 30 of the fourth money laundering Directive and article of the fifth money laundering Directive.

concerned holds one or more accounts in any non-bank financial institution located on the territory of the executing state. In this case, however, it is explicitly stated in the article that, in addition to the grounds for non-recognition and non-execution referred to in article 11, the execution of the EIO may also be refused if the execution of the investigative measure would not be authorised in a similar domestic case.

b) Article 27 DEIO

228. Article 27 of the DEIO regulates the possibility of issuing an EIO "in order to obtain the details of specified bank accounts and of banking operations which have been carried out during a defined period through one or more accounts specified therein, including the details of any sending or recipient account".[83] According to the recitals, the term "details" should be understood to include at least the name and address of the account holder, details of any powers of attorney held over the account, and any other details or documents provided by the account holder when the account was opened and that are still held by the bank".

229. While article 26 provided for the possibility to issue an EIO to find out whether a person owns, directly or indirectly, any bank account without any further inquiry into the transactions conducted by the account's holder, article 27 provides for the possibility to discover what transactions the account holder has conducted during a specific period of time. In the first paragraph of article 27 there is no reference to the fact that the accounts in regard of which an EIO is issued should be linked with a criminal proceeding. An indirect reference to it is mentioned only in paragraph 4 of the same article, where it is explicitly stated that in the EIO "the issuing authority shall indicate the reasons why it considers the requested information relevant for the purpose of the criminal proceedings concerned".[84] From a combined reading of

[83] Article 27(1) of the DEIO.

[84] Article 27(4) of the DEIO.

these two paragraphs and the explanatory memorandum,[85] it is thus clear that the EIO may also cover accounts held by third persons who are not themselves subject to any criminal proceedings but whose accounts are linked to a criminal investigation.[86] Furthermore, the fact that the article specifies that the information to be transmitted in the execution of such EIO includes also "the details of any sending or recipient account" means that the executing authority could be requested not only to provide information as regards the amount of money sent to/from the account or from/to another account on a certain date, but also to provide the requesting authority with information relating to the recipient/sending account, so that the issuing authority may trace the movements of money from account to account and, if necessary, proceed with an EIO in respect of the other account.

230. Article 27(3), similarly to article 26(3) specifies that each Member State shall take the measures necessary to enable it to provide the information referred to in the first paragraph and that the obligation set out in the article "shall apply only to the extent that the information is in the possession of the bank in which the account is held".[87] The remarks made with reference to article 26 are therefore also valid in respect of article 27.[88]

231. The final paragraph of the article finally provides, similarly to the last paragraph of article 26, that an EIO may be issued in respect of the information concerning the financial operations conducted by non-banking financial institutions. The definition of financial institutions is given in recital 28: the term "financial institutions" should be understood "according to the relevant definition of Article 3 of Directive

[85] Explanatory memorandum, p. 26.

[86] In the explanatory memorandum we read: "A practical example is the situation where the bank account of an innocent, and totally unaware, person is used as a 'means of transport' between two accounts, which are held by the suspect, in order to confuse and hide the transaction. Article 24 allows the issuing authority to get information on any transactions to or from such an account".

[87] Article 27(3) of the DEIO. The conditions under which the EIO may be issued are examined in section 1.2.

[88] The conditions under which the EIO may be issued are examined in section 1.2.

2005/60/EC of the European Parliament and the Council".[89] Considering that that directive has been replaced by Directive 2015/849, the term "financial institution" should thus be given the meaning referred to in article 3 of Directive 2015/849. The same additional ground for refusal applies in case of article 27, as in respect of article 26.

c) Article 28 DEIO

232. Both article 26 and article 27 of the DEIO concern the acquisition of information on previous activities which should be already in the bank's possession. Article 28 of the DEIO concerns, on the contrary, the monitoring of banking or other financial operations in real time, continuously and over a certain period of time. It therefore implies a higher level of intrusion upon fundamental rights and requires more active cooperation with banks.

233. In particular, article 28 concerns "the monitoring of banking or other financial operations that are being carried out through one or more specified accounts". As it is a more intrusive measure, article 28 provides an additional ground for refusal. The execution of the EIO may be refused, in addition to the grounds referred to in article 11, "if the execution of the investigative measure concerned would not be authorised in a similar domestic case".

234. This provision is very similar to article 3 of the 2001 Protocol to the MLA Convention. However, an improvement as regards the effectiveness of the cooperation between national authorities in comparison to the previous provision consists in the fact that article 3 of the 2001 Protocol to the MLA Convention only obliged Member States to set up mechanisms which make them able to monitor the banking operations carried out through one or more accounts specified in the

[89] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25.11.2005, p. 15.

request, but it highlighted in many parts of the provision that each Member State was then free to decide whether and under which conditions to give the assistance in a specific case, "with due regard for the national law of that Member State".[90] The Member States were therefore left with a wide margin of manoeuvre, which hampered the effective cooperation between them.[91]

13.2. Implementation of articles 26, 27 and 28 in Italy, Spain and Poland:

235. **Implementation in Italy**

236. As regards the implementation of the DEIO, it should firstly be noted that only few Member States provide for specific rules and investigative measures in order to obtain bank data; as a result, there is not a uniform procedure to obtain them, but as many different procedures as there are Member States.

237. In Italy two provisions of the Criminal Procedure Code, specifically article 255 and 256 CPC, apply in case of gathering of information and documents in banks and other financial institutions. Furthermore, as it is mentioned in the Italian national Report, a specific provision applies for the gathering of evidence in banks within the special proceedings for the application of a preventive measure[92]. In this case, the investigations on assets may be carried out directly by the holders of the power of proposal or by the Italian Finance Police (i.e. *Guardia di Finanza*) if there is delegation. The investigating police authority delegated by the Public Prosecutor has the power to seize documentation only if authorised by the Public Prosecutor or the judge[93].

238. However, in general, articles 255 and 256 CPC apply. According to the first

[90] Article 3 (3) of the 2001 Protocol of the MLA Convention.

[91] See in this regard, M. Simonato, M. Lassalle, A fragmented approach to asset recovery and financial investigations: a threat to effective international cooperation?, (2016) Durdevic, Zlata, Ivicevic Karas, Elizabeta (eds.), European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges, p. 145 ff.

[92] In this regard, article 19 of the Anti-Mafia code applies.

[93] See in this sense articles 253, 254 and 255 of the CPC.

article, it is possible to seize not only the documents, amount of money and securities deposited in current accounts held by the suspect or accused person, but also those held by persons other than the suspected or accused person if there are justifiable grounds to believe that they relate to the offence[94]. As it has been highlighted in the national report, according to case law, in such case "it is not necessary to serve the notice relevant to the right to defence (Article 369 bis of the CPC) to persons who hold the seizure document"[95]. Article 256 CPC, on the other hand, regulates the case when these documents are held by person subject to professional or public service secret. In this regard, it is provided that they shall immediately deliver the documents and the documentary evidence to the requesting judicial authority, as well as data, information and software, and anything else they possess by virtue of their function, job, service, profession or art. They are exempted from doing so if they declare in writing that this information is covered by either State, public service or professional secret. In the last two cases, nevertheless, the judicial authority has the power to assess the legitimacy of the statement if it has well-founded reasons to doubt about it and it believes that it can not proceed without the gathering of these documents, documentary evidence or objects. In case that it found the statement not justified, the judicial authority can consequently order its seizure. On the contrary, in case of State secrecy, if the evidence is essential to decide the case, the Court shall issue a judgment of non-prosecution due to the existence of the State secret.

239. As regards, the gathering of electronic flow in real time from or towards banks and financial institutions, the provisions concerning the interception of communications apply, i.e. article 266 and ff. CPC. In particular, the gathering of electronic flow of data is executed by the Public Prosecutor, upon request, if it is necessary, to the judge for preliminary investigations. In this case, thus, the Italian

[94] Literally, this provision provides that "documents, titles, securities, amounts of money deposited in current accounts and anything else held in banks, even if contained in safe deposit boxes, may be seized if the judicial authority has justifiable grounds to believe that they relate to the offence, even if they do not belong to the accused or are not registered in his name".

[95] Cass. I, 7 July 1992, n. 3272.

judicial authority shall verify whether there are specific conditions on admissibility, provided at the national level, for the interception of communications.

240. Furthermore, article 20 of the Legislative Decree 108 of 2017 provides that, when the EIO does not specify the reasons why the acts are relevant in the criminal proceeding, the public prosecutor, before executing it, asks the issuing authority to give this clarification and any other information useful for the quick and effective execution of the requested measure[96].

14. MINUTES OF THE PUBLIC DISCUSSIONS

The draft CBP took into account the replies by the practitioners in the questionnaires prepared to that end and the national reports of the three countries which were specifically studied. Nevertheless, as the practice in two of those countries was almost non-existent it was necessary to broaden the sources of information to present a more complete document taking into account practices of the authorities of another Member States as well as problems detected in such implementation of the EIO. To that end desk research was carried out in order to gather information from other EU countries, but there was still practical information that was lacking.

The draft CBP, ideally this should have been a more or less definitive draft, pending only to be completed after a public discussion with the relevant stakeholders and other experts. However, this was not possible, as more input was needed in order to finalise the CBP.

Despite those difficulties, most of the issues addressed in the present preliminary draft were subject to public discussion during two meetings with practitioners, first at the national level and second during a meeting organised by Eurojust. Those events were not specifically focused to discuss the EuroCoord draft for a CBP, but the UCM team

[96] Article 20, par. 3 of Legislative Decree n. 108 of 21 June 2017, "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.

leader was able to get a slot in EIO events to discuss the most problematic aspects of the EuroCoord CBP as well as to gather opinions on many of the proposals included in the CBP.

1) **The first public discussion** was held during the specialised course organised by the Spanish Public Prosecutor's Office at the UIMP Summer Courses in Santander. The course was focused exclusively on the implementation of the EIO and lasted three days, from the 20 August to the 22nd August. The participants were all public prosecutors, judges and law enforcement officers dealing directly with international judicial cooperation.

Although the EuroCoord team considered initially the convenience of organizing a specific conference within the D.4.2 and so present for public discussion the preliminary results on the drafting of the CBP, it was finally concluded that it could be more efficient to take the opportunity to present it during a course were the most relevant stakeholders were already present as participants.

Prof. Bachmaier, who had been invited to participate in the UIMP course took that opportunity to present the most debatable proposals included in the CBP with the participants gathered there. Despite the fact that a majority of the participants were national judicial authorities (judges and public prosecutors), many of the speakers were practitioners involved in judicial cooperation from other EU countries (*liason* magistrate of France, PP of Germany or Judge from Italy). The issues related to the concept of "judicial authority" and who should check if the issuing authority was really a judicial authority or not, was raised and our proposal was discussed. The same can be affirmed with regard to the application of the grounds for refusal when an investigative measure is not provided in the executing State for a "similar domestic" case. The meaning of the expression "similar domestic case" and what kind of checking should the executing authority undertake in the process of recognition of an EIO, was subject to public discussion. It was made clear that the positions in that regard were not uniform, as some of the practitioners supported the idea that the level of suspicions and the information supporting the decision on grating an investigative measure, should be

controlled also by the executing authorities, while others objected that such an approach would be contrary to the principle of mutual recognition. Finally, those conflicting views have been counterbalanced in the final text of the CBP, but still in need for more analysis.

2) **The second public discussion** was possible thanks to the opportunity provided by Eurojust to take part in the "Eurojust meeting on the European Investigation Order", held in The Hague on September 19th and 20th 2018. During those days, the UCM team leader was able to present several of the proposals for the CBP and discuss with the participants the points that were specifically identified by Eurojust as controversial or in need for interpretation.

During those two days, an important point that was discussed was precisely whether the concept of proportionality related to the costs of the cross-border evidence gathering should be introduced as one of the criteria to be assessed by the issuing authority before sending an EIO. The EuroCoord CBP had already identified an undesired overload of EIOs sent by administrative authorities for providing evidence to solve cases of a minimum economic relevance; and also, cases where the investigative measure requested implied significant costs, which did not seem to be proportional to the importance or gravity of the offence investigated. This led to re-draft some of our proposed best practices as well as to identify others related to the role of the issuing authority when assessing the proportionality of the investigative measure not only with regard to the gravity of the offence, but also with regard to the costs that it would entail.

On the other hand, some best practices on the communications between the issuing and executing authority regarding the sharing of costs were also re-drafted at the sight of the feedback gathered by the participants at the Eurojust meeting.

This public discussion was enormously useful as it provided direct information from the practitioners from all EU Member States, and thus allowed us to check if the proposals included in this preliminary draft were generally applicable or was only meaningful for the three countries to be analysed initially.

Those two events and the slot allocated to Prof. Bachmaier to present some of the conclusions drawn from the research done within the EuroCoord project were of great

importance to check in public with the most specialised practitioners dealing with EIOs in all EU. Their views were taken into account when drafting the final version of the EIO CBP and many new points were added as a result of those discussions. While many of the proposed best practices were presented and discussed with the practitioners – more specifically those dealing with the topics Eurojust had identified in the programme–, other points of the CBP were introduced precisely as a result of those discussions. Those proposed best practices have therefore not been to public discussion after being drafted, because we had not drafted them before the meeting. Nevertheless, this should, in general not represent a problem, as they reflect the best practice as identified already by the practitioners in such meeting. Having this been said, there are still some other guidelines that need to be further compared and contrasted with experts and practitioners, because they have not been sufficiently discussed or the positions are so diverse, that there is need for further follow up.