Transnational Evidence

Towards the Transposition of Directive 2014/41 Regarding the European Investigation Order in Criminal Matters

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ABSTRACT

On 3 April 2014, Directive 2014/41/EU regarding the European investigation order in criminal matters was finally approved. This instrument seeks to overcome the present fragmentary regulation on the gathering and transfer of cross-border evidence and improve the efficiency of the international judicial cooperation among the Member States. This article analyses the scope, content, and requirements of the European investigation order in order to make an assessment of this Directive from the point of view of the protection of the fundamental rights envisaged in Article 48 of the European Charter of Fundamental Rights, and, in particular, the right of defence in transnational criminal proceedings.

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I. Introduction

On 3 April 2014, Directive 2014/41/EU regarding the European Investigation Order in criminal matters (hereinafter DEIO)[1] was finally approved. Its aim is to facilitate and speed up the gathering and transfer of evidence between the different EU Member States and to harmonize the regulation of these proceedings. This Directive will substitute the rules on transnational evidence gathering in the European Evidence Warrant[2] and in the European Convention on mutual assistance in criminal matters of 29 May 2000,[3] among others.[4]

The EIO is a "judicial" resolution requesting – ordering – the gathering of evidence, which already exists or is to be obtained through investigative measures (Article 1 DEIO). The EIO can also include the request to secure or freeze evidence.[5] As stated in the Explanatory Memorandum (E.M.) of the DEIO, this instrument is based on the principle of mutual recognition, taking into account, however, the flexibility of traditional mutual legal assistance mechanisms.[6] It will be applied to any "criminal" investigative measure with a European cross-border dimension, save the establishment and functioning of the joint investigation teams. This aims at overcoming the undesirable fragmentation of the legal instruments regarding the collecting and transferring of evidence between the Member States.[7]

It has been long debated to what extent it is convenient to substitute the mutual legal assistance system by the principle of mutual recognition in judicial cooperation in criminal matters and to what extent an EIO was necessary to foster it.[8] Those discussions, although not completed, shall not be the focal point of this article. The aim of this analysis is to make an assessment of this new legal instrument from the point of view not only of its efficacy but also from the perspective of the protection of the fundamental rights of the defendant as recognized in Article 48 of the European Charter of Fundamental Rights. In particular, the right of defence in a transnational procedural setting will be examined.

To this end, I will analyse the most relevant features of this directive in order to assess to what extent this instrument represents a significant advancement towards the establishment of a single Area of Freedom, Security and Justice (hereinafter AFSJ).

II. The Directive on the European Investigation Order

Paragraph 36 of the conclusions of the frequently mentioned European Council of Tampere of 1999 determined that the principle of mutual recognition should allow the rapid gathering of evidence in the European judicial area.[9] Since then, the Commission and the Council have worked and negotiated intensely – at a varied pace – with the aim of achieving the defined objectives. In 2001, the programme of measures intended to implement the principle of mutual recognition of decisions in criminal matters, in which the gathering and securing of evidence had already been given the highest priority rating.[10] The Hague Programme[11] specifically mentions the gathering and admissibility of evidence among the measures to implement the principle of mutual recognition of judicial decisions in criminal matters.[12] The Green Paper of 2009 on obtaining evidence in criminal matters from one Member State to another and securing its admissibility[13] was followed shortly after by the proposal of a European Investigation Order in criminal matters, presented on April 2010.[14] In the meantime, the Framework Decision on the European Evidence Warrant has been passed, [15] although its limited scope already allowed foreseeing its meagre practical results.[16] After strenuous efforts and long debates, the EIO analysed here was finally approved. A long road travelled until approval of this new legal instrument for the cross-border gathering of evidence in criminal proceedings was reached; thus it is now time to concentrate on the content of this directive.

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1. Scope of application

The DEIO is applicable to all kind of investigative measures directed at the gathering of evidence in criminal proceedings, except joint investigation teams and the evidence they may collect. Framework Decision 2002/46[17] continues to regulate the joint investigation teams, and this is appropriate for various reasons. First, because the principles that govern the establishment of an EU joint investigation team are different from those applicable to the issuing of an EIO: while the DEIO is based on the principle of mutual recognition – subject to certain grounds for refusal –, the joint investigation teams are based on the agreement of the Member States involved.[18] It is for the Member States to agree on a case-by-case basis to create a joint investigation team to coordinate complex cross-border investigations. Moreover, a joint investigation team can also involve third countries that are not members of the EU.[19]

It is true that the ultimate objectives of the joint investigation team and the EIO are partially coincident: in both cases, the aim is to carry out investigative measures and obtain evidence in another Member State. However, these cooperation instruments operate in a different way, are based on different principles, and their scope is also different. The channels of communication and the transferring of the evidence also follow different routes, due to the fact that, in the case of a joint investigation team, authorities of the forum State are present at the spot where the evidence is collected. All these features explain why the rules on the joint investigation teams have not been included in the DEIO.

The DEIO applies to "criminal proceedings" and, in order to avoid confusion, the directive defines under Article 4 DEIO the proceedings to which it applies: not only proceedings that take place before a judicial authority but also those proceedings before an administrative authority that can be reviewed by a court with criminal jurisdiction. For example, criminal sanctions are imposed in some Member States by the public prosecutor and will only lead to a criminal procedure before a court if the sanctioned person opposes the sanction (e.g., in The Netherlands).[20]

Also, proceedings for administrative liability against a legal person that are dealt with through a criminal proceeding, as is the case in Italy,[21] would fall within the scope of the DEIO.

As to the territorial scope of application, neither Ireland nor Denmark are bound by the DEIO, whilst the UK has expressed interest in *opting-in*.[22] The DEIO will apply to all EIOs received after 22 May 2017 (Article 35.1 DEIO), the time limit for the transposition of the directive by the Member States.

Finally, the directive specifies that the EIO can be issued in criminal proceedings (defined under Article 4 DEIO) against a natural person as well as against a legal person, which is clarification that was not strictly necessary but that the EU legislator has considered appropriate to include.

2. Subjects

a) The issuing authority

Article 1.1 DEIO states that the EIO is a judicial decision "issued or validated by a judicial authority" of the issuing State. It is in Article 2 DEIO that the definition of "issuing authority" is found: a court, judge, prosecutor and also any other investigating authority that has powers to order the collecting of evidence according to the relevant national legislation. In the latter case, the EIO shall be validated "by a judge, court, investigating judge or a public prosecutor in the issuing State" and the validating authority "may also be regarded as an issuing authority for the purposes of transmission of the EIO" (Art. 2. c) ii) DEIO).

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This concept of "judicial authority" is quite broad, as it encompasses not only any kind of judge – professional and lay judges –, but also members of the public prosecution service.[23] It should be recalled that criminal investigation in most Member States is directed or supervised by the Public Prosecutor and, in most cases, this authority has powers to order investigative measures. Therefore, it is logical that the authority ordering the collecting of evidence in a national criminal procedure may also request such evidence from another Member State. However, when it comes to investigative measures restricting fundamental rights – which are usually subject to judicial warrant –, it would also be logical that the EIO could only be issued by a judge or court. This would have required that the directive identify a different issuing authority, depending on the measure requested. This would have entailed more complexity, because it would first have required reaching a common definition of what is considered a measure that restricts fundamental rights, a coercive measure, or an intrusive measure, as these concepts are not understood in the same way throughout the EU. Additionally, identifying different authorities depending on the intrusiveness of the measure requested through an EIO would have caused the requested authority to check, in each case, whether the issuing authority was the competent authority or not. In sum, such a system would have added complexity and thus negatively affected efficiency.

This is why the DEIO has opted for a broad definition of "issuing authority" but introduced the additional safeguard of the judicial validation of the EIO when such court warrant is required in the issuing or in the executing State. This solution is coherent with the diverse legal systems of the EU Member States as well as the different conceptions of coercive measures and measures restrictive of fundamental rights. In accordance with the DEIO, the requested State cannot refuse the execution of the EIO on the grounds that it has not been issued by a judge where the executing State requires such judicial warrant for the requested measure. Neither Article 9 DEIO, nor Article 11 DEIO provide for a ground for refusal *rationae auctoritatis*, and Article 9.5 DEIO cannot be interpreted in this sense. Only Article 9.3 DEIO[24] provides for the devolution of the EIO if it has not been issued by one of the authorities named in Article 2 DEIO, but it does not allow for refusal for the lack of competence of the issuing authority or because the EIO should have been validated by a judge or court in the issuing State.

If the executing State receives a EIO without court validation, while the executing State needs such a judicial warrant to carry out the requested investigative measure, the solution provided in the DEIO is to adopt a validation procedure within the executing State as provided by Article 2.d) DEIO instead of refusing the execution.

In order to comply with its own constitutional provisions, the executing authority can subject the execution of the EIO to a prior validation by a court in the executing State. For instance, if the EIO requesting a DNA test has been issued by a public prosecutor and it has to be executed in a Member State in which such measure needs a judicial warrant, the executing State may subject the measure to authorisation by a national court.

This system attempts to reduce the grounds for refusal to a minimum, while at the same time ensuring that the fundamental principles of a legal order are not infringed in the execution of an EIO. In fact, one of the most criticized aspects of the EIO during the negotiations was that it did not require that the issuing authority be a court in all events,[25] which, instead of promoting mutual trust, poses serious problems for the implementation of the principle of mutual recognition, in particular when coercive measures restrictive of fundamental rights are at stake. The solution foreseen in the DEIO – judicial validation in the issuing or in the executing State – seems to strike the right balance between efficiency and respect for the diversity of the different legal orders involved in the judicial cooperation. The solution, being specific, shows a positive pragmatic approach, but its implementation is not devoid of problems.

What shall be the role of the court that "validates" an EIO in the executing State in order to adapt it to national principles? Is this a mere formality or could the judge in the executing State really check the

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proportionality and necessity of the measure requested, which is the aim of the judicial warrant authorizing measures restrictive of fundamental rights? It appears that the intention of the Commission is that this "validation" ex Article 2 (d) remains a "pro forma" step in the procedure of executing the EIO: allowing the court in the executing State to check the conditions for issuing the EIO would clearly run counter to the principle of mutual recognition. However, establishing a kind of "pro forma" validation in the executing State, at the end does not represent any additional guarantees for safeguarding the constitutional principles of the executing State.

In the face of this dilemma, it would be very useful if the rules transposing Article 2.d) DEIO could clarify the scope and meaning of this provision.

b) The executing authority

Article 2 (d) DEIO defines the executing authority as the one "having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case." The only requirement of the DEIO in this regard is that the transmission of the EIO shall be carried out from judicial authority to judicial authority. To this end, the authorities can use the support of the European Judicial Network.

Thus, each Member State shall determine who will have competence as executing authority, opting either to designate a central authority for transmitting and receiving the EIOs or to decide that the requests shall be forwarded directly to the executing authority (Article 7.3 DEIO). When transposing this Directive, which should be the preferred option? Theoretically, direct transmission is the quickest and easiest way of proceeding but in practice it will not always be easy to identify the authority competent to execute the EIO. For example, if the issuing authority requests information via EIO about the bank accounts of the defendant (Article 26 DEIO), not knowing exactly where those banks are located, it would be easier in such a case to send the EIO to a central authority rather than trying to identify which body is territorially competent.

However, if one EIO requests the carrying out of several investigative measures and not all of them would take place in the same place, to whom shall the issuing authority send the EIO: to any of them, to the one competent for the majority of measures, or to the one competent to carry out the more urgent one? This is something that shall be determined by the laws transposing the Directive but, as each of the States may adopt different rules on territorial competence, it is clear to the issuing authority that it would be easier to send the EIO to a central authority that would coordinate the distribution among the executing authorities.

However, centralization is not unproblematic and presents serious risks of delays and, in some countries with a federal structure, it is an option that is out of question. Each of the Member States shall decide in their national transposition laws which system best adapts to its own judicial structure, seeking always to facilitate the swift transmission of the EIO and the easy identification of the executing authority. Taking into account that when receiving an EIO the judicial authority first has to check its own territorial competence before taking any further steps towards the execution of the EIO, the swifter this issue is solved the more effectively the system will function. If rules on territorial competence are not very precise and clear in the execution State, there is the risk that the EIO will keep wandering from one authority to the other: there may be very advanced legal instruments promoting quick and efficient cooperation but if the tiny details on court management at the domestic level are not efficiently dealt with, the entire system will not result in more efficiency.

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c) The defendant and third parties

Two aspects were controversial during the process of negotiating and approving the DEIO and still remain debatable with regard to the protection of the defendant's rights.[26] The first deals with the risk of imbalance between the powers of the prosecution and the defendant in the process of gathering evidence abroad, which would undermine the principle of equality of arms.[27] This uneven position of the parties in the transnational gathering of evidence is not new and is not generated by the EIO; however, these differences may be enhanced by this new EU instrument: while access to cross-border evidence by the prosecution will be governed by the principle of mutual recognition, for the traditional schemes that have been valid for decades in international judicial cooperation still apply to the defendant.

In order to respect the principle of equality of arms, the DEIO provides that "the issuing of an EIO may be requested by the suspected or accused person, or by a lawyer on his behalf." The request by the defendant may be filed "within the framework of applicable defence rights in conformity with national criminal procedure" (Article 1.3 DEIO). This possibility was not foreseen in the initial text of the proposal for an EIO[28] and its inclusion in the text of the Directive thus merits a positive assessment.

The wording of Article 1.3 DEIO is somewhat confusing, but the meaning appears to be clear: the Member States shall ensure that the defendant has the chance to request the issuing of an EIO, but they have discretion as to regulating how this right shall be exercised: the proceedings, moment, conditions, and other formal requirements for exercising these right shall be regulated by domestic law.

The system allowing the defendant to file a request to the court to collect evidence or to request the adoption of some investigative measures, is coherent with the so-called "inquisitorial" continental model of criminal procedure in which the prosecution acts with impartiality, defending legality and guided by the search for the truth, by looking for incriminating as well as exculpatory evidence. Within this type of proceedings, stemming from the Napoleonic *Code de Procédure Penale*, unequal access to the evidence on the part of the prosecution and defendant would theoretically be counterbalanced by the impartial approach of the public prosecutor.

Apart from the fact that this balance between the powers of the parties is often more theoretical than real and that practice shows many distortions of the principle of equality of arms, the fact is that providing the defendant with the possibility to file a request to issue an EIO does not seem to be sufficient to ensure such principle.[29] In any event, the solution provided by the DEIO is not fully satisfactory for systems with a more adversarial criminal procedure in many EU countries (among them, Italy, Cyprus, Malta, or England and Wales): on the one hand, when the defendant requests the issuing of an EIO, the decision on the proportionality and necessity of the measure lies with the issuing authority, which will also be the public prosecutor in many cases. And, on the other hand, the mere filing of such a request implies disclosing the defensive strategy to the opposing party in an initial stage of the proceedings.

This imbalance is also present at the domestic level, as many legal orders do not allow the defence to gather evidence independently, but only by requesting the adoption of measures by the investigating authority or court. But the difficulties obviously increase when the evidence has to be gathered in a transnational setting. In sum, Article 1.3 DEIO is a first step towards providing access to cross-border evidence to the defendant, but it seems to be insufficient to protect adequately the rights of the defence and the principle of equality of arms.[30]

It is still to be discussed whether the defence can intervene in the execution of the EIO in the executing State and the possibility to challenge the issuing and/or execution of an EIO. The Explanatory Memorandum of the DEIO recalls that this Directive shall be applied in the light of the Directives regarding the protection of the

fundamental rights of the suspect or accused,[31] but it is questionable whether such a reference is sufficient to ensure an effective protection of such rights. This issue will be discussed later.

Finally, the Directive does not contain any provision regarding the protection of the rights of third parties that may be affected when executing an EIO, save the rules on witness' and experts' testimonies through videoconference, telephone, or other audio-visual means (Articles 24 and 25 DEIO).

Insofar as third parties' fundamental rights can be encroached by the adoption of certain investigative measures – for example, the interception of communications (Articles 30 and 31 DEIO) or the controlled deliveries (Article 28 DEIO) –, the domestic laws should provide rules ensuring that these third persons are informed of the measure that has affected them and the ways to protect their rights.

When regulating the legal remedies against the EIO, Article 14.3 DEIO reads that "the authorities shall ensure that information is provided about the possibilities under national law for seeking the legal remedies," if such information does not undermine the need for the confidentiality of an investigation. The Directive states neither who shall be informed about the legal remedies nor does it state who has standing to challenge the EIO: the defendant affected (all of the defendants if several), the issuing authority, also any third parties? The Directive leaves a margin of discretion to the domestic legislator to regulate this and thus also to provide a way to protect the rights of third persons affected by the adoption of investigative measures in execution of an EIO. In the transposition of this Directive, the domestic laws should pay attention to the protection of the rights of third parties: first, providing that they shall be informed about them as soon as this is possible and, second, by establishing possible legal remedies if their rights have been unlawfully encroached upon.

3. Conditions and content of the EIO

According Article 6.1 DEIO, an EIO shall only be issued when it "is necessary and proportionate for the purpose of the proceedings" and the requested measure could have been ordered "under the same conditions in a similar domestic case." Necessity and proportionality are the conditions that have to be assessed by the "judicial" authority issuing an EIO.[32] This assessment is closely linked to the rules on the content of the EIO as provided under Article 5 DEIO.

a) Content of the EIO

The EIO will be initiated by filling out the form provided for that purpose,[33] the minimum content of which is regulated in Article 5 DEIO: identification of authorities and persons concerned; objective and grounds (reflecting the facts that are investigated and the evidence sought), description of the offence prompting the issuing of the EIO, indicating the criminal law applicable to it, and a description of the investigative measure to be carried out (Article 5.1 DEIO). This regulation is appropriate, but it remains to be seen in practice what level of detail is required. For example, what shall be the data to be provided regarding "the identification of the persons concerned?" Does this require the full name/the ID number, or will it be possible to identify the person by indicating the position in a company? To what extent shall the authority describe in the requesting form the criminal act being investigated? Would it be sufficient to refer to the conduct typified in the criminal code or should other particularities also be referred to that would allow the executing authorities to identify other ramifications of the offence? Similar questions arise with regard to the description of the measure requested: would a broad description be enough (e.g., bank data of X person) or shall it be more precise, in order to allow the executing authority to calculate the approximate costs (bank data of X person from a certain date to the present and regarding this precise account)?

It goes without saying that these issues are not to be clarified in the text of the Directive but should be defined as much as possible in the transposition laws in order to avoid practical problems in the execution of

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the EIOs. Up to now, it was not uncommon in the execution of *letters rogatory* that the executing authority demands more detailed information before granting the execution of the request for cooperation, which always causes delays in the execution of the measures requested. It would be advisable to establish guidelines on the information to be detailed in the EIO, not only to promote a certain level of harmonization in the laws transposing it but also to avoid requests for complementary information, which are time-consuming for both sides.

In any event, if additional information is required for the execution of the EIO, direct consultation between the authorities involved is the path to be followed, and these contacts should be conducted in a swift and easy manner, avoiding undue delays as much as possible. What is clear is that an incomplete – or insufficiently detailed EIO – shall not lead to refusal of its recognition and/or execution, being applicable here *in fine* Article 6.3 DEIO.

b) Proportionality, necessity, and lawfulness as conditions for the issuing of the EIO

Before issuing or validating the EIO, the "judicial" authority shall assess whether the evidence or measure requested is necessary, adequate, and proportional for the criminal investigation. The proportionality requirement is undoubtedly the most difficult to assess, and it is even more difficult to find a common understanding at the European level.

It would seem unnecessary to require expressly in the DEIO that one of the conditions for issuing an EIO shall be its proportionality, as any evidentiary measure and specifically a measure restrictive of fundamental rights needs to undergo the proportionality test, in the latter case according to the long established case law of the ECtHR.[34] Nevertheless, and even if proportionality is a condition that could be considered as implicitly required for the adoption of any investigative measure, it is positive that this is specifically mentioned in the Directive, especially taking into account that, in some EU countries, not all investigative measures restrictive of fundamental rights are subject to prior judicial authorization. The experience with the EAW and its "disproportionate" use may also have influenced the text of the DEIO in this aspect.

Once established that the EIO shall comply with the proportionality principle, the Directive does not set any guidelines on how to assess it. It does not even exclude the issuing of an EIO for less serious or petty criminal offences and does not establish a threshold under which the EIO could be considered unproportional[35].

As there is no common concept of proportionality in the AFSJ, it may be advisable to recall briefly what the elements to be considered are when assessing the proportionality of an EIO:[36] seriousness of the offence, necessity of the evidence for the investigation and adjudication of the offence, existence of other less intrusive investigative measures that would serve to the same aim, the consequences of adoption of the measures for the persons affected, and finally – and generally – whether the measure is proportionate to the aims of the procedure.[37] In addition to this proportionality test focused on justification of the encroachment of fundamental rights, another approach to the proportionality assessment may also be taken into consideration: the costs derived from the execution of the measure requested.

Each of these elements have different implications: proportionality regarding the encroachment of fundamental rights may cause the inadmissibility of the evidence collected, while the disproportionate economic costs of executing an EIO not affecting fundamental rights has an influence on efficiency of the criminal justice system but no impact regarding exclusionary rules of evidence. This does not mean that this aspect is not important, taking into account that, as a rule, the costs of the execution, save those being exceptional, will be borne by the executing State. In practice, this element is highly important when providing international judicial cooperation, and the excesses seen in the handling of the EAW have made clear that the cooperation

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instruments must also be used according to a rational cost-efficiency assessment. It seems that the Directive, when referring to the proportionality principle, is also mindful of this last aspect related to costs.

Is such an approach sensible? From the point of view of facilitating cooperation in transnational evidence gathering, it seems to be adequate not to fix a threshold for issuing an EIO depending on the gravity of the offence. In the future, this will allow use of the EIO to prosecute road traffic offences which are not heavily sanctioned but whose prosecution may require information on the insurance or the ownership of the vehicle – at least until a common register of vehicles is fully established or the different national databases are interconnected.

The proportionality and necessity of the EIO is to be assessed exclusively by the issuing authority and, following the principle of mutual recognition, the requested authority is not entitled to check such assessment or refuse the execution on this ground.[38] This being said, however, the Directive grants some leeway to the executing authority in checking the proportionality of the measure, precisely when the requested measure is not in conformity with the principles – also proportionality – established in the executing State.

Moreover, the Directive added in the final stages of its elaboration a new paragraph to Article 6 DEIO, which reads as follows:

> "3.
> Where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO. After that consultation the issuing authority may decide to withdraw the EIO."

The meaning of this provision is unclear. Literally, it allows the executing authority to "consult" the issuing one when there are doubts as to compliance with the conditions of proportionality and necessity. But does this mean that the executing authority can question the assessment made by the requesting authority on the necessity of the measure? Taking a look at the Explanatory Memorandum, this interpretation should be excluded. Should then the "consultation" be limited to questioning the proportionality of the EIO? In such case, what criteria of proportionality could be subject to consultation: only the proportionality of the costs or also the proportionality of an intrusive measure according to the offence investigated? The way in which Article 6.3 DEIO has been drafted admits any of these interpretations.

This provision may function as a "warning" to the issuing authority: it will know that the executing State may, by way of "consultations," exercise some control over the proportionality assessment made in the EIO. Be this the intention or not, in the end, the ambiguity of this article promotes the consultations between authorities.

More surprising is the consequence provided in Article 6.3 DEIO once the consultation has been completed: "after that consultation the issuing authority may decide to withdraw the EIO." An answer to the consultation is not foreseen, nor a clarification of the doubts expressed by the executing authority. All this suggests that the main objective of this rule is to solve issues related to the costs of executing the EIO. If this is the case, the term "consultation" would express the unwillingness of the executing State to cover the costs of the investigative measure requested, indicating by way of "consultation" that the issuing State should bear the costs (totally or partially). At this new "economic scenario" the issuing State should consider either assuming the costs or withdrawing the EIO.

If this is how Article 6.3 DEIO is to be interpreted, the procedure of "consultations" would serve to counter the criticism expressed by several Member States against bearing the cost of carrying out investigations in

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support of offences prosecuted abroad, while those same offences would not be prosecuted in their own territory in application of the principle of opportunity in order to save costs.

But if Article 6.3 DEIO is one of those rules that is included in a legal instrument just to pave the way towards facilitating its adoption and to overcome the opposition of some Member States – or the Council –, it cannot be overlooked that it gives rise to several questions: On one hand, because it does not state that the consultations will be limited to the costs of the execution of the EIO and, on the other hand, because through these "consultations" on the costs, there may be a risk that the cooperation is hindered or even that it is only provided if the costs are not "exceptional" (according to the point of view of the executing authorities) or if they are assumed by the requesting State.

Finally, in the future, it shall be clarified what is considered "exceptional costs,"[39] because if the legal differences between EU Member States are huge, the economic differences are no lesser, and there is also a risk that those economic differences may have a negative impact on the smooth implementation of the EIO. A common understanding of what proportional requests and proportional or reasonable costs are in the execution of EIOs should be reached with the aim of creating an environment favourable to transnational cooperation.

4. Recognition and execution of the EIO

In accordance with the principles of mutual recognition, the grounds for refusing to recognise and/or execute an EIO are limited to precise causes and, as a rule – as has been explained above – without reviewing the reasons which led to the issuing of the EIO.

During the process of drafting the DEIO, it was discussed at length how the grounds for refusal should be regulated in order to foster the principle of mutual recognition instead of creating reasons for distrust among the Member States.[40] Once the Directive has been adopted, this discussion should be left aside, as it is not a priority at present to define whether this principle is needed to overcome the problems of mutual legal assistance or to what extent the implementation of the principle of mutual recognition should move forward more quickly or rather with more caution. Despite the fact that there are still several EU countries not willing to yield any powers regarding the criminal law and that oppose carrying out intrusive investigative measures to support a foreign criminal proceeding, at the moment all stakeholders have to accept that the principle of mutual recognition shall apply to the gathering of evidence and everyone should contribute to the adequate implementation of the Directive on the EIO.

a) The grounds for substituting and/or refusing the EIO

When regulating the grounds for refusal of an EIO, the Directive has tried to limit them as much as possible and providing also that before refusing the execution of a measure, alternatives should be found to overcome the indrances for the execution of measure requested in the EIO. Thus, the DEIO regulates "the recourse to a different type of investigative measure" (Art. 10 DEIO) and posible grounds for refusal (Art. 11 DEIO). Another ground for refusal, this one of mandatory nature, is the one foreseen in Article 9 DEIO for those cases where the EIO has been issued by an authority who has no competence under the DEIO.

– Recourse to a different type of investigative measure

Article 10 DEIO regulates the cases in which the executing authority, prior to consultation with the issuing authority, can or shall apply a different measure than the one requested. The situations are mainly three:

1) The investigative measure indicated in the EIO does not exist under the law of the executing State (Article 10.1 a) DEIO);

2) The investigative measure indicated in the EIO would not be available in a similar domestic case (Article 10.1 b) DEIO;)[41]

3) The measure exists and could be applied, but the same result could be achieved by a less intrusive measure (Article 10.3 DEIO).

In the two first situations – the measure does not exist or is not applicable in the case described in the EIO – [42], if the EIO cannot be executed by resorting to an alternative measure, the issuing authority shall be informed about the impossibility of complying with the EIO. This can only happen with regard to measures not included in Article 10.2 DEIO, as such measures are considered to be applicable in every Member State.

With regard to the rest of measures – essentially those that would entail a restriction of fundamental rights – if the executing State does not have a measure equivalent to the one requested, the EIO shall be refused. Technically, this is not a "refusal" to execute but an "impossibility to provide the assistance requested" for legal reasons (Article 10.5 DEIO). This additional ground for non-execution is one of the examples of flexibility regarding the principle of mutual recognition, closer to the system of mutual legal assistance and was introduced in the EIO with the aim of protecting the coherence of the legal system of the requested State: this avoids the obligation to execute measures that would infringe its own principles on legality and proportionality and would imply applying different standards to the national investigations and to those investigations ordered by an authority of another Member State.[43] Imposing on the executing State the obligation to carry out a measure not provided for in its law would not only have caused internal inconsistency but would have also been contrary to the principle set out by the ECtHR on the "sufficient legal basis" to grant the foreseeability and protect against intrusive investigative measures.

It can be argued that this is exactly what happens when executing an EAW if the double incrimination condition is lacking, where the executing State detains a person even when the conduct for which the detention is ordered is not an offence in the executing State. In this case, the "sufficient legal basis" and the "foreseeability" requirement are also missing, as the detention would not be allowed for "a similar national case." This contradiction between the EIO and the EAW as to the approach to the principle of mutual recognition merits deeper reflection, which lies beyond the scope of this analysis.

It is manifest that the scope of application of the principle of mutual recognition has been limited in this Directive in comparison to the Framework Decision on the EAW of 2002. The explanation may be found in following reasons: On the one hand, the level of security alarm at present is perhaps not as high as it was at the moment the EAW was approved; on the other hand, since the adoption of the EAW, much criticism has been voiced against the abusive use of the EAW. This different scenario may explain – at least to a certain extent – that the Member States are no longer so willing to accept new EU legal instruments that require "blind" acceptance of the principle of mutual recognition, especially when those instruments may require the restriction of fundamental rights in their own territory. The EIO shows that the EU Member States may not be so enthusiastic to cooperate blindly in criminal matters against their own principles and traditions but, nevertheless, the EIO can still be viewed as progress in judicial cooperation in criminal matters.

The possibility to change the measure if another measure is less intrusive than the one indicated in the EIO would provide the same results also reflects a certain flexibility on the blind operation of the principle of mutual recognition. Article 10.3 DEIO allows the executing authority to check the proportionality of the measure selected in the EIO. This does not mean that the executing authority can review the assessment made by the issuing authority but, according to the facts described in the EIO and the legal framework of the executing State, it can suggest the substitution of the requested measure by another that is less intrusive than the one indicated in the EIO. For example, if the EIO requests taking blood samples to make a DNA match and such a DNA profile already exists in the police databases of the executing State, it is logical that

the executing State can provide the same information by less intrusive means and thus that the change in measure should be carried out. Or, for example, if the EIO requests the entry and search of premises to obtain some financial information, if such information can be obtained through a production order directed to the relevant bank, the less intrusive measure should be chosen.

This mechanism is welcome insofar as it does not affect the efficiency of the cooperation, while it provides an additional safeguard for the fundamental rights of the persons affected by investigative measures requested through an EIO.

– Grounds for refusal of recognition or execution

The structure and content of the grounds for refusal of an EIO basically follow the same pattern as the one found in the international conventions on mutual legal assistance in criminal matters of 1959 and of 2000,[44] excluding the clause of *ordre public* and double incrimination but adding the general clause on the protection of fundamental rights recognised in the EU and in the domestic legal order.[45] The general grounds for refusal are listed under Article 11 DEIO, which are completed with other grounds making the execution of the requested EIO impossible (e.g., Article 24.2 DEIO, when the defendant does not consent to appear through video link).

As a ground for refusal of the EIO, the inclusion that "there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter" (Article 11.1f) DEIO), is consistent with Article 1.4 DEIO, which recalls that this Directive does not modify the obligation to respect the fundamental rights enshrined in Article 6 TEU. The European legislator addresses herewith the criticism expressed during the elaboration of this Directive for not adequately addressing the protection of the fundamental rights.[46]

The formulation of this ground for refusal is quite broad: it does not require proof that there has been a violation of a fundamental right – which would be certainly difficult if not impossible – but it is sufficient that there are "substantial grounds to believe" that the execution of the EIO may cause such infringement. It is important here to draw attention to the fact that this provision refers to the rights recognised in the European Charter – as interpreted by the ECJ –, which will not be always coincident with the fundamental rights recognised in the national constitutions of the Member States.

Does this ground for refusal amount to a kind of European *ordre public* clause? To my mind, calling the ground provided in Article 11.1 f DEIO such would not be erroneous[47] and, as long as it is used correctly and not invoked in an abusive manner, it represents a specific safeguard for the protection of the fundamental rights in the AFSJ.

Before taking a decision on any refusal, the Directive imposes contacting the issuing authority, as a way of promoting fluent cooperation between both authorities and to overcome any doubts relating to possible grounds for refusal (Article 11.4 DEIO). The continuous communication should be the guiding principle in the cooperation requests, albeit maintaining a certain formality in order to enable the defence to monitor the lawfulness of the proceedings.

b) Applicable law in the execution of the EIO

The rules applied to obtain evidence in a foreign State may determine the admissibility of such evidence in the criminal process developed in the requesting State. Some legal systems require that, in order to produce its effects, evidence must be obtained in accordance with the *lex fori*, while other systems recognize its validity as far as the *lex loci* has been respected.[48] There are countries in which evidence stemming from a foreign State is accepted in accordance with the so-called *principle of non inquiry*, i.e., the formalities or rules

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that governed the evidence-gathering process are not questioned or confirmed at any time; there is not even any control over whether such rules were respected or not[49]. The diversity of solutions existing in each of the Member States prevents or impairs what has been named "the free circulation of criminal evidence,"on the one hand and, on the other hand, may have an impact on the defendant's rights of defence.

To overcome the first problem, and while there is sufficient procedural harmonization at the European level, the best solution is likely that the executing State respects as much as possible the rules and formalities indicated by the issuing State. Such accommodation of the investigative measure to the *lex fori*, which was already foreseen in the 2000 European Convention on Mutual Legal Assistance (Article 4), appears in the Framework Decision on the European Evidence Warrant and in Article 9.2 DEIO. Its purpose is to prevent the obtained evidence from becoming inadmissible because of not complying with the *lex fori.* In order to ensure the correct execution of the EIO, and also accommodation of the required formalities, the issuing authority can request that authorities of the executing State assist the local authorities in their execution if this is not contrary to the fundamental principles of the relevant State (Article 9.4 DEIO). At the same time, the Directive prevents the *lex fori* from being imposed in the executing State if it is not compatible with the *lex loci* or, to be more precise, with its basic legal principles. Such a rule, no doubt, facilitates inter-State cooperation as well as the admissibility of evidence obtained abroad but, in my opinion, it does not provide an appropriate answer to the problems raised by transnational evidence.

The transnational dimension of a proceeding must indeed foster cooperation but not at the cost of distorting the principles applicable to the proceeding or reducing the defendant's rights of defence[50]. This is the reason why many scholars argued, for a long time, that it is necessary to establish specific rules applicable to transnational criminal proceedings in Europe[51] in order to ensure that the right of defence is not infringed when evidence is transferred from one Member State to another. It is often taken for granted that the executing State taking care that the investigative measure performed in its territory respects the *lex loci*, adjusted, if need be, to the formalities of the *lex fori.* But who controls in the main proceedings if such rules have been respected? In most countries, the defence is supposed to take care of it, but what are the real possibilities if the defence does not know how the evidence was obtained in the foreign country and what the applicable rules in that country are? This is definitely a pending issue in the construction of an AFSJ if we wish to guarantee that security does not ultimately become the prevailing leitmotiv.

For the time being, Article 14.7 DEIO at least introduces a general rule aimed at also advancing the protection of defence rights in transnational proceedings:

> "Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO."

This rule, added to the text of DEIO at the last minute, certainly constitutes significant progress because, even though it does not explicitly abolish the principle of *non-inquiry*, it does imply that the courts must scrutinize the way evidence was obtained in another State and check that the defendant's fundamental guarantees have been respected.

c) Remedies

The substantive reasons for issuing the EIO can only be challenged before the courts of the requesting State "without prejudice to the guarantees of fundamental rights in the executing State" (Article 14.2 DEIO). As I understand this rule, it refers to the executing authority's obligation to ensure that fundamental rights are duly respected (Article 1.4 DEIO), to the possibility to refuse the execution when there are serious reasons to believe that the execution would cause a violation of those rights (Article 11.1 f) DEIO), or to the possibility to

consult the issuing authority when there are doubts about the proportionality of the investigative measure requested in the EIO.

Moreover, in accordance with Article 14.1 DEIO, Member States are bound to ensure that all measures adopted in execution of an EIO can be challenged through the same channels foreseen for a similar domestic case, i.e., under the same conditions as if a national authority had decided the measure.[52] This will be possible only if an essential condition is met: that the defence knows and is informed of the execution of such measure. [53] The determination of when and under which conditions such information must be provided is left to national legislation as long as confidentiality is not undermined (Article 14.3 DEIO). In this respect, this rule does not add virtually anything to the general right to a remedy except for the generic requirement that domestic rules must allow the "effective exercise" of those legal remedies.

In practice, the possibility to challenge the measures carried out following an EIO will depend on a number of factors; in particular: knowledge of such measures and the time in which the defence is aware of them; the national regulation of the right to be assisted by a lawyer in the execution of the measures; and the defendant's actual possibilities to have access to a lawyer in the executing State (or States).

This is, of course, a complex subject that would deserve a separate study. For the purposes of this article, it will suffice to mention that neither the EU Directive on Access to Lawyer[54] nor the Proposal for a Directive on Legal Aid[55] foresee specific mechanisms to guarantee such types of transnational defence.

As a consequence, the defence, once it has been informed of the measures executed abroad, will normally be able to challenge them in the State of execution of the EIO only if it appoints and pays its own lawyer. Furthermore, if the challenge is successful, even when it is recognized that the measure was unlawful or executed infringing the law, this would not lead to the exclusion of such evidence from the criminal proceedings for which it was requested, as it will depend on the exclusionary rules of evidence applicable in the relevant State. The only real contribution of the Directive in this regard, as indicated above, is the provision of Article 14.7 DEIO: Member States are to ensure that fundamental rights are respected in the assessment of evidence. This rule should certainly not be understood as an optional recommendation; nevertheless, its real impact will finally depend on the way the Directive is transposed in each of the Member States and, of course, on the case law of the ECJ when deciding on infringement proceedings as well as on preliminary questions.

III. Assessment of the EIO: Progress and Pending issues

No doubt the approval of this instrument is good news for the development of the area of freedom, security and justice in the EU in order to facilitate judicial cooperation in criminal issues and, therefore, to achieve a more efficient fight against transnational criminality.

From this perspective, it seems clear that it is very positive to have a single instrument for the requesting of cross-border evidence, overcoming in this way the lengthy and inefficient system based on the letters rogatory transmitted according to international conventions – with their innumerable reservations and slow procedures – and through the limited mechanism of EEW. Certainly, the fact that it is possible to request in the same EIO both the evidence and the measure for securing it is already an important improvement in comparison with the current system (Article 32 DEIO).

The use of standard forms simplifies the issuing and transferring of the judicial cooperation request, also facilitating its recognition and execution. However, the existence of standard forms does not automatically

guarantee a fluent and smooth execution of an EIO. One of the main problems identified so far in the area of judicial cooperation on obtaining evidence is the slow pace of the execution of letters rogatory – it is no exception that the execution experiences delays of many months and even years.[56] Obtaining and securing evidence through fast channels is essential for the success of criminal investigation in most cases, above all when it concerns electronic data.

This Directive endeavours to avoid delays in the execution of a EIO especially in two ways. On the one hand, it provides that the EIO will be processed with the same priority as any other request for assistance coming from a national authority. On the other hand, it explicitly indicates that the execution will be performed "as soon as possible" and determines specific deadlines for it – a maximum of 30 days to decide on its recognition and execution (Article 12.3 DEIO) and 90 days to effectively execute the requested investigative measure (Article 12.4 DEIO).

It is to be expected that the EIO will contribute to rendering judicial cooperation in a more agile and expedient manner. It could be objected that international conventions also provide that the execution be performed without delay, and it has not prevented regrettable and often unjustified procrastination. However, as is well known in all procedural systems, the mere establishment of deadlines does not guarantee *per se* that terms will be respected but it no doubt fosters compliance. To this we can add the mechanisms to enforce the EU rules, which are potentially much more efficient than those foreseen in international conventions. In any event, the difficulties will not disappear immediately, among other reasons because the delays and dysfunctions existing in the administration of justice of some Member States at the domestic level will continue having an adverse effect *ad extra* when those countries receive a European Investigation Order.

When an EIO requests the adoption of measures to secure evidence (Article 32 DEIO), the executing authority, if possible, must decide on the execution and communicate its decision to the issuing authority within 24 hours (Article 32.2 DEIO). Note, however, that no specific term is indicated for the execution of the relevant measure and therefore general terms are applicable, without prejudice to the obligation to execute the measure without delay or as soon as possible. In any event, if the issuing authority mentions emergency reasons in the EIO that justify the urgent adoption of precautionary measures, in my opinion, the executing authority should follow the same criteria and procedures as if they were measures requested by a national court. However, in practice, it would be important not to make excessive use of "urgency" in securing evidence, the only aim being to speed up the timely execution of the EIO, as this may also have negative effects in the long run.

It has to be taken into account that the Directive is aimed not only at facilitating the execution of the requested measures but also at ensuring that they are admissible later in the criminal proceedings for which they have been requested. Therefore, the admissibility of evidence obtained will certainly be facilitated if, in the execution of the EIO,the *lex fori* is also respected – at least those formalities explicitly indicated by the issuing authority that do not contradict fundamental principles of the State of execution.[57] The Directive does not include rules on admission or exclusion of evidence but at least states that the trial court shall take into consideration the way evidence has been obtained in a foreign country in order to assess its evidentiary value (Article 14.7 DEIO).

It must also be noted that, although harmonization of procedural rules in the AFSJ is not a direct objective of this Directive, the detailed regulation on hearings through video link (Article 24 DEIO) will most likely lead to a certain harmonization of the current rules governing this method of interrogating witnesses, experts, and the defendant.[58] Certainly, the Directive regulates only the way in which a videoconference is performed in a cross-border setting; it may also promote a harmonised regulation of videoconferences at the domestic level. In effect, it is foreseeable that national legislations will tend towards adopting only one regulation for videoconferences and not separate regulations for videoconferences at trial hearings in domestic trials and

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at trial hearings in transnational proceedings (without prejudice to the special characteristics of transnational questioning).

Also, in the field of access to data from banks and other financial accounts and operations, the Directive encourages a certain legal harmonization, for it imposes on Member States the obligation to regulate and guarantee such access ("take the measures necessary to enable it to provide the information referred to," Articles 26.2 and 27.2 DEIO).

If we look at the Directive from the perspective of the protection of fundamental rights, it can be said that its content has been notably improved since the initial drafts until approval of the final text, and many problematic aspects have been corrected.

The requirements that the issuing authority must meet before sending the EIO seem appropriate:[59]

- Issuing authorities must assess the necessity and proportionality of the measure in question as well as its legality, applying the same criteria as if it were for a domestic case;
- Every EIO must be authorized or validated by a judge or public prosecutor (depending on the relevant national laws), which means that evidence that can be obtained directly by the police at the domestic level will always be subject to the control of a judge or public prosecutor if it has to be obtained in a foreign State;
- States are obliged to regulate the possibility to file a remedy against the EIO as well as against the evidence obtained through it, in a way that guarantees that it can be effectively exercised;
- The trial court, when assessing the evidence obtained through an EIO, must take into account the way in which it was obtained – the Directive does not impose any specific exclusionary rule of evidence but indicates that it is necessary to scrutinize whether the requisites for the admissibility of evidence have been met.

The guarantees that must be complied with in the executing State also seem sufficient, above all considering the provision on respecting the *lex loci*.

In sum, the assessment of the EIO from the point of view of protecting fundamental rights of defence is positive, although there are certain aspects that need to be improved in order to ensure an effective defence at the transnational level.

IV. Concluding remarks

In this article, I have only addressed some aspects of the Directive regarding the EIO, considered relevant in order to make a preliminary assessment of this new EU legal instrument for the transnational gathering of evidence in criminal matters with a view to its adequate implementation into the national laws. There are many issues that need to be assessed in detail, for example the specific provisions on certain investigative measures, the impact of the DEIO on the rules contained in the FD EAW on the temporal transfer of detained persons, or also the important issue of the data protection of information transmitted in execution of an EIO.

Notwithstanding the positive assessment this Directive merits, the challenge remains of addressing a more effective protection of the fundamental rights of defendants in transnational criminal proceedings. As long as the right of access to a lawyer is not adequately guaranteed in both the issuing and the executing State, and as long as there is no effective possibility for the defence lawyer to challenge the validity of the evidence obtained in another EU country, it can be concluded that the principle of mutual recognition operates mainly

in favour of the prosecution: the defence still does not have the same opportunities to challenge transnational and national evidence, and this has a negative impact on the principle of equality of arms.

However, these negative consequences are not attributable to this Directive per se but rather to the lack of rules comprehensively governing the transnational proceedings and especially the absence of a mechanism to grant an efficient transnational defence.[60]

Finally, it can be questioned whether this Directive represents true progress in the implementation of the principle of mutual recognition in criminal matters, as the core principle for setting up the AFSJ as stated under Article 82 TUE. On the contrary, as the Directive has introduced a significant flexibility into the application of this principle, could this be viewed as a failure in adopting the principles accepted in the TUE? Are we at the beginning of a slow advancement towards the implementation of the principles of mutual recognition or rather facing a step backwards in this process? The answer to this question obviously depends on the point of view taken: when compared to the EAW, the EIO is clearly less ambitious or more cautious with regard to the principle of mutual recognition. But if the comparison is made with the system of gathering evidence through the mutual legal assistance instrument, the EIO unequivocally represents a significant advancement towards the implementation of the mutual recognition principle.

All in all, it may not be worth continuing to discuss the slower or swifter pace of the implementation of the principle of mutual recognition. At present, the long awaited EIO has to be welcomed, as it will serve to better fight the transnational criminality in an EU without borders. Attention is now to be paid to the process of transposing this Directive into the national legal orders and further to the role the ECJ is called to play in ensuring the efficient implementation of the EIO, respecting the rights of all parties concerned and especially the rights of defence.

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1. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. L 130, 1.5.2014.↩
2. Council Framework Decision 2008/9787/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, O.J. L 350, 30.12.2008.↩
3. Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on EU the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU (2000/C 197/01).↩
4. The international conventions, framework decisions and directives that are substituted and/or amended by the present Directive are listed in Article 34 DEIO.↩
5. Until now regulated in the Council Framework Decision 2003/577/JHA of 22 July 2003, on the execution in the EU of orders freezing property or evidence.↩
6. Paragraph 6 of the Explanatory Memorandum.↩
7. See paragraph 7 of the Explanatory Memorandum. See also L. Bachmaier, 'The role of the proportionality principle in the cross-border investigations involving fundamental rights', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings,* Springer, Heidelberg, N.Y., 2013, pp. 85-108.↩
8. See, for example, G. Ormazábal Sánchez, 'La formación del espacio judicial europeo en materia penal y el principio de reconocimiento mutuo. Especial referencia a la extradición y al mutuo reconocimiento de pruebas', in *El derecho procesal penal en la Unión Europea,* Madrid, 2006, p. 37-73, pp. 50 ff.; L. Bachmaier, 'European Investigation Order for obtaining evidence in the criminal proceedings: study of the Proposal for a European Directive', *ZIS,* 9/2010, p. 581 ff.; M. Jimeno Bulnes, *Un proceso europeo para el siglo XXI,* Cizur Menor, 2011, p. 92 ff.; F. Zimmermann, S. Glaser and A. Motz, 'Mutual Recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order', *EuCLR,* 2011, p. 56 ff.; F. Grande Marlaska-Gómez y M. Del Pozo Pérez, La obtención de fuentes de prueba en la Unión Europea y su validez en el proceso penal español, *RGDE,* 2011, Iustel, (http://www.iustel.com), pp. 1-42.↩
9. Point 36 of the Conclusions of the Tampere European Council of 15-16 October 1999: 'The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.'↩
10. O.J. C 12, 15.1.2001, in particular, see 2.1.1.↩
11. 'Strengthening freedom, security and justice in the EU, O.J. C 53, 3.3.2005, approved in the European Council of 4-5 November 2004, known also as Tampere II. This document defines the objectives for the next five years for the establishing of the EU AFSJ.↩
12. See point 3.3.1 of The Hague Programme.↩
13. Done in Brussels 11.11.2009, COM (2009) 624 final. The full text is available under http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0624:FIN:EN:PDF. Commenting this Green Paper see, S. Gless, *Beweisgrundsätze einer grenzüberschreitenden Strafverfolgung*, 2006; K. Ambos, 'Transnationale Beweiserlangung: 10 Thesen zum Grünbuch der EU-Kommission 'Erlangung verwertbarer Beweise in Strafsachen aus einem

anderen Mitgliedstaat', *ZIS,* 9/2010, pp. 557-567; and in the same issue, S. Allegrezza, 'Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', *ZIS*, 9/2010, p. 573 ff.↩

14. Brussels, 29.4.2010 (COPEN 115). The initiative for a Directive was presented by following Member States: Belgium, Bulgaria, Estonia, Spain, Luxemburg, Austria, Slovenia and Sweden. On that proposal for a DEIO, see, among others L. Bachmaier, 'European Investigation Order for obtaining evidence in the criminal proceedings: study of the Proposal for a European Directive', *ZIS*, 9/2010, pp. 580-589; and also L. Bachmaier, see Fn 7, pp. 85-107, and the literature there cited, and S. Ruggeri, 'Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Heidelberg, N.Y., 2013, p. 282 ff.↩
15. Council Framework Decision 2008/9787/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. On this instrument see, L. Bachmaier, 'El exhorto europeo de obtención de pruebas en el proceso penal. Estudio y perspectivas de la propuesta de Decisión Marco', in *El derecho procesal penal en la Unión Europea. Tendencias actuales y perspectivas de futuro*, Madrid 2006, pp. 131-178; R.A. Morán Martínez, 'Obtención y utilización de la prueba transnacional', *Rev. de Derecho Penal*, 2010, no. 30, pp. 79-102; B. Hecker, *Mutual Recognition and Transfer of Evidence. The European Evidence Warrant,* in S. Ruggeri (ed.), see Fn 14, pp. 269-278.↩
16. See. L. Bachmaier (2006), see Fn 15, p. 172.↩
17. Council framework Decision of 13 June 2002, on joint investigation teams 2002/465/JHA, O.J. 20.6.2002, L 162/1. On the joint investigation teams and its regulation in the EU Framework Decision see for example the monographic study of E. Vallines García, *Los equipos conjuntos de investigación penal en el marco de la cooperación entre los Estados de la Unión Europea,* Madrid, 2006, in particular p. 47 ff.↩
18. See Fn 17, p. 72 ff.↩
19. See Fn 17, p. 89.↩
20. See for example, M. Groenhuijsen y J. Simmelink, 'Criminal Procedure in the Netherlands', in B. Huber and R. Vogler (eds.), *Criminal Procedure in Europe,* Berlin 2008, p. 384 ff.; also M. Groenhuijsen and H. Selcuk, 'The Principle of Immediacy in Dutch Criminal Procedure in the Perspective of European Human Rights Law', *ZSTW,* 2014, p.254.↩
21. *Decreto legislativo* of 8 June 2001, n° 231, G.U. 19.06.2001 on the *Responsabilità amministrativa delle società e degli enti.*↩
22. See paragraphs 43-45 of the Explanatory Memorandum of the Directive.↩
23. The same in the Framework Decision 2008/978/JHA of 18.12.2008 on the European Evidence Warrant. The comments made on this provision of the EEW are mutatis mutandis applicable to the EIO, see L. Bachmaier, see Fn 15, pp. 146-148.↩
24. Article 9.3 DEIO: 'When an executing authority receives an EIO which has not been issued by an issuing authority specified in Article 2 (c), the executing authority shall return the EIO to the issuing State'. It has to be noted that it does not say that the execution will be denied, but that the EIO shall be returned, in order to amend the defective request.↩
25. L. Bachmaier, see Fn 8, p. 587 and B. Schünemann, 'The European Investigation Order: A Rush into the Wrong Direction', in S. Ruggeri (ed.) *Transnational Evidence and Multicultural Inquiries in Europe,* Heidelberg, N.Y., 2014, p. 32.↩
26. See G. Illuminati, 'Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, p. 23; A. Mangiaracina, 'A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order', *Utrecht Law Rev*., Vol. 10, Issue 1 (January) 2014, p.116.↩
27. L. Bachmaier, see Fn 8, p. 587.↩
28. It was included after the working sessions of 16 April and 14 May 2013, see the Council Document 8754/13, 24.04.2013. See also Council Document 9747/1/13, 29.05.2013.↩
29. In the same sense A. Mangiaracina, see Fn 26, pp. 123-124, although with regard to the Proposal for a Directive. Critical also R. Belfiore 'Critical Remarks on the Proposal for an European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence', in S. Ruggeri (ed.), see Fn 25p. 101.↩
30. Criticism also with the lack of provision on the defence participation in the execution of an EIO, although with regard to the text of the Proposal for a Directive: S. Ruggeri, 'Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues', in S. Ruggeri (ed.) see Fn 25,, p.17.↩
31. See para. 15 Explanatory Memorandum.↩
32. These requirements are also found in Article 7 FD EEW, but they were not in the first text of the Proposal for a Directive EIO, see L. Bachmaier, see Fn 8, p. 585.↩
33. See Annex A.↩
34. See L. Bachmaier, see Fn 8, p. 585. Some authors understood that I was considering that the EIO should not be subject to the proportionality test, as S. Ruggeri, see Fn 14, p. 288. However, this was never my stance.↩
35. See Article 4 DEIO.↩
36. I refer to L. Bachmaier, 'La orden europea de investigación y el principio de proporcionalidad', RGDE, 2011, Iustel (http://www.iustel.com), p. 7 ff., and the literature quoted there.↩
37. See, for example, M. Fordham and T. de la Mare, 'Understanding the principles of proportionality' in J. Jowell and J. Cooper (eds.), *Understanding human rights principles,* Antwerp, 2001, p.29 ff.; L. Bachmaier, see Fn 7, p. 88 ff.; S. Alegrezza, 'Collecting Criminal Evidence Across the EU: The European Investigation Order Between Flexibility and Proportionality', in S. Ruggeri (ed.), see Fn 25, p. 59 ff.↩
38. L. Bachmaier, See Fn 7, p. 98 ff.↩
39. On the difficulty of defining what are "exceptional costs" precisely with regard to the interception of coomunications see S. Arasi 'The EIO Proposal and the Rules on interception of Telecommunications", in S. Ruggeri (ed.), see Fn 25, p. 133.↩
40. As stated already in L. Bachmaier, see Fn 8, p. 584-585; and in 'La propuesta de directiva europea sobre la orden de investigación penal: valoración crítica de los motivos de denegación', *Rev. La Ley*, 28 December 2012, p. 7 ff.↩

41. This ground for refusal was not included in the initial text of the Proposal of a DEIO of 29 April 2010, which I already criticized in L. Bachmaier, see Fn 8, p. 584-585.↩
42. This is what S. Ruggeri has called 'availability assessment', who criticizes that the defence does not have an opportunity to intervene, S. Ruggeri, see Fn 14, p. 293.↩
43. See L. Bachmaier, see Fn 7, pp.100-105.↩
44. See L. Bachmaier, 'La propuesta de directiva europea sobre la orden de investigación penal: valoración crítica de los motivos de denegación', p.7 ff.↩
45. M. Böse, 'Ermittlungsanordnung – Beweistransfer nach neuen Regeln?', *ZIS*, 4/2014, p. 154 classifies the grounds for refusal in three types, similar to those set out here.↩
46. See, A. Mangiaracina, see Fn 26, p. 131.↩
47. In the same sense, M. Böse, 'Ermittlungsanordnung – Beweistransfer nach neuen Regeln?', p. 154. On the need of this rule see J. Vogel in 'La prueba transnacional en el proceso penal: marco para la teoría y la praxis', in *La prueba en el espacio europeo de libertad, seguridad y justicia penal*, p. 57.↩
48. On the admissibility of evidence obtained abroad in the Spanish criminal proceedings, see, among others, F. Grande Marlaska-Gómez and M. Del Pozo Pérez, 'La obtención de fuentes de prueba en la Unión Europea y su validez en el proceso penal español', p. 13 ff.; F. Gascón Inchausti, 'Report on Spain', in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, pp. 475-495.↩
49. A. van Hoek and M. Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights', *Utrecht Law Review*, vol. 1-2 (2005), p.15; S. Ruggeri, 'Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues', in S. Ruggeri, see Fn 25, p.15.↩
50. A. van Hoek and M. Luchtman, see Fn. 49, p. 16: 'the current inter-state practice thus creates a gap in legal protection that does not exist in purely national cases'.↩
51. See B. Schünemann, 'The foundations of transnational criminal proceedings', in B. Schünemann (ed.) *Ein Gesamtkonzept für die europäische Strafrechtspflege,* Köln, pp. 344-361; M.T. Krüssman, *Transnationales Strafprozessrecht*, Baden-Baden 2009, p. 134 ff.; S. Gless and J. Vervaele 'Law Should Govern: Aspiring General Principles for Transnational Criminal Justice', *Utrecht Law Review*, vol. 9-4,2013, , pp. 1-10. In the same issue, see S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle' p. 90 ff. and L. Bachmaier Winter, 'Transnational criminal proceedings, witness evidence and confrontation: lessons from the ECtHR's case law', p. 129 ff.↩
52. As demanded by J. Vogel in *La prueba transnacional en el proceso penal: marco para la teoría y la praxis*, p.60.↩
53. Granting the possibility for the defence lawyer to be present during the execution of hte EIO can also be crucial for the admissibility of evidence if such presence during the execution of an investigative measure is required in the *lex fori*, as for example in the Italian criminal procedure. See R. Belfiore, 'Critical Remarks on the Proposal for an European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence', in S. Ruggeri, see Fn 25, p. 102.↩
54. Directive 2013/48/EU of the European Parliament and of the Council, of 22 October 2013, on the right of access to a lawyer in criminal proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty'. On this Directive see S. Cras, 'The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings', *Eucrim* 01/2014, pp. 32-44; C. Arangüena Fanego, 'El derecho a la asistencia letrada en la directiva 2013/48/UE', *Revista General de Derecho Europeo* 32,2014, pp. 1-31.↩
55. Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects and accused persons deprived of liberty and legal aid in European arrest warrant proceedings, Brussels 27.11.2013, COM (2013) 824 final.↩
56. See L. Bachmaier, 'La cooperación judicial en asuntos penales en Europa: consideraciones prácticas, situación actual y propuestas de futuro', in *El derecho procesal español del siglo XX a golpe de tango. Liber Amicorum en homenaje a Juan Montero Aroca,* Gómez Colomer, Barona Vilar, Calderón Cuadrado (coords.), Valencia, 2012, pp. 1203-1223.↩
57. Although, as stated by S. Ruggeri, 'Transnational Investigations and Prosecution of Cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice', in S. Ruggeri (ed.), see Fn 25, p. 221 ff., in order to determine which is the *lex fori* it has first to be clarified which State will finally have jurisdiction to adjudicate the case.↩
58. Despite the fact that the Explanatory report on the application of Article 10 of the EU Convention on Mutual Legal Assistance of 29 May 2000 has already fostered certain harmonization, see O.J. C 379, of 29.12.2000, pp. 7-29.↩
59. On those requirements see also M. Böse, see Fn 45, p. 153-154.↩
60. Similar thoughts, although with regard to the regulation on the right to interpretation and translation in criminal proceedings in the Directive 2010/64/EU, are expressed by T. Rafaraci, 'The Right of Defence in EU Judicial Cooperation', in S. Ruggeri (ed.), see Fn 7, p.340.↩

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