



D3.1 CURRENT SITUATION

WORKSTREAM 2 – PHASE 1

Protocol 1: INTERVIEW TO LAW PROFESSIONALS



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



EUROCOORD

Version Final

Preparation date 16 March, 2017

Deliverable 3.1

Work Package WP 3

Authors: Mar Jimeno

Approved by Coordinator on: 23 May, 2017

Dissemination level: CO – Only consortium partners



Executive summary

Present deliverable constitutes the first deliverable in Workstream 2 under the title “comprehensive research on legal protection in the EU Member States under the EIO provision”, whose leading party is the University of Burgos. To be here also remembered that objective of this workstream is “to analyse the current practices in juridical protection for accused individuals, evidence gathering and investigative measures in Spain, Italy and Poland”. It is also expressly indicated that ‘it should be considered the qualitative assessment of the unstructured data, collected through interviews and focus groups’.

This document contains the common methodology to be used in Workstream 2 (henceforth WS2) proposed by WS2 coordinator to all partners. In fact this common methodology includes two different models of interview to be addressed to legal actors according to Workstream 2 description in order to analyze current practices on international and European judicial cooperation in all jurisdictions: Italy, Poland and Spain. A brief introduction is added in order to explain objectives, methodology, timeline and, specifically, the existence of two different models of questioning as far as two different groups of legal actors have been created.



Section 1: Introduction

It must be remembered that main objective of EUROCOORD is “to promote judicial cooperation by developing systematic research and generating specific knowledge and tools addressed to stakeholders to contribute to the efficient and coherent application of the Directive 2014/41/EU on the European Investigation Order (EIO) in criminal matters”. In fact, the main purpose of present research is the elaboration of a Code of Best Practices (WS3) to be employed by legal actors in application of the national laws implementing prior EIO, whose approval is still in process in mostly of Member States and, specifically, those ones represented by partners: Italy, Poland and Spain.

For this purpose, as first step, a national report focused in present practices related to international and European judicial cooperation in criminal matters affecting different jurisdictions has been elaborated according to desk research (WS1). But also qualitative research must be added in order to challenge theoretical approach with practical approach, which is essential in the topic. For this reason, WS2 foresees the elaboration of interviews to be addressed to different groups of legal actors, who are involved in the task of judicial cooperation between Member States (and or between third countries) along the development of criminal proceedings. This evidence shall show the reality of international and European judicial cooperation at present day in the three partners’ countries after a comprehensive qualitative analysis of the collected data (assessment), which shall constitute another deliverable of present WS2.

Project description related to WS2 initially foresaw two phases and two different focus groups; Phase 1) involving professional of the judicial institutions (judges and prosecutors) and lawyers, and Phase 2) involving NGOs members and lawyers/NGOs. But it was after agreed between all the partners to maintain, indeed, two different groups although just in a common phase in order to address the interviews. In this case difference should be better done, on one side, affecting judges as prosecutors as civil servants working in judicial institutions and, on other side, lawyers working as defence and/or on behalf of NGOs.

As far as both groups have same and different interests, it was also agreed between partners to elaborate two different models of interview with common and specific questions for each group. For this reason present document includes two different protocols contained in section 2 and section 3. As examples of specific interests and questioning it can be here exposed the topic on intervention of communications to be adopted as investigative measure affecting judges and prosecutors as far as they are specifically interested in cross-border evidence; by contrast, lawyers as defence lawyers and such ones acting on behalf of NGOs are specifically concerned in relation to procedural and defence rights in criminal procedure.

In this context WS2 coordinator (UBU) stated a common interview for all jurisdictions (Italy, Poland and Spain) after in March 2017 with agreement between partners of prior proposal elaborated by UBU and UCM. The idea was to promote a ‘open interview’, ie, interview with open questions to be free answered by each interviewee. For this reason some new questions proposed by Poland to be added to both protocols were at the end dismissed as far as all of them proposed ‘closed questions’, each of them containing 4 different answers to be crossed just one. It was agreed between partners to maintain such model of ‘open interview’ and, if it is the case, to address new questionnaires by email with the proposed ‘close questions’; it could be the case in Poland if necessary as far as many of the proposed new questions were related to specific national (Polish) experience in the context of prior EU instruments, such as the European Arrest Warrant (EAW).



EUROCOORD

Each partner elaborated both different lists with names of probable interviewees. It was agreed to interview, on one side, 20 judges and public prosecutors belonging to EU judicial institutions (Eurojust, EJM, liaison magistrates) and courts involved with judicial cooperation (eg, Supreme Court, National Court in Spain); on other side, 15 defence lawyers with independent office or lawyers working on behalf of NGOs involved in defence of procedural rights (International Amnesty, Fair Trials International, Rights International Spain-RIS). Interviews shall be done between April and September with personal appointment for each interviewee.

As methodology for interview, face-to-face meeting is preferred but also other methods shall be employed if necessary (ie, Skype) as far as some interviewees are long-distance; it is the case of judges and prosecutors working in EU institutions such as Eurojust or liaison magistrates. Interviewer shall take notes of answer as much as possible and recording shall also take place if authorised by interviewee. Interviews shall be anonymous and shall employ national language.



Section 2: QUESTIONS FOR JUDGES AND PUBLIC PROSECUTORS

Interviewed by

Date:

INFORMATION: The interview is being conducted for research purposes to learn about the Spanish/Italian/Polish judicial practice on international and European judicial cooperation in criminal matters especially related to the transmission of evidence and its admissibility. Your responses will be anonymous and will never be attributed to you personally, or described in a way that would make it possible to identify you. You can choose whether or not to participate, or to answer any particular question.

Request permission to record interview:

General questions

1. What is your position and how long have you worked at the court/in this position?

2. Do you have practice on international and/or European judicial cooperation?
YES/ NO

3. Did you receive any specific training or education from the courts or other institutions in order to prepare you for such international judicial cooperation?
YES/NO
 - If YES, did the training or education help to fulfil your duties in the daily practice on international judicial cooperation along the criminal procedure?

4. How many times have you carried out (or participated in) any practice on international/European judicial cooperation as requesting/executing authority? With which countries?

EU:

Others:

Experience in EU judicial cooperation

5. Which are the most international/European conventions and/or legal instruments commonly employed according to your practice within the EU judicial cooperation?



6. In relation to the duration of the criminal proceedings and according to your experience, how does it generally affect the practice of international judicial cooperation request? How much longer are criminal proceedings? What is the general time for executing the request since it is issued? According to your experience, which has been the shortest and most extensive deadline respectively and with which countries?

7. Do you believe that the degree of compliance with requests for international judicial cooperation is generally satisfactory? What are the main difficulties you face in general in that regard?

Cross-border evidence

8. What sort of assistance has been the most requested on international/European judicial cooperation according to your experience? Any of these requests have been related to the transmission of evidence and/or its admissibility? Can you provide examples?

9. Have you encountered problems with the admissibility of evidence in the ongoing criminal proceeding in Spain/Italy/Poland of the requested international judicial cooperation practice? How many times, with which countries and for what type of practice?

10. Do you request to execute/ or execute the requests according to the specific requirements of the counterpart EU countries? When you act as issuing authority, do you specify compliance with lex forum? Have you faced problems in this regard with the executing authority?

11. Do you believe that there is (or may exist) a reduction of procedural safeguards in cases where international judicial cooperation takes place in the gathering of evidence? In your opinion, which are the most frequent ones and what are or could be the procedural rights most affected and why? For example, search of premises, search of computers, telephone tapping, etc.

12. Are defence lawyers informed on the execution of a cross-border investigative measure in advance, so that they can appear in the executing country? Is this provided in the law? How are defence rights and fairness of proceedings in practice ensured when assessing evidence obtained abroad?

13. How does the execution and transfer of electronic evidence and interception of communications occur in practice?

14. When intercepting telecommunications abroad without technical assistance, do you inform later the relevant country? Would the evidence be inadmissible if the notification to the relevant state is not done? (Art. 31 DEIO)

15. How would you react if the request for obtaining evidence from another EU Member State entails extraordinary costs? (Art. 6.3 DEIO)
Refuse - apply reciprocity - consult with issuing authority and then refuse to execute - consider sharing costs



16. Have you ever transferred data obtained for other criminal proceedings, even if those data could not have been obtained for the concrete case where judicial cooperation request has taken place for?

17. What is your overall view of the Spanish/Italian/Polish international judicial cooperation in the cross-border gathering/transfer/admissibility of evidence practice in the EU? (Strongly favourable – somewhat favourable – slightly favourable – slightly unfavourable – somewhat unfavourable – strongly unfavourable)

18. What do you see as the main benefits/strengths and drawbacks of the present judicial cooperation in the cross-border gathering/transfer/admissibility of evidence in Spain/Italy/Poland?

19. In your opinion, if you are aware about the further implementation of European Investigation order (EIO), in what way will this implementation help in improving the practice of the international/European judicial cooperation?



EUROCOORD

20. If not all the EU MS transpose the EIO Directive on time (by 22nd May 2017), how will you deal with the requests for gathering evidence? (Art. 34 DEIO)

A) if you are executing authority and your State has transposed the EIO, but the issuing State has not

B) if you are executing authority and your State has not transposed the EIO but the issuing State has not

C) If you are the issuing State and your State has not transposed the EIO?

D) If you are the issuing State and your State has transposed the EIO and the executing has not

21. Do you identify problems with data protection laws and the speciality principle in the transfer of certain evidence to the requesting State?

22. Would you like to add any other comments?



Section 3: PROPOSED QUESTIONS FOR DEFENCE LAWYERS AND NGOS LAWYERS

Interviewed by

Date:

INFORMATION: The interview is being conducted for research purposes to learn about the Spanish/Italian/Polish judicial practice on international and European judicial cooperation in criminal matters especially related to the transmission of evidence and its admissibility. Your responses will be anonymous and will never be attributed to you personally, or described in a way that would make it possible to identify you. You can choose whether or not to participate, or to answer any particular question.

Request permission to record interview:

Interviewed by:

General questions

1. What is your position/law firm (medium size, national, international) and how long have you worked as criminal defence lawyer?
Number of years of experience:

2. Do you have practice on transnational criminal cases and international and/or European judicial cooperation?
No
YES
 - a. If yes, what kind of transnational criminal cases?

3. In relation to the duration of the criminal proceedings and according to your experience, how does the international/European dimension of the case and the issuing of international judicial cooperation requests effect on the duration of the proceedings? What is the general period of compliance from its request to its execution?



4. Do you believe that the degree of compliance with requests for international judicial cooperation is generally satisfactory? What are the main difficulties you face in that regard?

Cross-border evidence

5. What kind of evidence is more often requested to other EU member states in criminal proceedings? Can you provide examples?
6. Do you believe that there is (or may exist) a reduction of procedural guarantees in cases where international judicial cooperation takes place in the gathering of evidence? In your opinion, what are or could be the procedural rights most affected and why? If this is the case, how could this be overcome/counterbalanced?
7. How does the execution and transfer of electronic evidence and interception of communications occur in practice? Have you been able to challenge its integrity or validity in practice?
8. Are defence lawyers informed on the execution of a cross-border investigative measures in advance, so that they can appear in the executing country? If yes, in which cases? Were you granted the possibility to take part in the execution of such measure in the foreign state?
9. Is the defence in transnational criminal proceedings in a disadvantaged position compared to cases involving national criminal justice system only? Are the provisions for legal aid enough?



EUROCOORD

10. Do you think that procedural safeguards and defence rights are fully attended to abroad in cases in which coercive measures are requested by your national system?

11. Have you ever requested the gathering of evidence abroad in criminal proceedings? If yes, was it granted?

12. Regarding the evidence obtained abroad, do you consider there are enough mechanisms to challenge its validity and admissibility? Does the court check *ex officio* if the evidence gathered abroad complies with the *lex fori*? And the *lex loci*?

13. What do you see as the main benefits/strengths and drawbacks of international judicial cooperation in the cross-border gathering/transfer/admissibility of evidence at the present time in Spain/Italy/Poland? Can a certain trend/evolution be identified?

14. What is your overall assessment of the Spanish/Italian/Polish international judicial cooperation in the cross-border gathering/transfer/admissibility of evidence practice in the EU?
Strongly favourable – somewhat favourable – slightly favourable – slightly unfavourable – somewhat unfavourable – strongly unfavourable

15. In your opinion, in what way will the implementation of the EIO help in improving the practice of the international/European judicial cooperation? In what way?



EUROCOORD

16. Do you think that the implementation of the EIO will enhance the rights of the defence in cross-border criminal cases within the gathering of evidence?

17. In the case of the cross-border intervention of telecommunications, do you think the regulation is adequate? Would you be in favour of granting the forum State direct access to the telecommunications intercepting system in the executing State?

18. Would you like to add any further comments?