



“Best practices for EUROpean COORDination on  
investigative measures and evidence gathering”

**Training course**

**Judges**

**Prosecutors**

**Defence lawyers**

**Presentation no. 1: National Reports on EIO (D2.4)**

WS5.5. “Training course materials”

Partners:





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# Directive 2014/41/UE: what is an EIO?

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## ART. 1 § 1 DEIO

*“A European Investigation Order (EIO) is a **judicial decision** which has been issued or validated by a judicial authority of a Member State (‘the issuing State’) to have one or several **specific investigative measure(s)** carried out in another Member State (‘the executing State’) to obtain evidence in accordance with this Directive” (DEIO).*

The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.

Following **Art. 3 DEIO** is excluded by DEIO the setting up of a **JOINT INVESTIGATION TEAM** and the gathering of evidence within such a team.

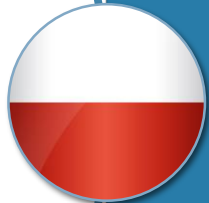


# The implementation in Italy, Poland and Spain



## ITALY

Has transposed the DEIO by means of the Italian Legislative Decree (hereinafter: LD) no. 108 of 21 June 2017, entered into force on 28 July 2017.



## POLAND

Has transposed the DEIO by Law of 10 January 2018, amending the criminal procedure code, entered into force on 8 February 2018.



## SPAIN

Has transposed the DEIO by the Law 3/2018, of 11 June, published on June 12th, 2018 in the Spanish Official Journal, amending the Act 23/2014, of 20 November.



# Art. 34 § 1 of DEIO and its meaning

**The Directive ‘replaces’ the following instruments of judicial cooperation in criminal matters:**

- Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959 as well as its two Protocols;
- Convention implementing the Schengen Agreement;
- Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol;
- FD 2008/978/JHA on the European Evidence Warrant, for obtaining objects, documents and data for use in proceedings in criminal matters of 18 December 2008;
- FD 2003/577/JHA on the execution of orders freezing property or evidence, of 22 July 2003, as regards freezing of evidence.



## Art. 34 § 2 DEIO and its meaning

The word ‘replaces’ has been interpreted in the sense that does not entail the automatic abolition of all the previous normative instruments adopted in the field of judicial assistance.

They will still be applied in situations where the DEIO is not applicable or in relation with States that are not bound by DEIO, such as for instance in relation with Denmark and Ireland.

*See Eurojust Meeting on the European Investigation Order, Outcome Report, December 2018.*

The DEIO is fully implemented: Luxembourg has been the last State to implement the Directive in September 2018.



# SUBJECTS

## Who can issue the EIO?

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**According to Art. 2 lett. c) of DEIO, issuing authority means:**

- i) *“a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or*
- ii) *any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO”.*



# SUBJECTS

## Who can issue the EIO?

The authority who can issue or validate the EIO in Italy, Poland and Spain is a “judicial” authority and any role has the administrative authority.

The concept of “**judicial authority**” depends on the structure of each normative procedural system



### ITALY

Public Prosecutor (during preliminary investigation)  
Judge who is proceeding (in the following stages)



### POLAND

Court or Public Prosecutor (the preparatory stage of the criminal proceedings)



### SPAIN

Public Prosecutors (issue or execute the EIO in Spain only when the measure requested does not entail restriction of fundamental rights)





# SUBJECTS

## The role of the defence

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The DEIO has included a special provision concerning the role of defence as issuing authority:

### ART. 1 § 3:

*“The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure”.*

Any role has the victim!



# SUBJECTS

## The role of the defence



According to Art. 31 of the LD no. 108/2017, the lawyer of a person under investigation, of a defendant or of a person proposed for the application of a preventive measure, MAY REQUEST TO THE PUBLIC PROSECUTOR OR THE JUDGE, DEPENDING ON THE STAGE OF PROCEEDINGS, THE ISSUANCE OF AN EIO with the specification, under penalty of inadmissibility, of the investigative measure and reasons that justify the measure itself.

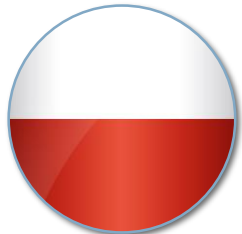
### **Weak points:**

- Lack of a national remedy against the refusal to issue an EIO
- A victim is not among the persons who may request the issuing of an EIO.



# SUBJECTS

## The role of the defence



According to the new Art. 589w, an EIO may be issued *ex officio* or on request of a part of the proceedings (or by a part's attorney).

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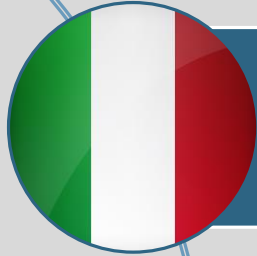


The issuance of an EIO can be requested 'by a suspected or accused person, or by a lawyer on his behalf', such request means just a proposal but not a proper standing as far as the director of pre-trial investigation is only the Judge of the Investigative.

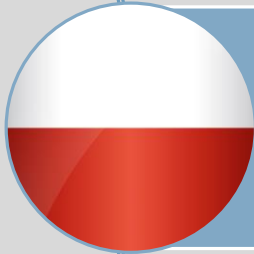
Regarding participation of a defence in the gathering of evidence abroad, in all the 3 countries there are not significant provisions on the participation of a defence lawyer or of private parties at the stage of execution.



# Types of proceedings



“Criminal” proceedings, excluding the administrative proceedings.  
Are included: proceeding on juridical liability of legal persons and proceedings for the application of a preventive measure on assets



“Criminal” proceedings, excluding the administrative proceedings.  
Are included: proceedings on juridical liability of legal persons;  
proceedings concerning a fiscal criminal offense;  
road traffic petty offences and petty offences against property



“Criminal” proceedings (having regard to the proportionality principle, it shall never be proportional to issue an EIO in the framework of proceedings for minor offenses).



# The concept of “coercive” measures



The DEIO does not provide any definition of coercive measure.



## Coercive measures in Italy:

- Measures that infringe the right to **personal freedom**, such as, for instance, inspections (Art. 244 and 245 of the CPC);
- Searches (Article 247 and ff of the CPC);
- Forced collection of biological samples from living persons (Art. 359-bis of the CPC);
- Measures that infringe the right to the **inviolability of domicile**.



# The concept of “coercive” measures



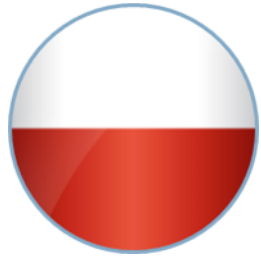
## Coercive measures in Spain:

Coercive investigative measures are adopted during pre-trial investigation with restriction of fundamental rights:

- Search and seizures in closed place (Arts. 545 - 572 LECrim);
- Register of books and papers (Arts. 573 - 578 LECrim);
- Warrant and opening of written and telegraphic correspondence (Arts. 579 - 588 LECrim);
- Provisions common to the interception of telephone and telematic communications; (Arts. 588 bis a – 588 bis k LECrim); interception of telephone and telematic communications (Arts. 588 ter a – 588 ter m LECrim); Gathering and recording of oral communications through the use of electronic devices (Arts. 588 quater a – 588 quater e LECrim);
- Gathering and recording of oral communications through the use of electronic devices (Arts. 588 quater a – 588 quater e LECrim);
- Use of technical devices for image acquisition, tracking and localization (Arts. 588 quinquies a – 588 quinquies c LECrim);
- Registering Mass Storage Information Devices (Arts. 588 sexies a – 588 sexies c LECrim); remote records on computer equipment (Arts. 588 septies a – 588 septies c LECrim);
- Freezing evidence measures (Arts. 588 octies LECrim).



# The concept of “coercive” measures



## Coercive measures in Poland

Coercive measures *largo sensu* also called measures for evidential purposes:

- **Search or telephone tapping**



# Grounds for non recognition or non execution

Listed in Article 11 DEIO, as Optional.



Grounds have been implemented as mandatory, but it should be noted that the Italian legislator has not implemented the one based on the principle of territoriality (Art. 10 LD).



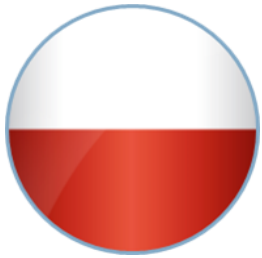
All the grounds for refusal are mandatory and accordingly with the inadmissibility of an EIO for administrative proceedings, a new Art. 207 (1) (g) foresees a specific ground of refusal not contemplated under [Art. 11 \(1\) DEIO](#)





# Grounds for non recognition or non execution

Listed in Article 11 DEIO, as Optional.



Some grounds for refusal have been implemented as optional, while other are mandatory.

In particular, following Art. 589zj § 1 CPC: immunity or privilege; *ne bis in idem*; execution of the EIO would jeopardise the source of the information relating to specific intelligence activities; possibility to harm essential national security interests; violation of human rights are **mandatory** and such also specific grounds for refusal relevant to the execution of the EIO, which indicates temporary transfer to the issuing State of persons held in custody, and which would prolong the detention of the person in custody.

By contrast: lack of double criminality; territoriality; execution of the EIO which would involve the use of classified information relating to specific intelligence activities; would not be authorised under the Polish law in proceedings in which an EIO has been issued, have been implemented as **optional**.



# Legal remedies at national level

Member States shall ensure legal remedies equivalent to those available in a similar domestic case; the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, 'without prejudice to the guarantees of fundamental rights in the executing State' (Art.14 §§ 1 and 2 DEIO)



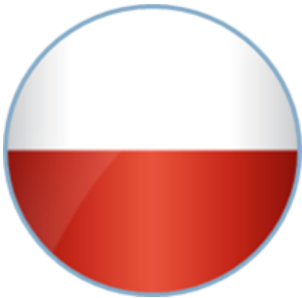
**Italy** has introduced a specific remedy against the decree that recognises the EIO. Where Italy is the requesting authority, the defence has a remedy only against the order of seizure aimed at the gathering of evidence (Art. 28).

According to the **Italian LD**, the decree which recognises the EIO is communicated, by the secretary of the PP, to the lawyer of the person under investigation, following terms provided by the Italian law (Art. 4 § 4): within 5 five days since the communication, the person under investigation and a lawyer may submit an **opposition** to the judge for preliminary investigations (art. 13 § 1); the opposition can be submitted also against the decree that recognises an EIO aimed at freezing for the purpose of evidence (art. 13 § 7).



# Legal remedies at national level

Poland and Spain make a reference to general legislation



Decisions on issuing and executing the EIO cannot be challenged. Legal remedies – regarding both the issue and execution of the EIO – are possible only if they are possible in strictly domestic criminal proceedings



Art. 24 LRM provides, textually, *‘against decisions issued by the Spanish judicial authority deciding on the European instruments on mutual recognition will be able to interpose the appeal that proceed according to the general rules foreseen in the Act of Criminal Procedure’*.



# Specific investigative measures

Chapter IV of the DEIO (Arts. 22-30 DEIO) provides for certain investigative measures that are aimed at favouring admissibility and the use of evidence in the criminal proceedings in the issuing Member State.

Chapter V regulates INTERCEPTION OF COMMUNICATIONS with or without technical assistance of another Member State (Arts. 30 and 31): several provisions are practically identical to those established in the 2000 EU MLA Convention. The latter has been implemented in Italy by LD no. 52 of 5 April 2017, in force since 22 of February 2018. By contrast, it has been implemented in Poland and Spain.

Practical issues arose especially from interception without technical assistance of another Member State: different regulations at national level regarding condition for the interceptions, as well as duration, may represent an obstacle for an efficient cooperation in this field.



# The admissibility of evidence obtained through an EIO

The DEIO does not establish any rule on the admissibility of evidence gathered abroad. Only Italy has introduced a specific rule at this regard.



The LD no. 108/2017 has introduced a specific provision (Art. 36) which establishes the types of investigative measures that are included in the file of trial (Art. 431 of the CPC):

- documentary and unrepeatable evidence gathered abroad through an EIO (such as the result of DNA analysis) can be included into the trial file pursuant to Art. 431 of the CPC without further conditions.
- conversely, repeatable evidence gathered by means of an EIO (such as witness statements), can be included in the trial file under the condition that the defence lawyer has been able to participate at the evidence gathering and to exercise powers recognised by Italian law.



# LIFE CYCLE OF AN EIO



- 1 - **DRAFTING** of EIO by judicial authority in Member State A
- 2 - **TRANSMISSION** of EIO to judicial authority in Member State B
- 3 - **RECOGNITION** of EIO in Member State B
- 4 - **EXECUTION** of EIO in Member State B

**EIO CASES**

EUROJUST IDENTIFIES CHALLENGES AND BEST PRACTICE IN EIO CASES