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# “Best practices for European Coordination on investigative measures and evidence gathering”

## Training course for Lawyers

### WS5.5 “Training and Dissemination”

Partners:





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RESEARCH OBJECTIVES

LEGAL ISSUES

1. Current legal instruments
2. Most requested sort of assistance
3. Length of criminal proceedings
4. Procedural safeguards
5. Requirements as requiring / executing authority
6. Information to defence lawyers
7. Practice on execution and transfer of electronic evidence and interception communications
8. Costs
9. Special considerations expressed by lawyers
10. Steps towards a model shift in evidence gathering and transmission

Conclusions



# RESEARCH OBJECTIVES

## Interviewees: Target subjects

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Italy

- 4 Judges
- 3 Public Prosecutors
- 4 lawyers

Poland

Spain

- 12 judges
- 6 prosecutors
- 6 lawyers



# LEGAL ISSUES

## Current legal instruments

### Italy

- Convention on Mutual Assistance in Criminal Matters of 1959 (entry into in force in 2018);
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

### Poland

- Convention on the Transfer of Sentenced Persons, done in Strasbourg on 21 March 1983;
- Agreement between the Republic of Poland and the United States of America on extradition on 10 July 1996;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

### Spain

- Convention on Mutual Assistance in Criminal Matters of 1959;
- Mutual Legal Assistance 2000;
- FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and securing
- FD 2005/214/JHA of the Council, of February 24, 2005, relating to the application of the principle of mutual recognition of pecuniary sanctions;
- FD 2008/909/JHA of 27 November de 2018, on the application of the principle of mutual recognition of judicial decisions in criminal matters for which penalties or other measures involving deprivation of liberty;
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.



# LEGAL ISSUES

## Current legal instruments

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- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding European Investigation Order in criminal matters. **(Date of transposition: 28 July 2017).**

1st

### Poland

- Convention on the Transfer of Sentenced Persons, done in Strasbourg on 21 March 1983;
- Agreement between the Republic of Poland and the United States of America on extradition on 10 July 1996;
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2nd

### Spain

- Convention on Mutual Assistance in Criminal Matters of 1959;
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3rd



# Most requested sort of assistance



- Assistance information on bank accounts, on banking and other financial operations.
- Information on the existence and the activity of enterprises that apparently have a seat abroad,
- Gathering documents,
  - Gathering of information.



- The transmission of evidence and/or its admissibility.



- The statement of the investigated person (by videoconference)
- The transmission of documents such as official copies of judicial resolutions issued in Spain,
- The intervention of communications.

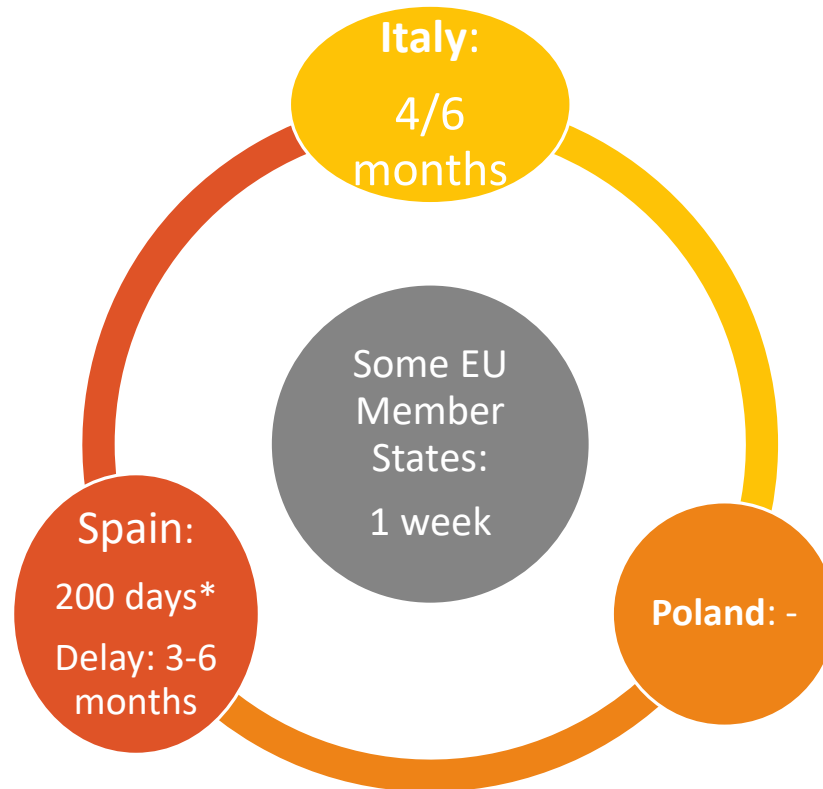


# Length of criminal proceedings

Delay as a consequence to request for judicial cooperation in criminal matters

Source:

Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2018) 364 final, [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2018\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf)



Outside EU:  
1/2 years  
(Switzerland, United States, China or South America)

\*needed to solve the 1st instance of civil, commercial, administrative and other case in Spanish Procedural System.



## Procedural safeguards



# Requirements as requiring/executing authority

- The United Kingdom, Italy and Netherlands are among the states that include specifications when acting as issuing authority.
- Italy: Defence lawyers believe that in the field of letters rogatory there is a reduction of procedural guarantees for the person under investigation/accused (p.14. Report D3.4).





# Information to defence lawyers



- A 'secondary role', maybe motivated because the intervention of a lawyer in another country shows practical difficulties (language, lack of training or knowledge of forensic uses, etc.).
- Coordination between lawyers.
- Only the Public Prosecutor's Office is informed in advance about the execution of a cross-border investigation proceeding, because to the qualification of the investigation as secret.
- If the secret of the investigations has not been settled, lawyers are informed in advance of the cross-border investigation diligence (Article 4 of the 1959 Convention).



# Information to defence lawyers



- The difficulty of the mobility of the defence lawyer could be replaced either for the use of video conferencing or to the submission of written questionnaire (defendants or witnesses statements).
- Tendency to inadmissibility the written questions, considering them tricky or suggestive.
- Rights of defence and a fair trial are ensure in practice by carefully examining the way in which the cross examination has been carried out abroad, either at the request of the Public Prosecutor's Office or at the parties involved in the trial.



# Information to defence lawyers



- Difference between preliminary investigations and trial. In the Italian criminal system, preliminary investigations are kept in secret.
- During the preliminary hearing and during a trial, when it is necessary to gather an evidence located abroad the defence is informed and can take part to the gathering of evidence (according to Art. 4 § 1 of the 1959 ECMACM of 1959).



# Information to defence lawyers

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- The defence lawyers are specialized in criminal law and work normally in legal offices of small size (1-5 associates) or medium size (6-15).
- Criminal proceedings with transnational element were mainly white-collar crimes.
- Main idea: the defence is a disadvantage in transnational criminal proceedings with respect to national cases. Because of the costs.



# Practice on execution and transfer of electronic evidence and interception communications

Spanish and Polish judges: No experience in the execution and transference of electronic evidence.

Italy: the interception on communications is the main area where are emerging practical questions in relation to the implementation of DEIO

Police transfers the digital information into data preservation devices (CDs, pen drives, memory cards or external hard disks). The Court Officer (Letrado de la Administración de Justicia) certify that the copies correspond to the original ones.

Article 24 of Italian LD n. 108 of 2017. Only the judge may order the termination of interception “if it concern an offence for which, according to national law, would not be permitted”

No  
data



# Costs

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- Homogeneous answers.
- **Spanish** judges and prosecutors usually execute investigation measures, regardless of the expense involved and even if the request from other EU Member State involves extraordinary costs (Article 6.3 DEIO).
- **Italy**: Disagreement for costs may be grounds for refusal and may involve intervention by the Ministry of Justice (thus leaving the field of mutual recognition).
- **Poland**: In case of extraordinary costs, Consultation with issuing authority and refuse (under proportionality principle) were the most frequent answers.



# Special considerations expressed by lawyers

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All the Italian and Spanish lawyers believe that the defence is in disadvantage in transnational criminal proceedings with respect to national cases (*No harmonization of procedural guarantees and the right of defence, poor knowledge of the language of the proceedings and of the legal system*).

The intervention in procedures abroad is also conditioned by the availability of financial means.

**Opinions:** EIO improves this situation because investigative measures can be requested from Spain to be practiced according to Spanish Criminal Procedure Law.

**Suggestion:** new technologies, especially video conferencing.

Spanish lawyers: *“Higher rates of admission of the requested evidence when it has also been requested by the prosecutor”*.

The provisions for legal assistance in Europe may be sufficient, but they are not always effective because some investigative measures are carried out in absence of a defence lawyer.



# Special considerations expressed by lawyers

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Spanish and Italian lawyers: *“there are not sufficient mechanisms for challenging the validity.*

*Suggestion: it would be convenient that the defence lawyer takes part in the practice of investigative measures done abroad in order to discuss its validity in the executing state itself”.*

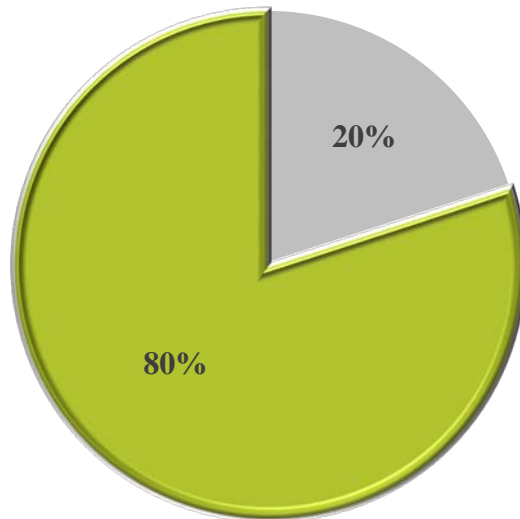
Polish lawyers: *“Most problems of admissibility concerns hearing of a witness or with technical matters such as differences in documents corrections”* (lack of information about the coherence between legal systems in the area of inadmissibility of evidence).

All the defence lawyers interviewed agree on the excessive time required to comply with the request for assistance and on the related consequences for the duration of criminal proceedings.





# Steps towards a model shift in evidence gathering and transmission



**Spain:** 20% strongly unfavourable.

Reasons:

- Violation of principle of reciprocity.*
- the scarce training of judges in cooperation instruments*
- the unequal treatment Judges give to prosecutors and to lawyers.*
- *Higher level of cooperation in relation with certain types of crimes (such as terrorism) than in others (such as money laundering or fraud).*

**Spain:** 80% of the interviewees are favourable on the practice of judicial cooperation between Spain, Italy and Poland, and regarding the collection, transfer and admissibility of evidence.



# Steps towards a model shift in evidence gathering and transmission



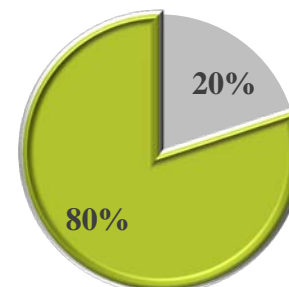
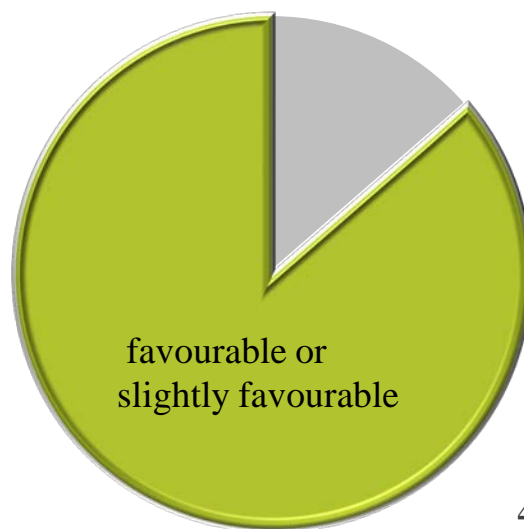
**Italy:** Less optimistic are lawyers who do not see an improvement in the level of guarantees for the accused involved.

**Italy:** Prosecutors and Judges are optimistic on the future of this new instruments.

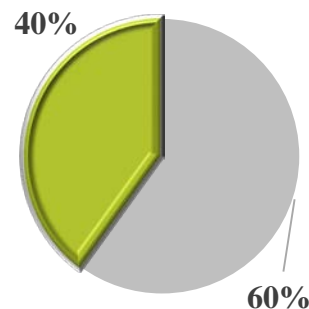
*“the DEIO is a first step towards an European code of criminal procedure, and an harmonisation of the stage of investigations as well as of evidence”*



# Steps towards a model shift in evidence gathering and transmission



80%: No training in the area of EIO



40%: Training on judicial cooperation



# CONCLUSIONS

- ✓ The request of Office of the Public Prosecutors composed by a group of persons with specific competences in the area of judicial cooperation and with the knowledge of foreign languages.
- ✓ Following the application of DEIO in Italy it will not be possible to use the “instradamento” procedure for the interceptions of telecommunications without technical assistance



# CONCLUSIONS

- ✓ Topic: Compliance of international judicial cooperation instruments (namely: satisfactory or not).
- ✓ Many difficulties in such cooperation and a variety of examples have been provided: difficulties in formalization of procedures (in ex. access to criminal records), unexpected differences in domestic systems, problems with the double criminality principle and also the most basic problems such as access to contemporary unified sources of law.



# CONCLUSIONS

- ✓ Common observations: increase in the length of criminal proceedings when cooperation operations are necessary. The EIO would come to suppose an advantage in this respect, standardizing the procedures.
- ✓ Spain: discrepancies between Judges and Prosecutors (optimistic, hopeful and positive for the implementation of the EIO Directive) and lawyers (critical because of the decrease in the threshold of protection of human rights and because of the not equally treatment of prosecutors and defense when they request an EIO).
- ✓ Important of Training courses, dissemination programs, easy ways of contact with (and support by) the European Judicial Network Contact Points.
- ✓ A collection of the best practices
- ✓ Specialized shifts of qualified professionals in international criminal matters should be implemented by the bar associations.
- ✓ Guidelines both at EU level and at National level; EIO electronic model forms and training for practitioners.
- ✓ A pragmatic approach in the interpretation of norms



# CONCLUSIONS

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- ✓ The use of electronic formats is repeatedly suggested, from Italy, and from Spain.
- ✓ Positive general attitude to EIO instruments.