



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

Presentation n. 3: Code of Best Practices (D4.4)



Partners:





Code of Best Practices (D4.4)

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Introduction.

- A “Code” of best practices in the legal field tries to identify a set of guidelines and ideas that should represent the most efficient, logical, and useful course of action, and give guidance to judges, public prosecutors, and defence lawyers on behalf of the defendants.
- In elaborating this CBP the drafters have focused both on providing guidance on the EIO to become an efficient tool in prosecuting transnational crime within the Area of Freedom, Security and Justice (AFSJ), but giving equal attention to the necessary procedural safeguards in the process of gathering evidence to ensure the fair trial rights.
- A CBP in principle has no binding effect. Not following it or manifestly acting against it as a rule will produce a loss of opportunity in the path towards excellence in terms of efficiency and protection of human rights.
- The proposal of this Project was based on the analysis of the rules and practical experience of three selected countries: Spain, Italy and Poland because these three countries present a highly interesting scenario in the field of cross-border criminality.



COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

The following schemes presents a non-exhaustive list of measures which fall within the scope of EIO application

COERCIVE MEASURES	NON-COERCIVE MEASURES
<ul style="list-style-type: none"> • Controlled deliveries of drugs and other prohibited substances (art. 263 bis LECrim). • Infiltration by police officers • Obtention of biological samples for DNA profiling, as well as inspections, recognition and physical intervention • Entry and search of the premises or of the domicile • Detention and opening of written and telegraphic correspondence Search of documents or personal belongings 	<ul style="list-style-type: none"> • Evidence necessary to prove the offence, such as the judicial inspection of the crime scene, the recovery of assets or proceeds derived from the offence or the autopsy • Evidence necessary to identify the offender and his circumstances as well as the identification parade, the photographic reconnaissance or the report on the conduct of the suspect • Interrogation of the suspect • Interrogation of the witnesses and the victim





COERCIVE MEASURES IN SPAIN, ITALY AND POLAND

The following schemes presents a non-exhaustive list of measures which fall within the scope of EIO application

COERCIVE MEASURES	NON-COERCIVE MEASURES
<ul style="list-style-type: none"> • Interception of telephone and telematic communications • Access to electronic data or associated information held by the service providers • Capturing and recording of oral communications using electronic means • Use of technical devices to capture the image and tracking devices • Search of computers Remote search of computer equipment 	<ul style="list-style-type: none"> • Confrontations between the suspect and/or the witnesses • Expert evidence report • Access to the IP address of a device • Identification of computer terminals through the capture of identification codes • Identification of the owner or the data of any means of communication Order to retain data or information included in a computer system





COMPETENT AUTHORITIES



• Issuing authorities:

- Judge or public prosecutor

• Receiving, recognising and executing authorities

- public prosecutor



• Issuing authorities:

- Judge or public prosecutor

• Receiving, recognising and executing authorities

- public prosecutor/District Court



• Issuing authorities:

- Judge or public prosecutor

• Receiving, recognising and executing authorities

- public prosecutor



Receiving authority , Recognition when receiving authority is not competent for the execution (**incompleto**)



Who may request the issuing of the EIO?

Italy

- The suspect or accused person
- Victim is not included but this does not mean that the victim may not ask for it

Poland

- Any person who is party to the proceedings:

Spain

- Any person who is party to the proceedings
- Ex officio or at the request of a part



Proposed Best Practice

- The decision rejecting the issuing of an EIO requested by the defence should be motivated.
- Victims and other parties should be entitled to request the issuing of an EIO.
- Centralising the receiving of the EIOs in the PP Office is positive for speeding up the process, for ensuring common standards in the whole territory of a State as to the recognition of an EIO.
- In cases of several measures requested within the same EIO, the decision on the competence of the executing authority might be quicker if the whole procedure is coordinated by one single authority.
- CBP: Direct contact between requesting and executing judicial authority is crucial. The communication channels should work equally regardless who is the receiving/executing authority.
- The splitting of the reception and execution of the EIO between the PPs and the judges does not appear to present practical problems.





FORM OF THE EIO AND JUDICIAL DECISION

- The EIO is set out in a form signed by the issuing authority.
- The form shall explain all the elements that justify the necessity and proportionality of the measure requested. If such information is missing, before refusing, the receiving/executing authority shall communicate with the issuing authority asking to complement the data required.
- The issuing authorities should include in the EIO those requirements that will facilitate the admissibility of the evidence and which should be followed by the executing authority.
- Within Section J (Legal remedies), it should be specified not only whether an appeal against the issuing of the EIO has been lodged, but also whether such an appeal is admissible according to the lex fori.
- It is possible to identify the authority competent to receive the EIO through the EU ATLAS.
- In Italy the EIO shall be transmitted to the Direzione Nazionale Antimafia e Antiterrorismo (and Ministero della Giustizia) when the investigations refer to some of the crimes mentioned in art. 51 (3 and 3bis) ICPP.
- In Spain, the issuing of the EIO (and its execution) shall be included in the corresponding statistics, which then shall be sent to the Ministry of Justice .




EXECUTION OF THE EIO


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- In general, the executing authority can NOT check whether the issuing authority has judicial nature under its national law. Only exceptionally when the executing authority has really grounds to believe/fear that the issuing authority might not be a judicial authority in the meaning of Article 2 (c) (i) DEIO.
 - The participation of the lawyers in the execution of an EIO should be facilitated in order to protect the defence rights as long as it is compatible with the investigations.
 - Issuing an EIO:




Ex officio upon request of the defence




Issuing authority, validating authority



Support: EJN and Eurojust, direct contact



Requirements of proportionality/necessity of the EIO



Formal requirements of the EIO form, transmission, confidentiality



LEGAL REMEDIES AT NATIONAL LEVEL



Issuing of the EIO	Public prosecutor (Prior to the opening of the criminal trial)	Investigating judge (*) (When a criminal proceeding has been initiated, but prior to the judgment)	Trial Court/ (Trial)
Pre-trial investigations by the prosecutors (Diligencias de investigación Fiscal)	There is no appeal (art. 13.4 LRM).		
Pre-trial phase of the criminal proceeding against minors	No direct appeal is provided, but the parties may challenge it before the Juvenile Judge (art. 26.2 LORPM).		
Proceeding for crime punishable with imprisonment of more than 9 years Proceedings for grave crimes (Procedimiento ordinario)		Reforma/appeal (arts. 216 y ss. LECrim). *** Annulment of the proceedings/ acts (240.2 LOPJ)	No direct appeal is permitted, but it is possible to lodge complaint. It is necessary to lodge complaint in order to appeal the judgment (art. 659 LECrim). *** Annulment of the proceedings/acts (240.2 LOPJ)
Proceedings for crimes punishable with imprisonment up to 9 years (Procedimiento abreviado)		Reforma/appeal (art. 766 LECrim). *** Annulment of the proceedings/acts (240.2 LOPJ)	No direct appeal is permitted, but the part that requested the issuing of the EIO and whose request was rejected may reproduce its request at the beginning of the trial (art. 785.1° II LECrim). *** Annulment of the proceedings/acts (240.2 LOPJ)



LEGAL REMEDIES AT NATIONAL LEVEL



Recognition and execution EIO	Public Prosecutor	Investigating Judge (*)	Juvenile Judge (**)
Measures not restricting the fundamental rights	There is no appeal (art. 24.4 LRM)	<p><i>a) Proceeding for crimes punishable with imprisonment of more than 9 years (Procedimiento ordinario)</i></p> <p>Reforma/appeal/complaint (arts. 216 y ss. LECrim).</p> <p>***</p> <p>Annulment of the proceedings/ acts (240.2 LOPJ)</p> <p><i>b) Proceeding for crime punishable with imprisonment up to 9 years (Procedimiento abreviado)</i></p> <p>Reforma/appeal (art. 766 LECrim)</p> <p>***</p> <p>Annulment of the proceedings/acts (240.2 LOPJ)</p>	<p>Reforma and subsequent appeal (art. 41.2 LORPM).</p> <p>***</p> <p>Annulment of the proceedings/ acts (240.2 LOPJ)</p>
Measures restricting the fundamental rights or EIO in which the issuing authority requires the intervention of the judge			



LEGAL REMEDIES AT NATIONAL LEVEL



Issuing state EIO	Public Prosecutor (Pre-trial)	Judge for the preliminary hearing (Pre-trial)	Judge (Trial)
Criminal proceedings	<p>a) In general Remedies?</p> <p>b) Seizure aimed at evidence Request for a review (art. 28 LD y art. 324 ICPC) + Appeal and Cassation (Apelación y casación) (arts. 322 bis y 325 ICPC)</p>	<p>a) In general Remedies?</p> <p>b) Seizure aimed at evidence Request for a review (art. 28 LD y art. 324 ICPC) + Appeal and Cassation (Apelación y casación) (arts. 322 bis y 325 ICPC)</p>	<p>a) In general Remedies?</p> <p>b) Seizure aimed at evidence Request for a review (art. 28 LD y art. 324 ICPC) + Appeal and Cassation (Apelación y casación) (arts. 322 bis y 325 ICPC)</p>
Proceedings for the application of financial preventive measures (“Anti-Mafia Code)	<p>Seizure aimed at evidence Request for a review (art. 28 LD y art. 324 ICPC) + Apelación y casación (arts. 322 bis y 325 ICPC)</p>	<p>Remedies?</p>	<p>Remedies?</p>



LEGAL REMEDIES AT NATIONAL LEVEL



Executing state EIO (art. 13 LD)	Public prosecutor	Judge
	<p><i>a) In general:</i></p> <p>Opposition to the judge for the preliminary investigations within five days since the communication of the decree which recognise the EIO (art. 13.1 LD)</p> <p><i>b) Seizure aimed at evidence:</i></p> <p>Opposition to the judge for the preliminary investigations within five days since the communication of the decree which recognise the EIO + recourse to the Supreme Court (arts. 23.7 LD y 127 ICPC)</p>	<p><i>a) In general:</i></p> <p>Opposition to the judge for the preliminary investigations within five days since the communication of the decree which recognise the EIO (art. 13.1 LD)</p> <p><i>b) Seizure aimed at evidence:</i></p> <p>Opposition to the judge for the preliminary investigations within five days since the communication of the decree which recognise the EIO + recourse to the Supreme Court (arts. 23.7 LD y 127 ICPC)</p>



LEGAL REMEDIES AT NATIONAL LEVEL



Issuing state EIO Arts. 589w § 4 and 589ze § 4 PCPC	Other investigating authorities (Preparatory proceedings)	Public prosecutor (Preparatory proceedings)	Judge (Trial)
Decisions concerning measures included in arts. 236, 240 y 241 PCPC (e.g., search of a house or a person, seizure of property, surrender of correspondence, surveillance or telephone tapping)	Remedies?	Interlocutory complaint Specific name?	Remedies?
Decisions concerning others measures	No remedies	No remedies	

Executing state EIO	Circuit Prosecutor (Pre-trial)	District/circuit courts (Trial)
	Is possible a complaint/remedy against the decision which recognise/ execute an EIO?	Is possible a complaint/remedy against the decision which recognise/execute an EIO?



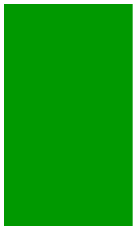
IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN SPAIN



- In Spain, articles 26 and 27 DEIO are respectively implemented by articles 198 and 199 of the law 3/2018, of 11th June, modifying law 23/2014 of 20th November, implementing the DEIO. Article 28 DEIO, as far as the monitoring of bank transactions are concerned, is implemented by article 200 of law 3/2018.
- The wording of the implementing Spanish law reproduces faithfully the text of article 26 DEIO without specifying further conditions for the issuing of the EIO or adding limitations to the issuing of an EIO
- Article 27 DEIO is faithfully reproduced, except for the fact that in the DEIO is specified that when the EIO is issued with regard to information with reference to the financial operations conducted by non-banking institutions, in addition to the grounds for non-recognition and non-execution mentioned in Article 11 of the DEIO, an additional ground for refusal applies: “refused where the execution of the investigative measure would not be authorised in a similar domestic case”
- Article 28 DEIO is, on the contrary, not implemented in a specific provision in the Spanish implementing law. The relevant provisions in this respect are articles 200 and article 219



IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN ITALY



- Two provisions of the Criminal Procedure Code, specifically article 255 and 256 CPC, apply in case of gathering of information and documents in banks and other financial institutions.
- Furthermore, as it is mentioned in the Italian national Report, a specific provision applies for the gathering of evidence in banks within the special proceedings for the application of a preventive measure.
- The investigations on assets may be carried out directly by the holders of the power of proposal or by the Italian Finance Police (i.e. Guardia di Finanza) if there is delegation.
- The investigating police authority delegated by the Public Prosecutor has the power to seize documentation only if authorised by the Public Prosecutor or the judge.
- When the EIO does not specify the reasons why the acts are relevant in the criminal proceeding, the public prosecutor, before executing it, asks the issuing authority to give this clarification



IMPLEMENTATION OF ARTICLES 26, 27 AND 28 IN POLAND



- TO BE COMPLETED WITH THE INFORMATION FROM THE POLISH There are no information in the national report about how those provisions have been implemented by the Polish national law implementing the DEIO. Thus, we don't know whether there are specific provisions in this respect or whether, instead, the general regime applies.



Relationship with other mutual recognition instruments

- European legislator clarifies that the rules on the assignment of cross-border investigative measures and the channels of communication foreseen in the EPPO are to be applied with preference to other mutual recognition instruments.
- It is stated that the instruments of mutual recognition will supplement the rules of this Regulation, in particular, with respect to measures not provided for in the national legislation of the assisting State for a purely domestic situation, but only for transnational proceedings.
- The Regulation does not regulate EPPO cross-border investigations that will have to be carried out in a Member State not participating in the enhanced cooperation, or in a third State. Obviously in such cases the assignment system will not be applicable and the handling EDP will have to resort either to the rules of the EIO Directive or to international instruments of mutual legal assistance in criminal matters.